No. _____

In the Supreme Court of the United States

TAMARA J. FISHER, et al.,
Petitioners,
v.

McCRARY CRESENT CITY, et al.,
Respondents.

On Petition for Writ of Certiorari to the Court of Special Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At the time the lawsuit in this case was filed, the only party to this case that was domiciled in Maryland was a codefendant. Notwithstanding this, the trial court established *in personam* jurisdiction over the Petitioners by applying a novel version of the "conspiracy" theory of jurisdiction that allowed the courts below to assume "constructive knowledge" of jurisdictional facts by a nonresident defendant under circumstances where it was unforeseeable that the Petitioners would be "haled" into court in Maryland. The questions presented are:

I. Does the "conspiracy" theory of *in personam* jurisdiction violate the Due Process Clause of the Fourteenth Amendment and run afoul of this Court's repeated admonition that in a "minimum contacts" analysis "it is the contacts of the defendant himself that are determinative" *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)?

II. Does it violate Due Process for a State to exercise "conspiracy" jurisdiction over a nonresident defendant where that defendant does not expressly aim any conduct towards the forum and it was unforeseeable that the plaintiff would move to the state after suit was filed?

III. Does it violate Due Process for a State to exercise "conspiracy" jurisdiction over a nonresident defendant where the courts below imputed constructive knowledge of jurisdictional facts under the "willful blindness" theory of liability used in conspiracy cases?

PARTIES BELOW

Michael McCrary, MR Crescent City, McCrary Crescent City and Crescent City Estates, LLC were the Plaintiffs in the Circuit Court for Baltimore City, the Appellees in the Court of Special Appeals of Maryland and the Respondents in the Court of Appeals of Maryland. Stuart C. Fisher, Tamara J. Fisher, Edward Giannasca, Giannasca Crescent City, LLC, Crescent City Estates[1], TJ Biscayne Holdings, LLC and Market Street Properties Palm Beach, LLC were the Defendants in the Circuit Court for Baltimore City, the Appellants in the Court of Special Appeals of Maryland and the Petitioners in the Court of Appeals of Maryland.

RULE 29.6 STATEMENT

TJ Biscayne Holdings, LLC and Market Street Properties Palm Beach, LLC, have no parent company, and no public company has any ownership interest in them.

[1] Crescent City Estates, LLC was both a Plaintiff and a Defendant in the trial court and an Appellant and Appellee in the Court of Special Appeals of Maryland.

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The opinion of the Court of Special Appeals of Maryland (App., *infra*, 1a-68a) is reported at 186 Md. App. 86, 972 A.2d 954. The order of the Court of Special Appeals of Maryland denying Petitioners' motion for reconsideration (*id*. at 85a) is unreported. The order of the Court of Appeals of Maryland denying Petitioners' Petition for Certiorari (*id*. at 83a) is unreported. The order of the Court of Appeals of Maryland denying Petitioners' motion for reconsideration (*id*. at 81a) is unreported. The opinion of the Circuit Court for Baltimore City (*id*. at 68a) is also unreported.

JURISDICTION

The Maryland Court of Appeals' order denying Petitioners Petition for Certiorari was entered on December 11, 2009. The Maryland Court of Appeals' order denying Petitioners motion for reconsideration was entered on March 12, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). This Court has jurisdiction because if it were to grant review and reverse the judgment, that action "would be preclusive of any further litigation on the relevant cause of action" because the Circuit Court for Baltimore City would lack personal jurisdiction over Petitioners. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). For that reason, and because "a refusal immediately to review the state court decision might seriously erode federal policy" (*id*. at 483), this Court has repeatedly exercised review in "cases

presenting jurisdictional issues in this posture." *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) (citing *Rush v. Savchuk*, 444 U.S. 320 (1980), *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Kulko v. Superior Court*, 436 U.S. 84 (1978).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides, in pertinent part, that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." Pertinent provisions of the Maryland long-arm statute, MD. CODE, CTS. & JUD. PROC. § 6-103 (2005), are reprinted at App., *infra*, 89a.

STATEMENT OF THE CASE

A. Factual Background

Crescent City Estates, LLC (CCE) a Louisiana limited liability company was formed in February 2005 by MR Crescent City, LLC (MRCC) a Louisiana LLC with a 50% interest in CCE and Giannasca Crescent City, LLC (GCC) a Louisiana limited liability company with a 50% interest in CCE. MRC was in turn owned by McCrary Crescent City, LLC. (MCC) and GCC was owned by Edward Giannasca (Giannasca) and his former wife. Stuart Fisher (Mr. Fisher), individually, owned 50% of the Giannasca's share of CCE. Former Baltimore Ravens defensive end Michael McCrary (McCrary) owned 100% of MCC.

In addition to being organized and created under the laws of the State of Louisiana all of the LLC's had

a principal place of business in New Orleans. McCrary, Fisher and his former wife, Tamara J. Fisher (Ms. Fisher), were domiciled in Florida. Of all of the parties in this case only Giannasca was domiciled in Maryland.

Shortly after CCE was formed it purchased the Plaza Towers, a 45 story office tower in New Orleans, with the intent of converting the building into condominiums. On August 29, 2005, Hurricane Katrina struck causing significant damage to the building. Shortly after the hurricane, CCE submitted insurance claims for the damage.

In late October 2005, Giannasca hosted a conference call, with Mr. Fisher and a representative of McCrary. McCrary contends that during this call Giannasca and Mr. Fisher misrepresented to him that CCE's insurance claims would probably be denied. It was also at this time unbeknown to McCrary that $1,000,000 in insurance money had been paid to CCE.

In November 2005, Mr. Fisher, on behalf of CCE, negotiated the sale of the building from CCE to another development group for $20,000,000. From the sale McCrary was repaid his initial investment of $3,550,000 and received a profit of $2,384,639.

In December 2005, McCrary met Giannasca in Giannasca's Baltimore office. During this meeting Giannasca told McCrary that the insurance companies denied their claims.

In the spring of 2006, an additional $11,000,000 was paid to CCE by the insurance companies. Mr. Fisher, who had been operating CCE from Florida and

Louisiana, kept that money. Ultimately, on he wrote a check, to "TJ Fisher Biscayne Holdings, LLC[2]" for $5,000,000, which was deposited into a Florida bank account in which Ms. Fisher had an interest.

B. Proceedings in the Trial Court

On February 23, 2007, McCrary, MRCC, MCC and CCE filed a complaint in the Circuit Court for Baltimore City against GCC, Giannasca, CCE and Mr. Fisher. The core allegations of the complaint were that the defendants conspired to and did fraudulently misrepresent the existence of the insurance proceeds; then once received conspired to misappropriate and fraudulently conceal the insurance proceeds to which CCE, MRCC, MCC and ultimately McCrary were entitled.[3]

On May 25, 2007, the Plaintiffs amended the complaint adding TJ Biscayne Holdings LLC[4] (TJ Biscayne), Market Street Properties LLC (Market

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[2] The actual name of Ms. Fisher's defunct limited liability company is TJ Biscayne Holdings, LLC.

[3] Howard Acquisitions, LLC (Howard) a successor in interest to the purchasers of the building, filed a lawsuit against CCE in the District Court for New Orleans. The heart of their claim was that the $12,000,000.00 of insurance proceeds belonged to them. Mr. Fisher intervened and Howard filed a counterclaim against him for conversion. Initially the case was removed to the U. S. District Court for the Eastern District of Louisiana. Next the case was transferred to the U. S. District Court for the District of Maryland. *See, Howard Acquisitions v. Giannasca New Orleans, LLC* (Case # 1: 09-CV-2651- WDQ).

[4] This entity was administratively dissolved prior to the time period alleged in the complaint. Because it was a non-entity, under Florida Law, Ms. Fisher stands in its shoes and is ultimately liable for any judgment entered against it.

Street) and Ms. Fisher as Defendants. This amended complaint, alleged TJ Biscayne, Market Street and Ms. Fisher were members of the conspiracy and that McCrary was a Maryland[5] resident.

Market Street and Ms. Fisher moved to dismiss the Complaint based on a lack of personal jurisdiction. Specifically asserting that: "Plaintiffs' complaint falls short of the requisite factual allegations necessary to satisfy the 'reasonable expectation' standard set forth in the Due Process Clause of the Fourteenth Amendment." Ms. Fisher asserted in a supporting affidavit that she was not a partner in CCE had no knowledge of McCrary or his interest in it. She also attached corporate documents establishing that MRCC, MCC, CCE and GCC were organized and created under the laws of the State of Louisiana with a principal place of business in New Orleans.

The Circuit Court denied the motion to dismiss in part relying on a Maryland Court of Appeals decision adopting the "conspiracy" theory of in personam jurisdiction, *Mackey v. Compass Marketing, Inc.*, 391 Md. 117, 892 A.2d 479 (2006). Apparently finding that the conspiracy theory articulated in *Mackey* insufficient to support its ruling, the Circuit Court then expanded the rule in *Mackey* by: one, imputing constructive knowledge of jurisdictional facts to the Petitioners, under a "willful blindness" theory of liability applied in conspiracy cases[6] and, two accepting

[5] The original complaint alleged that McCrary was a resident of Florida with an office in Baltimore.

[6] THE CIRCUIT COURT: "Well, then, I'm confused. I mean, case law says that it can be actual knowledge, or constructive knowledge. Then they go into this willful blindness discussion that I saw argued." Motions Hearing, App., *infra*, 73a.

as a jurisdictional fact that McCrary was a resident of Maryland, not Florida, at the time of the conspiracy.

Over the next seven weeks numerous hearings were held on the issue of whether Petitioners were in constructive contempt for failing to fully provide discovery or an accounting. Ultimately the Petitioners were held in contempt, default or both. Equally important the court below excluded the Petitioners and their lawyers from participating during the hearing on the issue of damages.

At the hearing on damages, the court granted an oral motion for summary judgment in favor of the Plaintiffs and against all Defendants. At the conclusion of the hearing the Judge awarded $15,855,722.44 in compensatory damages, $15,855,722.44 in punitive damages and pre-judgment interest in the amount of $1,923,156.16. The total award of $33,634,601.04 was the exact amount requested by the McCrary's lawyers.

C. The Decision of the Court of Special Appeals of Maryland

The Petitioners noted a timely appeal to the Court of Special Appeals of Maryland (CSA). On June 8, 2009, the CSA reversed in part and affirmed in part the Judgment of the trial court. In short the CSA vacated the $33,634,601.04 damage award and affirmed the imposition of liability as to all of the Defendants.

With respect to jurisdiction the CSA found "[t]he complaint alleged sufficient facts to establish that

Tamara[7] knowingly participated in a conspiracy." App., *infra*, 22a, *Fisher*, 186 Md.App. 111-12, 972 A.2d 969-70, but did not identify any record evidence establishing that Ms. Fisher had any actual knowledge of the conspiracy. The CSA went on to add that because "[t]he existence of the conspiracy in this case was established by the orders of default as to liability[8]." It was "reasonable to *infer* that Tamara knew the origin of the substantial funds that were deposited into her personal account and TJB's account…" *Id.* (Emphasis supplied).

Because the amended complaint alleged that McCrary was a resident of Maryland[9] the CSA found that Ms. Fisher had reason to believe she would be subject to personal jurisdiction in Maryland. Specifically the Court stated:

> Appellees alleged in their complaint that Tamara, and consequently MS, knew at the time that they conspired to defraud appellees that Giannasca lived in and maintained his principal office in Maryland. Tamara *knew that McCrary was from Maryland* and maintained an office in Maryland. Any reasonable person would have reason to believe that they would be subject to personal jurisdiction in Maryland when they conspire with a Maryland resident with its primary office in Maryland against

[7] Ms. Fisher.

[8] The orders of default occurred after the denial of the motion to dismiss.

[9] The trial judge came to the same erroneous conclusion. In fact during oral argument Plaintiffs' counsel falsely implied that McCrary was a resident of Maryland at the time of the tortious conduct. *See,* Motions Hearing, App., *infra*, 70a.

> another individual with personal ties to Maryland and their principal place of business in Maryland. Despite *knowing that the conspiracy involved actors with ties to Maryland*, neither Tamara nor MS refrained from entering into the conspiracy.

App., *infra*, 23a, *Fisher*, 186 Md.App. at 112, (Emphasis supplied).

Following the CSA's opinion the Petitioners filed a motion for reconsideration asserting that the CSA's decision either relied on facts not in the record or that were simply untrue. After the CSA denied that motion and issued its Mandate the Petitioners filed a timely Petition for a Writ of Certiorari to the Court of Appeals of Maryland (Court of Appeals). When the Court of Appeals denied that Petition the Petitioners, filed a motion for reconsideration which was ultimately denied on March 12, 2010. App., *infra*, 81a.

REASONS FOR GRANTING THE PETITION

The actions of the Maryland courts in this case are in direct conflict with a long line of precedent from this Court and undermined the due process constraints on a forums' exercise of personal jurisdiction over a non-resident defendant in the following ways. First by adopting a version of the "conspiracy theory" that sweeps more broadly than (and thus conflicts with) the formulations embraced by the courts that accept that theory. Second, by substituting a "willful blindness" standard in lieu of the well-established requirement of "purposeful" conduct calculated or known to cause injury in the forum state. And finally, by allowing the plaintiffs to establish jurisdictional facts solely on the basis of an amended pleading.

As a result, this case nightlights a significant deprivation of due process rights and raises important and recurring issues of federal constitutional law on which the state and federal courts are sharply divided. Those issues include the validity, under the Due Process Clause of the Fourteenth Amendment, of the conspiracy theory of *in personam* jurisdiction - as well as the necessary limits imposed by due process on that jurisdictional theory.

Under the conspiracy theory of jurisdiction, a court may assert jurisdiction over a non-resident defendant who lacks the requisite minimum contacts with the forum state based solely on allegations that the nonresident conspired with others who allegedly do have minimum contacts with the forum. The use of the theory has been criticized by commentators for over 27 years, *see, e.g.,* Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction*, 52 Fordham L.

Rev. 234 (1983). Not only is the conspiracy theory subject to abuse, as is apparent in this case, but the lower courts repeatedly fail to grasp the due process implications of its application.

This Court's intervention is required to bring the lower court's decision into line with this Court's teachings, to resolve the pervasive conflict over the constitutionality of the conspiracy theory, and to provide additional guidance on the limits imposed by due process relating to forum contacts. Petitioners are not alone in urging this Courts intervention. Over 12 years, ago a legal commentator suggested the need for this Court's intervention and even went so far as to predict that this theory seems "destined for Supreme Court review." Donovan, *Conspiracy Jurisdiction Issue May Go To High Court*, Nat'l L.J., Nov. 9, 1998, at B8).

I. Maryland's Novel Version Of The "Conspiracy" Theory Of Jurisdiction Exceeds The Limitations Imposed By The Due Process Clause Of The Fourteenth Amendment On A State's Exercise Of Jurisdiction.

In this case the courts below applied a novel version of the conspiracy theory of *in personam* jurisdiction that ignored Maryland's long-arm statute and materially prejudiced the due process rights of the Petitioners.

The conspiracy theory was initially adopted by the Court of Appeals of Maryland in *Mackey, supra*. In that case Maryland's high court took the view that the attribution of one alleged co-conspirators forum contacts to another is constitutionally permissible because, under state law, each co-conspirator is

deemed for liability purposes to be an "agent" of all the others (even if the purported agency relationship does not satisfy traditional requirements for an agency relationship).

This theory based on one legal fiction was then expanded further by the courts below based on the incorrect assumption that "constructive" or "imputed" knowledge of another party's jurisdictional status satisfies the [*International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945)] requirement for "purposeful" conduct in the context of an alleged conspiracy. Finally, by then allowing the plaintiffs to establish jurisdictional facts in an amended pleading, the court's below abandoned all pretext of comporting with Constitutional strictures regarding minimum procedural requirements to adjudicate the existence of personal jurisdiction.

If the wife of a defendant can be so easily cast as a "conspirator" in a "conspiracy [that] involved actors with ties to Maryland…" 23a, *Fisher*, 186 Md.App. at 112, other spouses and relatives of potential defendants will be subject to suit wherever a codefendant lives and a plaintiff moves. That surprising result, as well as the continuing confusion in the lower courts over the existence and scope of a "conspiracy theory" merits this Court's review.

As applied in this case there is little doubt that the "conspiracy theory" is inconsistent with the Due Process Clause of the Fourteenth Amendment. Contrary to this Court's teachings this theory shifts the focus away from the defendant's contacts with the forum to those of an alleged co-conspirator. This Court has repeatedly pointed out that in a "minimum

contacts" analysis "it is the contacts of the defendant himself that are determinative." *Rush*, 444 U.S. at 332. In other words "the requirements of *International Shoe*... must be met as to each defendant over whom a state court exercises jurisdiction." *Rush*, *supra*.

When a State seeks to exercise personal jurisdiction over a foreign defendant, the linchpin of due process is the defendant's knowledge that his or her conduct is going to harm the plaintiff in that state. The *Calder* Effects Test requires foreseeable harm to the Plaintiff in the state that he or she is domiciled before jurisdiction can attach. *Calder, supra*. Under this test only purposeful conduct that is calculated or known to cause injury to a person in the forum will ordinarily support personal jurisdiction in that forum. *Id*. 465 U.S. at 791.

Critical to the foreseeability analysis is the proposition that it is the State where the plaintiff is domiciled or resides that is the "the focal point … of the harm suffered." *Calder*, 465 U.S. at 789. In other words, the injury and thus the cause of action arises where the plaintiff lives. Although this concept of foreseeability was noted in *Mackey*[10], *supra,* the courts below ignored it.

During the life of the conspiracy alleged in the Complaint, McCrary was domiciled in the State of Florida. By Respondents' own admission, McCrary did not move to Maryland until months after the lawsuit

[10] *Mackey*, 391 Md. at 133-34 (approving use of conspiracy theory of jurisdiction upon showing that conspirators intended to do something they could reasonably expect to lead to "consequences" in forum);

was filed. Therefore, under *Calder* any harm that McCrary suffered, created a cause of action in Florida not Maryland.

This is also true for McCrary's limited liability companies which were incorporated in Louisiana. The definition of a corporation's domicile is the place of incorporation. *Ohio & Mississippi Railroad Co. v. Wheeler*, 66 U.S. 286 (1861)("A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created. It must dwell in the place of its creation.") *See also*, *Pure Oil Co. v. Suarez*, 384 U.S. 202, 203 (1966); 17 James Wm. Moore et al., Moore's Federal Practice § 110.03 (3d ed.1997); Restatement (Second) of Conflict of Laws § 11, cmt. l ("When a domicile is assigned to a corporation, it is always in the state of incorporation"); 8 Fletcher Cyc. Corp. § 4025.

Therefore any harm to the Corporations would have occurred, and any cause of action for that harm to the Corporations would have arisen, in Louisiana not Maryland. Ultimately any harm that McCrary suffered flowed through his Louisiana companies to him in Florida.

To the extent that there is any question that the courts below completely abandoned the foreseeability requirement. It becomes painfully apparent when they relied on an amendment to the lawsuit, to change McCrary's domicile from Florida to Maryland. There is nothing in the record to suggest that McCrary made his intentions to move to Maryland known to anyone, let alone to Ms. Fisher. Clearly, McCrary's future move to Maryland was completely unforeseeable to any of

Petitioners, particularly Ms. Fisher. Although respondents have accused Ms. Fisher of many things clairvoyance is not one of them.

Without this foreknowledge there was no way for her to "reasonably anticipate being haled into court," *Burger King v. Rudzewicz*, 471 U.S. 462, 476-77 (1985), in Maryland. Because the novel version of the conspiracy theory constructed by the courts below ignored the requirement of foreseeability it flunked the *Calder* Effects Test.

The confusion of the courts below is highlighted by their application of the "willful blindness"[11] variant of the conspiracy theory. Applying this theory of liability used in conspiracy cases the courts below imputed constructive knowledge of jurisdictional facts to the Petitioners. Other courts faced with attempts to impute jurisdictional facts have concluded that "constructive knowledge cannot substitute for actual intent in the effects test." *Novelty, Inc. v. RCB Distributing, Inc.*, 2008 WL 2705532 (S.D. Ind. 2008). As one Federal Judge put it:

> This court was, and remains, unaware of any authority under which constructive knowledge is adequate to satisfy the due process requirements of personal jurisdiction.

Argo Systems FZE v. Liberty Ins. PTE, Ltd., 537 F. Supp. 2d 1223, 1228 (S.D.Ala. 2007).

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[11] A theory of liability for conspiracy where there is evidence to support a finding that the "defendant deliberately avoided knowledge of wrongdoing." *United States v. Whittington*, 26 F.3d 456, 464, 40 Fed. R. Evid. Serv. 1172 (4th Cir. 1994)

By expanding the reach of the conspiracy theory, and allowing *in personam* jurisdiction to be predicated on the theory of constructive knowledge, the decisions below put Maryland squarely at odds with most if not all jurisdictions. This approach ignores the "diametrically opposed purposes of the law of civil conspiracy and the law of *in personam* jurisdiction." Riback, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506, 530 (1984). The purpose of the former is to "broaden the pool of resources to which an injured plaintiff may look for recovery." *Id.* While the purpose of the latter is aimed at "protecting the *defendant*'s liberty interest" by imposing constitutional "restrictions on *in personam* power" *Id*. (Emphasis added). As Judge Friendly put it:

> We believe, moreover, that *attaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support in personam jurisdiction.* The person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him.

Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972). (Emphasis added).

This is especially troubling in the context of this case. The courts below exercised jurisdiction over Ms. Fisher based on a teleconference between Giannasca, her husband and a representative of McCrary and a Baltimore meeting between Giannasca and McCrary, at a time when neither the Fishers nor McCrary were residents of Maryland. This was accomplished not by

applying traditional Due Process principles rather this was the result of unconstitutional legal sleight of hand.

Clearly this was a blatant attempt to manufacture jurisdiction where none previously existed and that the courts below have thus created an artifice for circumventing long standing decisions of this Court, *e.g. International Shoe, supra*; *Calder, supra*; *World-Wide Volkswagen Corp.; supra; Burger King*, *supra; Rush*, *supra.*

This court's intervention is clearly needed for several reasons: first, to remind lower courts that the "central concern of the inquiry into personal jurisdiction" is directed to "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); and second, to emphasize that the Due Process Clause requires direct action by the defendant with a foreseeable effect in a foreseeable jurisdiction, a constitutional requirement that cannot be met by piling legal fiction upon legal fiction upon yet another legal fiction.

II. The Lower Courts Are In Conflict Over The Validity And Scope Of The "Conspiracy" Theory Of Jurisdiction.

The lower courts and litigants in general, urgently need guidance concerning fundamental questions of jurisdictional due process. The lower courts are split on the question of whether allegations of a conspiracy are sufficient to establish personal jurisdiction. As the decision below shows, an averment of "conspiracy" can be easily used to avoid the traditional limitations imposed by the Due Process Clause on forum selection. The consequences are deeply troubling and profound

where, as here, the Plaintiff does not move to the forum state until after the suit is filed.

The decision below also deepened and extended an existing split in the lower courts over whether, and in what circumstances, a non-resident defendant with no contacts with a forum may nevertheless be sued there because of his or her alleged participation in a conspiracy. As listed *infra*, the courts of twelve (12) states and twelve (12) federal courts have adopted the "Conspiracy" theory while eight (8) states and eleven (11) federal courts have rejected it as unconstitutional or openly questioned the validity of this overreaching jurisdictional theory.

Contributing to the divide is the irreconcilable conflict in Colorado, Illinois and Vermont where the federal courts have adopted the theory while the state courts have rejected or question it. The divergent views are listed below.

The "conspiracy theory" is recognized by the high court's of Delaware, Florida, Kansas, Maryland, Minnesota, South Carolina, and Tennessee. *See, e.g. Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982); *Execu-tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So.2d 582, 583-584, 586 (Fla.), *cert. denied*, 498 U.S. 952 (1990); *Merriman v. Crompton Corporation*, 282 Kan. 433, 146 P.3d 162 (2006); *Mackey, supra*; *Hunt v. Nevada State Bank*, 172 N.W.2d 292, 311 (Minn. 1969), *cert. denied*, 397 U.S. 1010 (1970); *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798-799 (S.C.), *cert. denied*, 498 U.S. 952 (1990); *Chenault v. Walker*, 36 S.W.3d 45, 53-54 (Tenn. 2001).

Likewise the intermediate appellate courts of Georgia, Illinois, New Jersey, New Mexico, and New York have also recognized this theory. *See*, e.g. *Rudo v. Stubbs*, 472 S.E.2d 515, 517 (Ga. Ct. App. 1996); *Szeliga v. State of New Jersey, Department of Finance, Division of Investment*, 387 N.J. Super. 487, 904 A.2d 786, *cert. denied*, 550 U.S. 935 (2006); *Santa Fe Technologies, Inc. v. Argus Networks, Inc.*, 42 P.3d 1221, 1233-34 (N.M. Ct. App. 2002); *Cameron v. Owens-Corning Fiberglas Corp.*, 695 N.E.2d 572, 577-78 (Ill. App. Ct.), *appeal denied*, 705 N.E.2d 434 (Ill. 1998), *cert. denied*, 525 U.S. 1105 (1999); *Reeves v. Phillips*, 54 A.D.2d 854, 388 N.Y.S.2d 294 (1976) (allowing want of jurisdiction as affirmative defense on remand).

Similarly federal courts in Alabama, Colorado, the District of Columbia, Illinois, Iowa, Kansas, Michigan, Maryland, Pennsylvania, New York, North Carolina and Vermont have embraced the theory. *See*, e.g., *Professional Locate & Recovery, Inc. v. Prime, Inc.*, No. 07-0175-WS-C, 2007 WL 1624792, at *2 (S.D. Ala. 2007); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Kozeny*, 115 F.Supp.2d 1231, 1236-37 (D. Colo. 2000), *aff'd*, 19 Fed. Appx. 815, 2001 WL 1149327 (10th Cir. 2001); *Textor v. Board of Regents*, 711 F.2d 1387, 1392-93 (7th Cir. 1983)(citing *United States Dental Institute v. American Association of Orthodontists*, 396 F. Supp. 565 (N.D. Ill. 1975)); *In re Vitamins Antitrust Litig.*, 270 F. Supp. 2d 15, 27-29 (D.D.C. 2003); *Remmes v. Int'l Flavors & Fragrances, Inc.*, 389 F. Supp. 2d 1080, 1093-95 (N.D. Iowa 2005); *Dodson Int'l Parts, Inc. v. Altendorf*, 181 F. Supp. 2d 1248, 1254 (D. Kan. 2001) (same); *Gen. Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F. Supp. 656, 665 (E.D. Mich. 1996); *Cawley v. Bloch*, 544 F. Supp. 133, 135 (D. Md. 1982);

Cleft of the Rock Foundation v. Wilson, 992 F. Supp. 574, 581 (E.D.N.Y. 1998); *Gemini Enterprises, Inc. v. WFMY Television Corp*., 470 F. Supp. 559, 564-65 (M.D. N.C. 1979); *United States v. Arrow Med. Equip. Co.,* Civ. A. No. 90-5701, 1990 WL 210601 (E.D. Pa. Dec. 18, 1990); *Vermont Castings, Inc. v. Evans Products Co.,* 510 F. Supp. 940, 944 (D. Vt. 1981).

On the other the other side of this divide are the states of California, Colorado, Illinois, Texas and Washington which have rejected the theory as inconsistent with due process, *see, e.g., Mansour v. Super Ct. of Orange County*, 38 Cal. App. 4th 1750, 1760-61, 46 Cal. Rptr. 2d 191 (Cal. Ct. App. 1995) (rejecting argument that "conspiracy" can be "a basis for acquiring personal jurisdiction over a party"). *Gognat v. Ellsworth*, 224 P.3d 1039, 1053 (Colo. App. 2009)(declining to adopt theory); *Knaus v Guidry*, Ill. App. 3d 806, 906 N.E.2d 664 (2009); *National Industrial Sand Association v. Gibson, 897 S.W.2d 769*, 773 (Tex. 1995) (rejecting the theory); *Hewitt v. Hewitt,* 896 P.2d 1312, 1316 (Wash. Ct. App. 1995) (same). State trial courts in Missouri and Maine have also rejected the conspiracy theory. See *City of St. Louis v. American Tobacco Co.*, 2003 WL 23277277, at *6-7 (Mo. Cir. Ct. Dec. 16, 2003); *Maine v. Philip Morris, Inc*., 1998 Me. Super. LEXIS 250 (Me. Super. Ct. Oct. 14, 1998).

Similarly the federal courts in Arizona, California, Maine, Minnesota, Ohio, Oregon, Texas, and Wisconsin have also rejected the conspiracy theory on due process grounds. *See* e.g., *Karsten Mfg. Corp. v. United States Golf Ass'n*, 728 F. Supp. 1429, 1434 (D. Ariz. 1990); *Gutierrez v. Givens*, 1 F. Supp. 2d 1077, 1083 n. 1 (S.D. Cal. 1998); *Kipperman v. McCone*, 422 F. Supp. 860,

873 & n.14 (N.D. Cal. 1976); *In re New Motor Vehicles Canadian Export Antitrust Litig*., 307 F. Supp. 2d 145, 157-58 (D. Me. 2004) ; *I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp.*, 408 F. Supp. 1023, 1024-25 (D. Minn. 1976); *Hollar v. Philip Morris Inc*., 43 F. Supp. 2d 794, 802 n.7 (N.D. Ohio 1998); *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co.* (American), 499 F. Supp. 829, 840-41 (D. Or. 1980)); *Hawkins v. Upjohn Co.*, 890 F. Supp. 601,608-09 (E.D. Tex. 1994); *Insolia v. Philip Morris Inc*., 31 F. Supp. 2d 660, 672 (W.D. Wis. 1998).

Finally, courts in Massachusetts, Montana Nevada and Vermont although not reaching the issue have questioned the validity of the "conspiracy theory" of jurisdiction. *See In re Lernout & Hauspie Sec. Litig*., 2004 WL 1490435, at *8 (D. Mass. June 28, 2004) (noting, as well, that conspiracy theory is "highly questionable" in the First Circuit) (citing *Glaros v. Perse*, 628 F.2d 679, 682 (1st Cir. 1980)); *Steinke v. Safeco Ins. Co. of America*, 270 F. Supp. 2d 1196, 1200 (D. Mont. 2003) ("This Court has never recognized the conspiracy theory of jurisdiction, nor has the Ninth Circuit, nor has the Montana Supreme Court."); *In Re: Western States Wholesale Natural Gas Antitrust Litigation*, 605 F. Supp. 2d 1118, 1141 (D. Nev. 2009)(stating that theory "confuses liability with personal jurisdiction"); *cf. Schwartz v. Frankenhoff,* 733 A.2d 74, 80 (Vt. 1999) (doubting, but not deciding, that the theory is consistent with due process).

Particularly troubling is the situation in Colorado, Illinois and Vermont where the state courts *Gognat, supra*; *Knaus, supra; Schwartz, supra,* have either declined to adopt, rejected or questioned the validity of this jurisdictional theory notwithstanding the adoption

of the theory by federal courts in those jurisdictions, *Nat'l Union Fire Ins. Co. of Pittsburg, supra; Textor, supra; United States Dental Institute, supra.*

As time has passed, the gap between the lower courts, that accept or reject the conspiracy theory of jurisdiction, continues to grow as to not only accepting or rejecting the theory but also as to how far the theory can constitutionally reach. For all the above reasons if there was ever a jurisdictional theory, which should be reviewed and rejected as unconstitutional, it is clearly the conspiracy theory of jurisdiction.

III. The Lower Courts Are Confused Over The Meaning Of This Court's Decisions In *Bankers Life, Calder* And *Rush*.

This Court has never approved a conspiracy theory of jurisdiction, and its recognition is at odds with this Court's prior decisions in *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379 (1953), *Calder, supra* and *Rush, supra*. The constitutional framework laid out by this Court has always focused on the acts of the defendant. Thus when the "defendant has 'purposely directed' his [or her] activities at residents of the forum," and the "litigation results from alleged injuries that 'arise out of or relate to' those activities" an exercise of jurisdiction would be appropriate. *Burger King*, 471 U.S. at 472-73 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).FN15). To do otherwise would be to invite plaintiffs to stage communications and events in order to manufacture jurisdiction where it otherwise would not lie.

In order for a court to find specific jurisdiction, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citation omitted). This requirement of "purposeful availment" for purposes of specific jurisdiction precludes personal jurisdiction as the result of "random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 475.

This case typifies the confusion lower courts are experiencing in applying this court's jurisdictional roadmap. Much of the conflict in the lower court decisions relating to the constitutionality of the conspiracy theory is traceable to disagreements about the proper interpretation of this Court's decisions.

First, many of the lower courts that have rejected the conspiracy theory have relied on this Court's observation that a similar conspiracy argument relating to venue under the Clayton Act was "frivolous." *Bankers Life*, 346 U.S. at 384. See, e.g., *Hewitt*, 896 P.2d at 1316; *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 307 F. Supp. 2d at 158; *Karsten Mfg. Corp.*, 728 F. Supp. at 1434; *Kipperman*, 422 F. Supp. at 873 & n.14 (compared to the "theory of vicarious venue" rejected in *Bankers Life*, "the contention that personal jurisdiction, the exercise of which is governed by strict constitutional standards, may depend upon the imputed conduct of a co-conspirator" is "[t]hat much more frivolous"); *Mansour*, 38 Cal. App. 4th at 1761.

In startling contrast, Maryland's high court has concluded that any reliance on *Bankers Life* in this

setting was "misplaced" because that case hinged "not *** on the Due Process Clause, but rather on" statutory construction, and because the critical language in Bankers Life was "*dicta*." *Mackey*, 391 Md. at 493, n4. Other courts have read *Bankers Life* the same way. *See, e.g.*, *Istituto Bancario Italiano SpA*, 449 A.2d at 225.

In addition to this pervasive disagreement over the meaning of *Bankers Life*, there is disagreement over this Court's decision in *Calder*. *See* Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time For the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again,* 54 Cath. U. L. Rev. 53, 95 & n. 278 (Fall 2004) (noting that *Calder* "has proved particularly troublesome in the lower federal and state courts"); *United States v. Swiss American Bank, Ltd.,* 274 F.3d 610, 624 & n. 7 (1st Cir. 2001) (noting that the lower courts have "struggled" with *Calder* and that "several circuits do not appear to agree as to how to read *Calder*.").

Besides the disagreement over the import of *Bankers Life* and *Calder*, the lower courts are also divided over the import of this Court's decisions in *Rush v. Savchuk* and other cases that have emphasized the need for courts to "assess[] individually" the forum contacts of "[e]ach defendant." *Calder*, 465 U.S. at 790. Some courts have concluded that the conspiracy theory is inconsistent with these teachings. See, e.g., *National Indus. Sand Ass'n*, 897 S.W.2d at 773; *Siskind v. Villa Found. for Educ. Inc.,* 642 S.W.2d 434, 437-438 (Tex. 1982); *Mansour*, 38 Cal. App. 4th at 1761; *Allen v. Columbia Fin. Mgmt., Ltd*., 377 S.E.2d 352, 357 (S.C. App. 1988); *Gutierrez*, 1 F. Supp. 2d at 1083 n.1; *Karsten Mfg. Corp*., 728 F. Supp.

at 1434. One has suggested as much without resolving issue. See, *Schwartz*, 733 A.2d at 80.

Again Maryland, has rejected this view out of hand. See *Mackey*, 391 Md. at 493, n4. In that court's view, these decisions "rest[] on a misreading of Rush." *Id*. Because the lower courts are clearly confused and irreconcilably divided only this Court can resolve the disagreements over the meaning of its decisions.

IV. The Issues Presented Are Recurring And Important.

Personal jurisdiction is a threshold question in every case, and is one of the most litigated issues in the state and federal courts. *See* Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. Davis L. Rev. 531, 531 & n. 5 (1995). As the large number of cases cited above suggests, questions concerning the constitutional validity and limits on the conspiracy theory of jurisdiction arise with great regularity. Basic confusion over such a common and much-litigated question, probing the outer jurisdictional limits of the Due Process Clause, alone merits this Court's review.

Moreover the specific issue of the conspiracy theory's constitutional validity and limits will continue to arise with regularity because over two thirds of the states authorize the assertion of personal jurisdiction to the maximum extent permitted by due process. *See,* McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended The Limits Of Due Process*, 84 B.U.L. Rev. 491, 525-30 (2004). In the remaining jurisdictions, the constitutional issue can arise after a determination that the conspiracy theory comes within the state long-

arm statute. Thus, the due process issues relating to the conspiracy theory arise with regularity not only in the state courts but also in the federal courts that sit in those states (in diversity as well as federal-question cases). *See*, *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-05 (1987).

Clearly the number of cases in which personal jurisdiction will be raised will explode based on the growing use and abuse of this jurisdictional theory by plaintiffs eager to obtain a home field advantage. Here the home town advantage to a former Super Bowl Star represented by a former Circuit Court judge was no doubt irresistible to the Respondents. As this Court can see the courts below were very obliging to the home team.

As this case illustrates a claim based on nothing more than a plaintiff's "information and belief" and a clever amendment led to the wife of a defendant, who was not party to an agreement, a conversation, a phone call or an e-mail, (and denied knowing McCrary), to being haled into a Maryland court. Where it took a mere seven short weeks from the time Ms. Fisher's motion to dismiss was denied until she was defaulted and found in contempt. And it took a two more weeks for her to have a Thirty-Three Million Dollar Judgment awarded against her in a proceeding where she and her lawyer were barred from participating.

The national and international[12] significance of the issues presented in this petition cannot seriously be disputed. As is plain from the actions of the lower

[12] *See*, e.g., *Geo-Culture, Inc. v. Siam Inv. Management S.A.*, 147 Or. App. 536, 936 P.2d 1063 (1997)

courts in this case, state courts are ignoring longstanding precedents from this Court in their efforts to expand their reach over non-resident defendants. This case concerns the limits placed on the authority of a state to hale nonresident defendants into court. The questions raised are of great concern to defendants across the country that would not be subject to in personam jurisdiction but for the availability of this theory. Because this theory conflicts with relevant decisions of this Court, is easy to rise and abuse, it raises a loud call for this Court's intervention to stem this tide of due process abuse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
Tamara J Fisher, TJ Biscayne Holdings, LLC,
and Market Street Properties Palm Beach, LLC
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APPENDIX

APPENDIX

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APPENDIX A

REPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1282

September Term, 2007

[Filed June 8, 2009]

STUART FISHER A/K/A NEIL FISHER)
)
v.)
)
MCCRARY CRESCENT CITY, LLC, ET AL.)
)

Eyler, James R.
Wright,
Plitt, Jr., Emory A.
(Specially assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: June 8, 2009

This appeal arises from a judgment entered by the Circuit Court for Baltimore City against appellants, Edward V. Giannasca, II ("Giannasca"), Stuart Cornelius Fisher, a.k.a. "Neil Fisher" ("Stuart"), Tamara Jeanne Fisher ("Tamara"), TJ Biscayne Holdings, LLC ("TJB"), Giannasca Crescent City, LLC ("GCC"), Market Street Properties Palm Beach, LLC ("MS"), and Crescent City Estates, LLC ("CCE"), in favor of appellees, Michael C. McCrary ("McCrary"), McCrary Crescent City, LLC ("MCC"), MR Crescent City, LLC ("MRCC"), and CCE.[1] The following chart illustrates the status of the parties in this litigation:

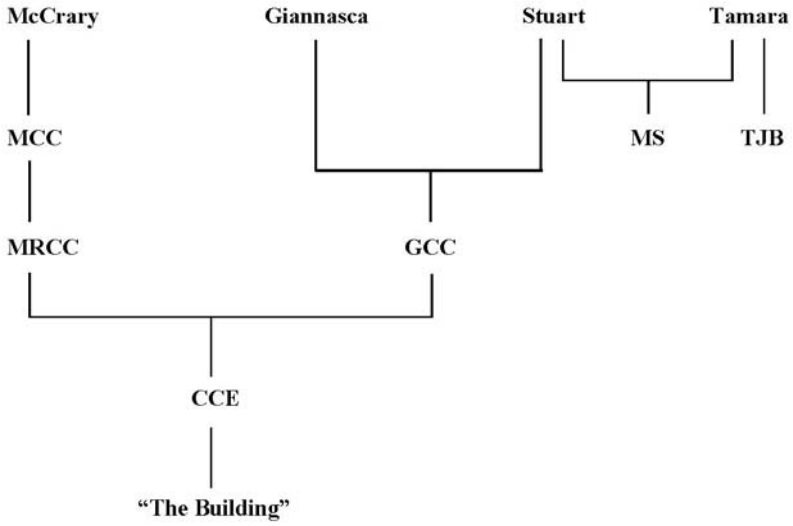
Plaintiffs **(Appellees)**	**Defendants** **(Appellants)**
McCrary MCC MRCC CCE	Giannasca Stuart Tamara GCC MS TJB CCE

McCrary owns MCC. MCC owns MRCC. Giannasca and Stuart own GCC.[2] MRCC and GCC each owned a

[1] As is apparent from the chart, CCE is both an appellant and appellee.

[2] Giannasca and Stuart each represented to McCrary that Stuart possessed an ownership interest in GCC or an ownership interest in CCE through GCC, although the documentation portrays Giannasca as the sole owner of GCC.

50% interest in CCE. CCE owned the New Orleans building ("the building") that is at issue in this case. Tamara, Stuart's wife or ex-wife,[3] owns TJB. Stuart and Tamara jointly own MS.[4] The following chart illustrates the organization of the parties with respect to each other[5]:



The circuit court, by "Second Revised Order and Judgment" dated September 16, 2008, entered the judgment after entering orders of default as to liability

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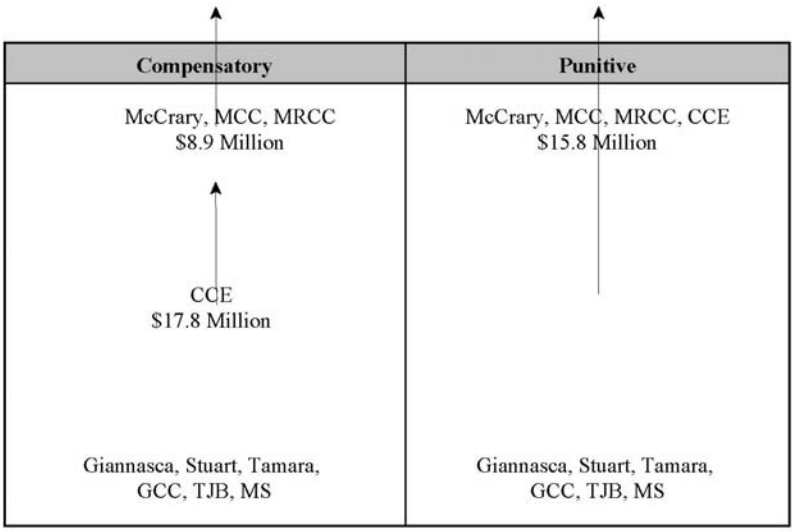
[3] It is not clear whether Stuart and Tamara are divorced.

[4] Tamara is the owner of record of MS. However, Stuart stated in his deposition that he and Tamara jointly own MS.

[5] It may be helpful to think of McCrary, MCC, and MRCC as the McCrary entities; GCC as the Stuart Fisher and Giannasca entity; Tamara, TJB, and MS as the Tamara Fisher entities; and CCE as an entity owned one-half by the McCrary entities and one-half by GCC.

against Giannasca, Stuart, and Tamara because they violated court orders and committed discovery failures; entering judgment as to liability against TJB, MS, GCC, and CCE after they failed to answer the complaint; and sanctioning Giannasca, Stuart, Tamara, MS, and TJB by precluding them and their counsel from participating at the damages hearing because they violated court orders and committed discovery failures. The circuit court awarded approximately (1) $17.8 million in compensatory damages in favor of CCE against all appellants with the exception of CCE; (2) $15.8 in million punitive damages in favor of all appellees against all appellants with the exception of CCE; and, (3) $8.9 million in compensatory damages in favor of McCrary, MCC, and MRCC against CCE. The following chart illustrates the structure of the damages award:



On appeal, appellants present several contentions, but we need only decide whether the circuit court erred when it denied Stuart's motion to dismiss,

denied Tamara's motion to dismiss, entered orders of default and imposed sanctions, and awarded punitive damages and other remedies. We shall affirm the orders of default as to liability but we shall vacate the judgment and remand for further proceedings because of errors relating to the assessment of damages.

Background

Appellees claim that Giannasca, Stuart, and Tamara, acting individually and through their respective entities, fraudulently concealed certain insurance proceeds that should have been paid to CCE. CCE was owned one-half by the McCrary entities and one-half by Giannasca and Stuart through GCC. The operative complaint[6] is lengthy and contains detailed factual allegations. In circuit court, Giannasca and the Fishers disputed many of the facts, but the orders of default established the operative facts, giving rise to liability. We shall provide an overview at this point and include some additional information, as relevant, when we discuss the issues.

As previously mentioned, McCrary owns MCC, and MCC is the sole owner and member of MRCC (all three hereinafter "McCrary" except when necessary to distinguish them). In February 2005, Giannasca, who co-owned GCC with Stuart, approached McCrary about an investment opportunity. Giannasca asked McCrary to partner with him to buy a building in New Orleans, and convert it into "up-scale" residential condominiums.

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[6] The third amended complaint is the last and, therefore, the operative complaint.

McCrary agreed,[7] and MRCC and GCC formed CCE. CCE's operating agreement appointed Giannasca as manager. MRCC and GCC each held a 50% ownership in CCE. CCE purchased a building in New Orleans (the "building"). CCE also obtained property damage insurance on the building from Lexington Insurance Company ("LIC") and One Beacon Insurance Company ("OBIC").

In late August 2005, Hurricane Katrina struck New Orleans. Hurricane Katrina caused damage to the building's internal mechanical systems, and created several environmental hazards within the building. Accordingly, CCE filed insurance claims with LIC and OBIC, and retained a public insurance adjuster named Richard Agid to represent CCE in pursuing the insurance claims. McCrary was informed about the insurance claims, but was not informed about the substance of the claims or that Agid represented CCE.

In early October 2005, McCrary asked Giannasca and Stuart about the progress of the insurance claims. Stuart told Giannasca that an early meeting with the insurance companies had "gone well," but cautioned that "we will have to wait and see."

A few weeks later, LIC issued a check to CCE for $1 million, representing the first insurance payment. Neither Giannasca nor Fisher told McCrary that CCE received this payment. Instead, the next day, Giannasca paid $450,000 of the insurance proceeds to himself, $150,000 of the insurance proceeds to Stuart,

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[7] McCrary's agents were involved in some of the subsequently mentioned communications.

and $150,000 of the insurance proceeds to TJB. TJB is a Florida entity owned and managed by Tamara.

In late October 2005, Giannasca hosted a conference call with Stuart and McCrary in his Baltimore City office. Giannasca and Stuart told McCrary that the insurance claims probably would be denied.

On November 9, 2005, CCE sold the building to an unrelated party. CCE used the sale proceeds to pay its debts, including a loan for $3.5 million that McCrary made to CCE. Ultimately, CCE made a profit of approximately $6.3 million off of the sale. Giannasca and Stuart told McCrary that they needed to use a substantial portion of the proceeds to pay CCE's outstanding operating expenses. Giannasca and Stuart told McCrary that the expenses totaled approximately $1.7 million, but never provided any proof of the expenses. After expenses, CCE was left with approximately $4.7 million. McCrary was paid approximately $2.35 million, in accordance with his 50% ownership interest in CCE.

Giannasca met with McCrary at Giannasca's Baltimore office in December 2005. Giannasca told McCrary that the insurance companies denied CCE's insurance claims, and that CCE would not receive any insurance proceeds.

Two months later, in February 2006, LIC paid CCE $2 million in additional insurance proceeds. Neither Giannasca nor Fisher told McCrary that CCE received this payment. Instead, Stuart paid approximately $1.72 million to himself.

In March 2006, LIC paid CCE $7 million in additional insurance proceeds. Neither Giannasca nor Fisher told McCrary that CCE received this payment. Instead, Stuart wired $700,000 to a private trust account, and paid $5 million to TJB. TJB invested the $5 million in another real estate investment project called the Entergy Project. MS is a member of an organization that is the owner and developer of the Entergy Project. Tamara and Stuart jointly own MS.

In April 2006, OBIC paid CCE $2 million in insurance proceeds. Neither Giannasca nor Fisher told McCrary that CCE received this payment. Instead, Stuart transferred $800,000 to Giannasca, $200,000 to Tamara, and $200,000 to himself.

McCrary, Giannasca, and Stuart all attended Tamara's birthday party in July 2006. Agid, the insurance adjuster, attended the party as well. McCrary met Agid at the party for the first time. Agid introduced himself to McCrary as the public insurance adjuster retained by CCE who "got the pot of gold for you guys." Surprised and confused, McCrary asked Agid for further details. Agid revealed that the insurance proceeds totaled $12 million. McCrary confronted Giannasca at the party, asking him "How much did we get from insurance?" McCrary asked the question four times. Giannasca responded "what?," "huh?," "what are you talking about?," and "I don't know." McCrary then asked Giannasca the question a fifth time. Giannasca replied "Two or three million . . . . Ask [Stuart]." After the party, McCrary contacted Giannasca and Stuart multiple times via email, and asked them to account for the insurance proceeds. Giannasca and Stuart never complied.

Appellees filed suit on February 23, 2007, against appellants, with the exception of the Tamara Fisher entities, who were added at a later time. On August 24, 2007, appellees filed the third amended complaint. The gist of the action was fraudulent concealment of insurance proceeds, but it also contained counts alleging breach of contract, unjust enrichment, breach of fiduciary duty, violation of a Louisiana antifraud statute, conspiracy and aiding and abetting, and a derivative claim by MRCC and MCC on behalf of CCE. In addition to damages, appellees sought an accounting, injunctive relief, and the imposition of a trust on assets.

On July 2, 2007, the court entered a scheduling order, which established a discovery cutoff date of February 21, 2008 and a trial date of June 17, 2008.

Giannasca, GCC, TJB, and CCE never answered the complaint or subsequent complaints, or filed motions to dismiss. None of the appellants complied with temporary restraining orders ("TROs") issued by the court, which, in essence, prohibited the transfers of assets and required an accounting by specified dates. Giannasca, Tamara, and TJB were the only appellants who produced any requested documents during discovery, but the documents largely were irrelevant and did not fully comply with the discovery requests. Giannasca never appeared for his deposition. Stuart left his deposition before it was finished and without notifying anyone, then failed to appear for the completion of his deposition on at least one subsequent occasion. Tamara failed to appear for her properly scheduled deposition on at least three occasions. When Tamara finally appeared for her deposition, she testified that she had no knowledge of nearly all the

facts in this case, including information relating to her own finances. Appellants delayed the litigation for over six months by filing an unauthorized petition for bankruptcy, which the federal bankruptcy court eventually dismissed.

The circuit court entered orders of default as to liability against Giannasca, Stuart, Tamara, MS, TJB, GCC, and CCE because of failure to plead or as sanctions because of violations of court orders or failure of discovery. The circuit court also sanctioned Giannasca, Stuart, Tamara, MS, and TJB for their discovery failures and violations of court orders by precluding them from participating at the damages hearing. Following the damages hearing, the court entered a judgment, awarding approximately $17.8 million in compensatory damages to CCE against Giannasca, Stuart, Tamara, MS, TJB, and GCC. The court also awarded approximately $8.9 million in compensatory damages to McCrary, MCC, and MRCC against CCE.[8] Additionally, the court awarded approximately $15.8 million in punitive damages to McCrary, CCE, MRCC, and MCC against Giannasca, Stuart, Tamara, MS, TJB, and GCC jointly and severally. Furthermore, the circuit court removed Giannasca from his position as manager of CCE, enjoined Giannasca and Stuart from taking any action on behalf of CCE, established a constructive trust to hold appellants' funds directly or indirectly derived from funds or assets of CCE, and ordered Giannasca, Stuart, Tamara, MS, TJB, and GCC to "disgorge" all

[8] Presumably, this award reflected MRCC's one-half interest in CCE.

revenues and profits acquired with the funds or assets of CCE. This appeal followed.

Questions Presented

Appellants present the following questions:

I. Did the trial court err in denying [Stuart's] motion to dismiss the complaint?

II. Did the trial court err in denying [Tamara and MS's] motion to dismiss the complaint?

III. Did the trial court deprive [Tamara, TJB, and MS] of procedural due process when it granted default judgments against them on an accelerated basis?

IV. Did the trial court err in precluding appellants and their counsel from participating in the damages hearing?

V. Did the preclusion of appellants' counsel from participation in the damages phase of the trial deprive appellants of due process of law?

VI. Did the trial court err in awarding compensatory damages?

VII. Did the trial court err in awarding punitive damages?

VIII. Did the trial court err in awarding pre-judgment interest?

In light of our disposition of appellants' other questions, we need not address appellants' sixth contention—where appellant contends that the circuit court improperly admitted certain evidence during the damages proceeding and that the evidence was legally insufficient in any event—nor appellants' eighth contention—where appellant contends that the circuit court erred when awarding prejudgment interest.[9] To ease our analysis, we combined, re-worded, and re-ordered the remaining questions as follows:

> I. Did the circuit court err when it denied Stuart's motion to dismiss?
>
> II. Did the circuit court err when it denied Tamara and MS's motion to dismiss?
>
> III. Did the circuit court err when it entered orders of default as to liability and imposed sanctions against appellees?
>
> IV. Did the circuit court err when it awarded punitive damages and imposed other remedies?

Discussion

1. *Stuart's Motion to Dismiss*

Stuart argues that the circuit court erred when it denied his motion to dismiss because he was improperly served, the circuit court lacked personal jurisdiction over him, Maryland was an improper

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[9] Appellants' counsel will be able to participate in the damages hearing on remand and note any proper objections.

forum, and the circuit court was an improper venue. As appellants acknowledge, these issues are of law, even though at the time they were decided, they were decided on affidavits. *See* Bond v. Messerman, 391 Md. 706, 718 (2006).

A. Service

Stuart, a resident of Florida, argues that he was improperly served because appellees tricked him into coming to Maryland, and then served him. In Maryland,

> [i]f a defendant is within the jurisdiction of the Court by means of fraud or trickery of the plaintiff, no act accomplished thereby can be allowed to stand. There is very little difference between enticing a person from one jurisdiction to another for the purpose of getting process on him and by carrying him by force from one jurisdiction to another to be served with process. A fraud or trick usually has a fair face. It would not succeed without it.

Margos v. Maroudas, 184 Md. 362, 371 (1945). Appellants cite two cases discussed by the Margos Court: Commercial Mutual Accident Co. v. Davis, 213 U.S. 245 (1909), and Empire Manufacturing Co. v. Ginsburg, 253 Ill. App. 242 (1929).

In Commercial Mutual, the plaintiff's husband died from a gunshot wound. 213 U.S. at 250. The insurance company asked to inspect the decedent's body. Id. The plaintiff invited the insurance company to send an examiner, and asked that the examiner have authority to settle the matter if appropriate. Id. at 250-51. The

company sent a doctor, and authorized him to settle the matter if appropriate. Id. at 251. Upon arrival, the insurance company's doctor asked the plaintiff to procure an additional doctor to oversee his examination. Id. At that point, the plaintiff served the doctor. Id. The insurance company challenged the service. Id. at 251-52. The Supreme Court held that the plaintiff did not trick the insurance company into service, explaining that "[t]here is testimony tending to show that both parties expected an adjustment of the claim to be made at this meeting, which was held for that purpose." Id. at 257.

In Empire Manufacturing, the plaintiff invited the defendant to the forum state "to settle the controversy." 253 Ill. App. at 244. The plaintiff arrived in the forum state on a train. Id. A representative of the defendant met the plaintiff at the train station. Id. The defendant's representative informed the plaintiff that he had a car that would take the plaintiff to the meeting. Id. The plaintiff entered the back seat of the car, where a deputy sheriff immediately served him. Id. The court held that the service was improper because the plaintiff tricked the defendant into entering the forum state. Id. at 247.

The difference between these cases is that in Empire Manufacturing, the plaintiff promised to conduct settlement negotiations, only to lure the defendant to the forum and serve the defendant without ever making a bona fide attempt to settle. Id. at 247. In Commercial Mutual, the plaintiff and the defendant made a good faith bona fide effort to settle. 213 U.S. at 256-57. The plaintiff served the defendant only after negotiations broke down. Id. at 257.

In this case, there is evidence that Stuart came to Maryland intending to settle the case. On August 8, 2006, Stuart, who supposedly possesses a law degree, emailed McCrary and stated[10]:

> You, [Giannasca], and I have to meet face to face to resolve all issues. I believe that this is possible. I have always been willing to do that. . . . Let me know what your schedule is and perhaps all of us can meet over the weekend. Because both you and [Giannasca] are in Baltimore it only make[s] sense for me to come see both of you.

On February 12, 2007, Stuart emailed McCrary, stating, "Perhaps if your [sic] guys schedule works, I can drive up to Baltimore and we can meet on Monday March 5, in the afternoon or for dinner. Let me know."

Stuart stated on several occasions that the purpose of the February 23, 2007 meeting was to settle the issues underlying this case. For example, at the hearing on the motion to dismiss, the following colloquy occurred:

> THE COURT: And there was an email that suggested that [Stuart] was the one that proposed coming to Maryland.
>
> [STUART'S COUNSEL]: There's no question about that, Your Honor. [Stuart] recognized the need to sit down with . . . McCrary and have a

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[10] Stuart's emails are in all capital letters. When quoting Stuart's emails, we will use upper and lower case letters.

> meeting. He said, "I'll come to Baltimore if that's more convenient for you," to have a settlement meeting.[] He didn't say I'll come to Baltimore so you can serve me with process and a lawsuit that I don't know anything about. That's not what he would have done
>
> * * *
>
> The misapprehension was he thought he was coming for a settlement meeting. When he was introduced to [McCrary's attorney], he was not told that [McCrary's attorney] was outside counsel for . . . McCrary.

Additionally, in Stuart's "Second Affidavit," Stuart stated, "The settlement meeting that occurred on February 23, 2007, had its origins in a birthday party . . . ."

The evidence also indicates that McCrary intended to and did make a good faith effort to settle the case at the meeting. McCrary, Giannasca, and Stuart met in Maryland on February 23, 2007, at around 10 a.m. The group[11] discussed settling this case for approximately four hours, and apparently were close to settling the

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[11] McCrary's attorney also was present at the meeting, and participated in negotiations. Stuart did not object to the presence of McCrary's attorney, and continued with the meeting. There is a dispute as to whether Stuart was told that McCrary's attorney was a practicing or nonpracticing attorney.

case on several occasions.[12] McCrary served Stuart only after the negotiations broke down.

Under Margos and Commercial Mutual, the circuit court did not err in its ruling because the evidence supports a conclusion that Stuart willingly came to Maryland, both Stuart and McCrary intended to settle and made a good faith attempt to settle the claim at the meeting, and service occurred only after the bona fide settlement negotiations broke down.

B. Personal Jurisdiction

Stuart argues that the circuit court erred when it denied his motion to dismiss because the circuit court lacked personal jurisdiction over him.

A circuit court has personal jurisdiction over a nonresident defendant if the requirements of the Maryland long-arm statute, Maryland Code (2006 Repl. Vol.), § 6-103 of the Courts and Judicial Proceedings Article, have been satisfied and exercising jurisdiction comports with due process i.e., defendant has minimum contacts with the forum, such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *See* Himes Associates, Ltd. v. Anderson, 178 Md. App. 504, 527 (2008). Appellants do not challenge the applicability of the statute, but assert that the exercise of jurisdiction violated due process.

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[12] Giannasca left the meeting around 12:30 p.m. to tend to other matters.

Under the conspiracy theory of personal jurisdiction, a defendant possesses the requisite minimum contacts if the defendant (1) entered into a conspiracy, and (2) "had a reasonable expectation, at the time the co-conspirator agreed to participate in the conspiracy, that acts to be done in furtherance of the conspiracy by another co-conspirator would be sufficient to subject that other co-conspirator to personal jurisdiction in the forum." Mackey v. Compass Mktg., Inc., 391 Md. 117, 132-34 (2006).

Appellees pled conspiracy, and the circuit court entered an order of default, establishing that Stuart engaged in a conspiracy. Nevertheless, Stuart argues that he could not have reasonably expected that acts would be done in furtherance of the conspiracy sufficient to subject him to personal jurisdiction in Maryland. We disagree.

Before entering into the conspiracy, Stuart knew that his co-conspirator, Giannasca, was a Maryland resident and maintained an office in Maryland. Furthermore, Stuart knew that McCrary maintained an office in Maryland, and had other Maryland ties. Stuart also knew that Giannasca was the manager of CCE, and CCE's operating agreement required Giannasca to deposit all CCE funds in a Maryland bank account. Any reasonable person with knowledge of these facts would have reasonably expected that acts would be done in furtherance of the conspiracy sufficient to subject him to personal jurisdiction in Maryland.

C. Forum Non Conveniens

Stuart argues that Maryland was not the appropriate forum for this case. As appellants acknowledge, the circuit court is vested with wide discretion when determining whether a forum is convenient. *See, e.g.*, Johnson v. G.D. Searle & Co., 314 Md. 521, 523, 526 (1989).

Maryland is not an inconvenient forum for the parties. Giannasca and McCrary are Maryland residents. Giannasca, CCE, and McCrary all maintained offices in Maryland, providing easy access to sources of proofs. Although Stuart and Tamara are nonresidents, Stuart has a history of doing business in Maryland. Moreover, Giannasca and Stuart carried out fraudulent activities in Maryland when they made fraudulent misrepresentations to appellees. There is nothing to indicate that obtaining compulsory process for unwilling witnesses would be difficult, or that the cost of obtaining the attendance of witnesses would be prohibitive. Viewing the premises at issue is not important.

Appellants argue that Florida and Louisiana were convenient forums for this case. Stuart, Tamara, TJB, and MS all are Florida residents. GCC and CCE are Louisiana residents. The building at issue is located in Louisiana. Moreover, fraudulent acts occurred in both Florida and Louisiana. Nevertheless, the convenience of Florida and Louisiana does not preclude Maryland from also being a convenient forum.

D. Improper Venue

Stuart also argues that "[t]he action did not belong in the Circuit Court for Baltimore City. None of the parties on either side had actual physical addresses in Baltimore City that would have made venue proper."

Maryland Code (2006 Repl. Vol.), § 6-201(a) of the Courts and Judicial Proceedings Article provides "a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. In addition, a corporation also may be sued where it maintains its principal offices in the State." Furthermore, a plaintiff can bring suit in any county in the State in an action for damages against a nonresident individual. Id. §§ 6-201(a), -202(11). If the action is against a corporation that has no principal place of business in Maryland, the appropriate venue is the county where the plaintiff resides. Id. § 6-202(3).

Venue is proper anywhere in Maryland against Stuart and Tamara because they are nonresident individuals. Venue is proper in Baltimore County against GCC, MS, and TJB because they are nonresident corporations with no principal place of business, and one of the plaintiffs, McCrary, resides in Baltimore County. Although CCE also is a nonresident defendant, CCE's principal place of business was in Baltimore City because its only office was in Baltimore City. Giannasca resided in Harford County, and carried on regular business in Baltimore City because he was the sole manager of CCE, and CCE's only office was in Baltimore City. Therefore, no single venue was appropriate for all defendants.

"If there is more than one defendant, and there is no single venue applicable to all defendants, under [§ 6-201(a)], all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose." Id. R. 6-201(b). Under this rule, the Circuit Court for Baltimore City was an appropriate venue.

II. *Tamara and MS's Motion to Dismiss*[13]

Appellees asserted personal jurisdiction over Tamara and MS under a conspiracy theory. As we previously stated, under the conspiracy theory of personal jurisdiction, Maryland courts have personal jurisdiction over a conspirator when the conspirator (1) entered into a conspiracy; and (2) "had a reasonable expectation, at the time the co-conspirator agreed to participate in the conspiracy, that acts to be done in furtherance of the conspiracy by another co-conspirator would be sufficient to subject that other

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[13] Despite the fact that TJB failed to raise the issue below, TJB argues that we also should examine whether the court had personal jurisdiction over TJB. TJB argues that it was unable to raise the issue below because the circuit court prohibited it from defending itself. This argument does not hold water. The circuit court granted partial summary judgment, on liability, against TJB, at the trial on June 25, 2008. Prior to that, on June 23, the circuit court granted discovery sanctions against TJB. The circuit court never "prohibited [TJB] from defending itself" in any other phase of the litigation. TJB never filed an answer or a motion to dismiss. TJB could have asserted the jurisdictional argument in a motion to dismiss, or at a subsequent point in the litigation. TJB failed to do so, and thus, we refuse to address its jurisdictional argument. Nevertheless, we note that TJB's jurisdictional argument is meritless for the same reasons that Tamara and MS's personal jurisdiction argument does not prevail.

co-conspirator to personal jurisdiction in the forum." Mackey, 391 Md. at 132-134.

A. Tamara and MS Entered Into the Conspiracy

The complaint alleged facts sufficient to establish that Tamara knowingly participated in a conspiracy. Specifically, the complaint alleged that Tamara is or was Stuart's wife, a member of MS, and a member and the manager of TJB. LIC Paid $1 million to CCE in October 2005. CCE paid $150,000 of the proceeds to TJB. Tamara managed TJB. LIC also paid CCE $5 million to CCE in insurance proceeds on March 22, 2006. Eight days later CCE paid $5 million to TJB. On April 6, 2006, TJB transferred $4.2 million to Tamara's personal account. OBIC also paid CCE $2 million. Subsequently CCE transferred $200,000 to Tamara. Furthermore, MS is a member of the owner and developer of the Entergy Project, where other portions of the insurance proceeds were invested. It is reasonable to infer that Tamara knew the origin of the substantial funds that were deposited into her personal account and TJB's account, and were invested in MS's development projects. The cases relied on by appellants, McKown v. Criser's Sales and Service, 48 Md. App. 739 (1981), and AP Links, LLC v. Global Golf, Inc., Civ. Action No. CCB-08-705, 2008 WL 4225764 (D. Md. Sept. 2, 2008), are not apposite because they involved a failure of proof. The existence of the conspiracy in this case was established by the orders of default as to liability. The conspiracy, as thus established, existed prior to the initiation of this action.

B. Tamara and MS had Reason to Believe that They Would Be Subject to Personal Jurisdiction in Maryland

Appellees alleged in their complaint that Tamara, and consequently MS, knew at the time that they conspired to defraud appellees that Giannasca lived in and maintained his principal office in Maryland. Tamara knew that McCrary was from Maryland and maintained an office in Maryland. Any reasonable person would have reason to believe that they would be subject to personal jurisdiction in Maryland when they conspire with a Maryland resident with its primary office in Maryland against another individual with personal ties to Maryland and their principal place of business in Maryland. Despite knowing that the conspiracy involved actors with ties to Maryland, neither Tamara nor MS refrained from entering into the conspiracy. In fact, Tamara and MS continued to participate in the conspiracy despite the fact that numerous acts in furtherance of the conspiracy occurred in Maryland.[14]

Again, appellants' reliance on cases, such as Capital Source Financial, LLC v. Delco Oil, Inc., Civ. Action No. DKC 2006-2706, 2007 WL 3119775 (D. Md. Sept. 17, 2007), is unavailing because they were based

[14] For example, in October 2005 in Giannasca's Maryland office, Giannasca told McCrary's representative that the insurance companies would deny their claims. In December 2005 in Giannasca's Marland office, Giannasca told McCrary that the insurance companies denied their claims, and CCE would not receive any insurance proceeds. In January 2006, in Giannasca's Maryland office, Giannasca executed and trnsmitted a "Release and Indemnity Agreement" to induce LIC to pay additional insurance proceeds.

on lack of sufficient allegations. In this case, there were detailed allegations and an order of default as to liability.[15]

III. *Orders of Default, Contempt, and Discovery Sanctions*

In some instances, when finding appellants in contempt and imposing discovery sanctions, the circuit court erred because it failed to follow the proper procedures. In addition, it abused its discretion when it precluded certain appellants and their counsel from participating in the damages hearing.

A. Procedural Flaws

When a party or circuit court is confronted with an uncooperative party, the party or circuit court may seek to compel the party's cooperation, or punish the party. Specifically, the party or circuit court may pursue direct civil or criminal contempt sanctions, constructive civil or criminal contempt sanctions, or discovery sanctions. The remedies may overlap, but each one has certain requirements, largely contained in the applicable rules, which must be followed. Because the court may wish to revisit the question of sanctions on remand, we shall summarize the major requirements for each remedy.[16] *See infra* Parts

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[15] Appellants argue that they were subject to personal jurisdiction in Florida and Louisiana. Assuming that to be true, it is not relevant to our examination of Maryland's personal jurisdiction.

[16] We shall not discuss any rules specifically relating to contempt actions for spousal or child support.

III.A.1-4. We then will apply the rules to the facts of this case. *See infra* Part III.A.5.

Contempt proceedings require an action constituting contempt.

> In a narrow sense, a contempt has been defined as a despising of the authority, justice, or dignity of the court; in a more general sense, a person whose conduct tends to bring the authority and administration of the law into disrespect or disregard, interferes with or prejudices parties or their witnesses during litigation, or otherwise tends to impede, embarrass, or obstruct the court in the discharge of its duties, has committed a contempt.

Goldsborough v. State, 12 Md. App. 346, 355 (1971).

If a contempt has occurred, the moving party and the court must determine the nature of the contempt proceeding—i.e., direct or constructive, and civil or criminal. *See* State v. Roll and Scholl, 267 Md. 714 (1973) (holding that the nature of the contempt proceeding is determined before reaching the time for imposing sanctions). To conduct this analysis, parties and courts first should determine whether the contempt was direct. *See infra* Part III.A.1. If the contempt was direct, the party or court follows the same rules to dispose of the case, regardless of whether the contempt was criminal or civil. *See infra* Part III.A.1. If the contempt was not direct, it must have been constructive. Md. Rule 15-202(a). The party or court then must determine whether the constructive

contempt was criminal or civil, and apply the rules accordingly. *See infra* Parts III.A.2-3.

A court may impose discovery sanctions if "a failure of discovery" has occurred or if a party has failed to obey an order compelling discovery. Md. Rule 2-433(a), (c); *see infra* Part III.A.4.

1. Direct Civil and Criminal Contempt

A direct contempt is "a contempt committed in the presence of the judge presiding in court or so near to the judge as to interrupt the court's proceedings." Md. Rule 15-202(b). Direct contempt proceedings are inappropriate when the judge does not have personal knowledge of all relevant facts, and must learn all of the facts from others. Roll and Scholl, 267 Md. at 734. Any contempt that is not a direct contempt—"where the judge must look at extrinsic evidence to determine that a contempt has been committed"—is a constructive contempt. Md. Rule 15-202(a); Scott v. State, 110 Md. App. 464, 480-81 (1996); *see infra* Parts III.A.2-3.

Once the court finds that a direct contempt—either civil or criminal—has occurred, the court must determine whether to impose summary sanctions,[17] defer imposing sanctions until the conclusion of the proceeding where the alleged contemnor committed the contempt, or issue the sanctions after holding a hearing. We shall briefly discuss these three options.

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[17] A court institutes summary sanctions when it does not conduct a hearing, and simply announces and imposes the sanctions. Md. Rule 15-203 advisory committee note.

First, summary sanctions are appropriate when the court observes actions that "pose[] an open, serious threat to orderly procedure that instant . . . ." Roll and Scholl, 267 Md. at 733; *see also* Md. Rule 15-203(a). Ordinarily, the court should "afford the alleged contemnor an opportunity, consistent with the circumstances . . . , to present exculpatory or mitigating information." Md. Rule 15-203(a). The alleged contemnor may offer affidavits before or after the court imposes sanctions. Id. R. 15-203(c).

If the court issues sanctions summarily, the court must (1) issue a written order[18] (2) stating that a direct contempt has been committed; (3) specifying whether the contempt is civil or criminal[19]; (4) specifying the evidentiary facts that support a finding of direct contempt, known to the court from the court's own personal knowledge; (5) specifying the evidentiary facts that support a finding of direct contempt but are not known to the court's personal knowledge, and the court's basis of finding them as facts; the sanction imposed for the contempt[20]; (7) how the contempt may

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[18] Written orders with findings are mandatory. Thomas v. State, 99 Md. App. 47, 54-56 (1994).

[19] For guidance in determining whether a contempt is civil or criminal, see *infra* Parts III.A.2-3. The principles used to determine whether a constructive contempt is civil or criminal are the same principles used to determine whether a direct contempt is civil or criminal.

[20] Reciting the facts is more than a formality; it is essential to disclosing the basis of a contempt decision with sufficient particularity, such that an appellate court can conduct an informed review of the legal sufficiency. Robinson, 19 Md. App. at

be purged if the contempt is civil; (8) if the sanction is incarceration and the contempt is criminal, the determinate term of the incarceration; and (9) any condition under which the sanction may be suspended, modified, revoked, or terminated if the contempt is criminal. Md. Rule 15-203(b).

Second, if the court wants to impose sanctions at the conclusion of the proceeding in which the contempt occurred, the court must "summarily find[] and announce[] on the record" after the contempt that the alleged contemnor committed direct contempt. Md. Rule 15-203(a). When the court issues sanctions at the conclusion of the proceeding, it should follow the same procedures used when issuing sanctions summarily immediately after the contempt. *See supra*.

Third, if the court wants to hold a hearing before issuing sanctions, "reasonably promptly" after the contemptuous conduct, the court must issue a written order identifying the contemnor, and the "evidentiary facts within the personal knowledge of the judge as to the conduct constituting the contempt." Md. Rule 15-204; *see also* Hermina v. Baltimore Life Ins. Co., 128 Md. App. 568, 584-590 (1999) (holding that the court committed procedural errors when not summarily sanctioning a contemnor in a direct contempt case). The order should specify whether the contempt is civil or criminal. *See* Md. Rule 15-204; *infra* Parts III.A.2-3. If the contempt is civil, the court must proceed pursuant to the constructive civil contempt rules. Md. Rule 15-204; *see infra* Part III.A.2.

25-26. Indeed, conclusory language and general citations are not sufficient. Id. at 26.

If the contempt is criminal, the court must proceed pursuant to the constructive criminal contempt rules. Md. Rule 15-204; *see infra* Part III.A.3.

With certain exceptions, the judge instituting the direct contempt proceeding is disqualified from presiding over the hearing if the judge reasonably expects to be called as a witness at any hearing on the matter. Md. Rule 15-207(b).

Regardless of whether the court imposed the sanctions summarily, after the conclusion of the proceeding, or following a separate hearing, the clerk should ensure that the record consists of (1) the written order of contempt; (2) a transcript of the portion of the proceeding in which the court found someone in direct contempt, if the proceeding was recorded; and (3) "any affidavits offered or evidence admitted in the proceeding." Id. 15-203(d). The record should be composed so that the appellate court can conduct a meaningful review.

2. Constructive Civil Contempt

A party, the Attorney General,[21] or the court may institute a constructive civil contempt proceeding when (1) the movant intends to file or filed the proceeding as a continuation of the original action, as opposed to a separate and independent action; (2) the movant seeks relief to benefit themselves or a party instead of punishing the alleged contemnor; (3) "the acts complained of do not of themselves constitute

[21] The court must request the Attorney General to institute the proceeding. Md. Rule 15-206(b)(2).

crimes or conduct by the defendant so wilful or contumacious that the court is impelled to act on its own motion"; and (4) the contempt is not a direct contempt. Md. Rule 15-206(a), (b); Winter v. Crowley, 245 Md. 313, 317 (1967).

The court order or petition must satisfy three general requirements. The order or petition must comply with Rule 2-303 (form of pleadings), Md. Rule 15-206(c), and the order or petition must "expressly state whether or not incarceration is sought." Id. If the court initiates the proceeding or receives a petition for constructive civil contempt, the court must "enter an order," generally referred to as a show cause order, as long as the petition for contempt is not "frivolous on its face . . . ." Id. R. 15-206(c)(2).

The show cause order must include three elements. First, if incarceration is sought, the court must provide a notice in the form set forth in Rule 15-206(c)(2)(C). Second, the order must establish a date by which the alleged contemnor must answer the petition. Id. R. 15-206(c)(2)(A). The date may not be less than 10 days after service of the order, unless good cause exists. Id. Third, the order must establish a time and place at which the alleged contemnor must appear in person for a prehearing conference, a hearing, or both. Id. R. 15-206(c)(2)(B). If the court schedules a hearing, the order also must state whether the hearing is before a master or a judge.[22] Id. With certain exceptions, if the judge initiated the proceeding, the hearing cannot be before that judge if the judge reasonably expects to be called as a witness. Id. R. 15-207(b). Additionally, if

[22]If a master, Rule 9-208(a)(1)(G) applies.

the court schedules a hearing, the hearing date must allow the alleged contemnor a reasonable amount of time to prepare a defense. Id. R. 15-206(c)(2). The amount of time may not be less than 20 days after the prehearing conference. Id. Also, when scheduling the hearing, the court may consolidate constructive criminal and civil contempt petitions for hearing and disposition. Md. Rule 15-207(a). Nevertheless, the constructive criminal and civil contempt proceedings must have separate charging documents. Dorsey v. State, 356 Md. 324, 348-50 (1999).

The Rules' requirement of an answer and a hearing for the alleged contemnor in a constructive civil contempt proceeding is one of the main differences between constructive and direct proceedings. The court may punish contempt summarily only in direct contempt proceedings. Betz v. State, 99 Md. App. 60, 66 (1994). In contrast, in constructive contempt proceedings, the court must give the accused contemnor an opportunity to challenge the alleged contempt and show cause why a finding of contempt should not be entered. Id.

The show cause order must be served upon the alleged contemnor pursuant to Rule 2-121 (service of process-in personam) or in the manner prescribed by the court if the alleged contemnor is a party in the action.

If the hearing on constructive civil contempt is before a master, Rule 9-208 (referral of matters to masters) is applicable. If the hearing on constructive civil contempt is before a judge, the alleged contemnor appears without counsel, and incarceration is sought, the court must follow a specific set of procedures. *See*

id. R. 15-206(e)(1), (2) (notice and right to and waiver of counsel).

If the hearing on constructive civil contempt is before a judge, incarceration is sought, and the alleged contemnor asks to discharge his counsel, the court must follow another specific set of procedures. *See* id. R. 15-206(e)(3) (meritorious reason).

If the alleged contemnor fails to appear at the hearing on constructive civil contempt, the court may (1) proceed ex parte; and/or (2) order the "sheriff or other peace officer to take custody of and bring the alleged contemnor before the court or judge designated in the order." Id. R. 15-207(c)(2). The rules do not allow for pre-hearing incarceration of the alleged contemnor. Young v. Fauth, 158 Md. App. 105, 110-12 (2004); Redden v. Dep't of Soc. Servs., 139 Md. App. 66, 72-76 (2001).

At the show cause hearing, the court may terminate the civil contempt proceeding and institute new criminal contempt proceedings if facts exist indicating "that the alleged contemnor cannot comply with the order of the court" due to the contemnor's "deliberate effort or a wilful act of commission or omission . . . committed with the knowledge that it would frustrate the order of the court . . . ." Roll and Scholl, 267 Md. at 730. Nevertheless, some time lag must exist between the termination of the civil contempt proceeding and the trial of a new constructive criminal contempt case. Indeed, courts may not convert or merge a civil contempt proceeding to a criminal contempt proceeding mid-trial. Bryant v. Howard County Dep't of Soc. Servs., 387 Md. 30, 50 (2005); Dorsey, 356 Md. at 350-51.

A court must find civil contempt by a preponderance of the evidence. Roll and Scholl, 267 Md. at 728. Following a finding of contempt, the court must issue a written order specifying (1) the coercive sanction imposed for the contempt, and (2) how the contempt may be purged. Md. Rule 15-207(d)(2); Roll and Scholl, 267 Md. at 730 (stating that "[i]f it is a civil contempt the sanction is coercive and must allow for purging . . . ."). The purging provision—another critical difference between civil and criminal contempt—is important. "In this way, a civil contemnor is said to have the keys to the prison in his own pocket." Jones v. State, 351 Md. 264, 281 (1998). Absent a purging provision, the sanction is no longer coercive and remedial. *See* id. at 279-83. Rather, the sanction is punitive, and "the constitutional and procedural rules applied to criminal trials must be observed." Id. at 280 (quotations and citations omitted).

Not only must a sanction contain a purge provision, but the contemnor must have the ability to comply with the purge provision. Jones, 351 Md. at 281-82. In other words, completion of the purging provision must be feasible. *See* Young, 158 Md. App. at 113-14; Redden, 139 Md. App. at 77-78.

3. Constructive Criminal Contempt

The court, the State's Attorney, the Attorney General, or the State Prosecutor, depending on the circumstances, may institute a constructive criminal contempt proceeding when (1) the movant intends to file or filed the proceeding as a separate action as opposed to a continuation of the original action; (2) the alleged contemnor willfully violated or attempted to frustrate a court order, such that the alleged

contemnor offended the dignity or process of the court; (3) the act was not a direct contempt; and (4) the movant seeks to punish the alleged contemnor for his act. *See* Md. Rule 15-202(a), -205(a), (b); Bryant, 387 Md. at 47; Dodson v. Dodson, 380 Md. 438, 452 (2002); Roll and Scholl, 267 Md. at 728.

The order or petition instituting the proceeding must contain the information required by Rule 4-202 (contents of charging document). Md. Rule 15-205(d). The order, along with a summons or warrant, must be served in accordance with Rule 4-212 (service of summons or warrant).

At the hearing on constructive criminal contempt,

> [w]hile a contemnor in a criminal contempt proceeding in Maryland is not entitled to indictment by a grand jury and may not have a right to a jury trial, ... [t]he burden of proof is increased [to proof beyond a reasonable doubt], the accused cannot be compelled to testify against himself, he cannot be put in double jeopardy, and, except when a contempt may be dealt with summarily, the panoply of fundamental due process rights comes into play.
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> * * *
>
> These include not only the right to notice, and the opportunity to be heard but also the right to counsel and with the possibility of imprisonment an indigent has the right to have an attorney appointed for him.

Roll and Scholl, 267 Md. at 730-31, & 731 n.12 (citations omitted).

With certain exceptions, the judge cannot be the same judge who (1) instituted the constructive criminal contempt proceeding; and (2) reasonably expects to be called as a witness at any hearing on the constructive criminal contempt proceeding. Md. Rule 15-207(b).

If the alleged contemnor fails to appear at the hearing on constructive criminal contempt, the court may order the "sheriff or other peace officer to take custody of and bring the alleged contemnor before the court or judge designated in the order." Id. R. 15-207(c)(2). Unlike constructive civil contempt proceedings, the court may not conduct an ex parte proceeding. *See* id.

At the hearing, the State must prove beyond a reasonable doubt "a deliberate effort or a willful act of commission or omission by the alleged contemnor committed with the knowledge that it would frustrate the order of the court . . . ." In re Ann M., 309 Md. 564, 569 (1987). "[E]vidence of an ability to comply, or evidence of a defendant's conduct purposefully rendering himself unable to comply, may, depending on the circumstances, give rise to a legitimate inference that the defendant acted with the requisite willfulness and knowledge." Dorsey and Craft, 356 Md. at 352.

Following a finding of criminal contempt beyond a reasonable doubt, the court must issue a written order specifying a sanction. Md. Rule 15-207(d)(2). Unlike orders in constructive criminal contempt proceedings,

orders in criminal contempt proceedings do not need a purge provision. *See* id. In constructive criminal contempt proceedings, sanctions punish the contemnor "for past misconduct which may not necessarily be capable of remedy." Roll and Scholl, 267 Md. at 728. In any event, "if the sanction is incarceration, the order [must] specify a determinate term[,] and any condition under which the sanction may be suspended, modified, revoked, or terminated." Md. Rule 15-207(d)(2). Ultimately, the sanction for criminal contempt "is largely within the discretion of the court, so long as it is not cruel or unusual." Arrington v. Dep't of Human Res., 402 Md. 79, 100 (2007).

4. Discovery Sanctions

Discovery sanctions are permitted if a "failure of discovery" has occurred or a party fails to obey an order compelling discovery. Md. Rule 2-432, -433. We reviewed the procedures in Hossainkhail v. Gebrehiwot, but will briefly summarize them herein. 143 Md. App. 716, 729-33 (2002).

A discovering party may move for sanctions without first moving to compel if another party fails to appear for a properly noted deposition, fails to respond to interrogatories, or fails to respond to a request for production or inspection. Md. Rule 2-432(a). When defending the motion for sanctions, the party against whom sanctions are sought may not argue that the court should excuse that party's discovery failure because the discovery sought is objectionable unless a protective order has been obtained. Id. R. 2-432(a).

A discovering party may move for an order compelling discovery if there is a failure of discovery or

if a party provides discovery but fails to respond to one or more discovery requests, as enunciated in Md. Rule 2-432(b). "If the court denies the motion [to compel] in whole or in part, it may enter any protective order it could have entered on a motion pursuant to Rule 2-403." Id. R. 2-432(b)(2). If the court grants the motion to compel, the court must issue an order compelling discovery. *See* id. R. 2-433(b). If a party fails to obey an order compelling discovery, the discovering party may move for sanctions. Id. If either party wants a hearing on a motion for sanctions, the party must request the hearing in accordance with Rule 2-311(f). Karl v. Blue Cross & Blue Shield of Maryland, Inc., 100 Md. App. 743, 745-48 (1994).

After receiving a motion for sanctions produced by either method outlined above, the court may enter such orders[23] "as are just, including one or more of the

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[23] The rules addressing discovery violations do not expressly indicate that an order imposing sanctions must be in writing. The Maryland Rules do not define "order." The Rules Committee's minutes do not indicate whether the Rules Committee intended for orders imposing discovery sanctions to be written or oral.

Nevertheless, the Rules' definitions of other terms suggest that orders may be written or oral. Specifically, the Maryland Rules define "writ" as "a *written* order issued by a court . . . ." Md. Rule 1-202(aa) (emphasis added). Similarly, the Rules define "subpoena" as "a *written* order or writ . . . ." Md. Rule 1-202(y) (emphasis added). Furthermore, the Rules define "process" as "any *written* order . . . ." Md. Rule 1-202(u) (emphasis added). The Rules imply that some orders may be oral because they include the adjective "written" in all of these definitions.

Likewise, case law indicates that orders—not necessarily in the context of discovery sanctions—may be written or oral. In re Ann M., 309 Md. at 569 n.5 (stating that "[t]he refusal to obey an order of court, *whether oral or written*, may constitute a contempt." (emphasis added)); Goldsborough, 12 Md. App. at 356

following." Id. R. 2-433(a), (b). The court may order that certain matters are established. Id. R. 2-433(a)(1). The court may prohibit the failing party from supporting or opposing designated claims or defenses. Id. R. 2-433(a)(2). The court may prohibit the failing party from introducing certain matters into evidence. Id. R. 2-433(a)(2). The court may strike out pleadings in whole or in part. Id. R. 2-433(a)(3). The court may stay further proceedings until the failing party provides discovery. Id. The court may dismiss the action in whole or in part. Id. The court may enter a judgment by default that determines liability and all relief sought by the moving party against the failing party,[24] as long as the court is satisfied that it has

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(stating that "the refusal to obey an order of the court, *whether written or oral*, or a satisfactorily proved subtle defeat of its mandate is contempt, either under the statute or at common law." (emphasis added)).

Secondary sources conflict regarding whether orders generally must be in writing. The definition of "order" provided in Black's Law Dictionary (8th ed. 2004) indicates that orders must be written: "order, n. 1. A command, direction, or instruction. See mandate (1). 2. A *written* direction or command delivered by a court or judge." (emphasis added). Am. Jur. 2d recognizes that "at least some court orders may be oral." Am. Jur. 2d, Motions, Rules, and Orders § 43 (2008).

Based on the language of the rules, we conclude that an order imposing discovery sanctions may be oral. However, we note the contrast with the contempt rules which require that orders be in writing. Pursuant to Rule 2-433(c), a court may sanction a party for failure to obey an order compelling discovery by *oral* order under Rule 2-433(a) or by *written* order under Rule 15-206. If this interpretation is incorrect, the Rules Committee and/or the Court of Appeals should consider the matter.

[24] Dismissing a case or entering default judgment usually is appropriate when the noncomplying party engaged in

personal jurisdiction over the party. Id. Lastly, if the discovering party moved to compel, the court granted the motion and issued an order compelling discovery, the other party still failed to honor the order, and the discovering party then moved for sanctions—the court may initiate a constructive civil contempt proceeding in compliance with the rules outlined above "[i]f justice cannot otherwise be achieved." Id. R. 2-433(b); *see supra* Part III.A.3. Ultimately, discovery sanctions are in the sound discretion of the circuit court. Williams, 32 Md. App. at 691.

5. Appellant-Specific Procedural Errors When Imposing Sanctions for Contempt and Discovery Violations

i. Giannasca: The court entered an order of default against Giannasca on April 30, 2007, because he failed to answer appellees' complaint within 30 days, as required by the Maryland Rules. Giannasca does not challenge this order. Nevertheless, we note that we perceive no error.

On June 5, 2008, appellees filed a petition to hold Giannasca in constructive civil contempt. On June 10, 2008, the circuit court issued a show cause order. At a hearing on June 17, 2008, the circuit court found Giannasca in contempt for noncompliance with TROs

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contumacious or dilatory conduct, or disobeyed a direct order of the court. *See, e.g.*, Williams v. Williams, 32 Md. App. 685, 695 (1976). The decision of whether to dismiss a case or grant default judgment for failure to comply with discovery is within the sound discretion of the trial judge, however, and will not be disturbed on appeal in the absence of an abuse of discretion. *See* Wilson v. John Crane, Inc., 385 Md. 185, 198-99 (2005).

requiring an accounting, ordered him to appear on June 23, 2008, with an accountant, and prohibited him from participating in the damages hearing.

In doing so, the circuit court erred because it failed to place its finding of constructive civil contempt in writing. Additionally, the circuit court erred because it failed to state how Giannasca could purge his contempt. Rather, the circuit court merely prohibited Giannasca from participating in the damages hearing. The court also erred under clearly established case law to the extent that it converted the civil contempt proceeding to a criminal contempt proceeding. *See* Bryant, 387 Md. at 50; Dorsey, 356 Md. at 350-51. Moreover, on the facts of this case, we conclude that precluding Giannasca or his counsel from any participation in the damages proceeding was an abuse of discretion. *See infra* Part III.B.

ii. Stuart: On April 6, 2007, appellees filed a petition to hold Stuart in constructive civil contempt, alleging that Stuart violated a TRO issued by the court, which prohibited him from transferring funds out of certain bank accounts. The court issued a show cause order, requiring Stuart to appear on June 11, 2007. At the June 11 hearing, the court ordered Stuart to produce documents required by the TRO, produce documents requested during discovery, pay a fine, and appear for his deposition on June 28, 2007. Stuart did not comply with the court's June 11 order.

Appellees moved for judgment by default against Stuart on July 9, 2007, because he failed to appear for his June 28 deposition, failed to produce documents requested during discovery and required by the TRO, and generally failed to comply with the court's June 11

order. On April 28, 2008, the circuit court entered an order of default as to liability "as a sanction" against Stuart because he "purposely and intentionally failed to comply with [the] [c]ourt's [June 11] order and has failed to comply with discovery."

Stuart does not challenge the order of default as to liability. Nevertheless, we note that we perceive no error. The circuit court's order can be upheld as a discovery sanction pursuant to Rules 2-432(a) and 2-433(a), because of Stuart's total failure of discovery.

On June 18, 2008, appellees moved for additional sanctions against Stuart, asking the court to exclude Stuart from participating in the damages hearing. In a memorandum attached to appellees' original motion, they reasoned that additional sanctions were necessary because Stuart still had not produced any of the requested or required documents. In a reply memorandum, appellees reasoned that additional sanctions were necessary because Stuart failed to comply with the March 2008 TRO. On June 23, 2008, the court granted the sanctions, providing little explanation other than the following statement: "The Motion for Additional Sanctions [is] granted and [Stuart is] precluded from participating in the trial also." The court did not enter a written order.

Stuart challenges these June 23 sanctions. The memoranda filed by the parties in circuit court, in support of and in opposition to the imposition of sanctions, indicate that appellees sought sanctions for discovery failures. At the hearing, appellees and Stuart barely discussed the merits of the motion, and the court did not explain its ruling. Thus, we assume the circuit court relied on appellees and Stuart's

memoranda, leading us to conclude that the circuit court granted the sanctions for total discovery failures. That appears to be justified[25] but we conclude, nevertheless, that completely precluding Stuart or his counsel from participating in the damages hearing was an abuse of discretion. *See infra* Part III.B.

iii. Tamara: Appellees noted Tamara's deposition for July 31, 2007, and requested that she bring certain personal records to the deposition. Tamara moved for a protective order on July 27, 2007, requesting the court to delay her deposition until the court ruled on a motion to dismiss that she filed the same day. The court scheduled a hearing on the motion to dismiss for August 27, 2007, and never acted on the motion for a protective order. Tamara failed to attend her deposition on July 31, 2007. The August 27, 2007 hearing did not occur due to the bankruptcy proceeding.

Following dismissal of the bankruptcy proceeding, this case resumed on March 27, 2008, when the circuit court issued a TRO, requiring Tamara to account for and refrain from using any CCE funds. The circuit court eventually extended the TRO until June 15, 2008.

Appellees noted Tamara's deposition for May 16, 2008. Tamara refused to appear. Appellees noted

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[25] It is not clear whether Stuart was sanctioned twice for the same discovery failure. Nevertheless, Stuart was obligated to provide discovery, even after being sanctioned on April 28, and in any event, the issue was not raised by Stuart. Thus, we need not address whether multiple sanctions for the same failure are permissible.

Tamara's deposition for May 19, 2008. Tamara moved for a protective order on May 16, 2008. The circuit court denied Tamara's motion by order dated May 16, 2008. Tamara failed to attend her deposition on May 19, 2008, or produce any requested documents.

On May 19, 2008, appellees moved for judgment by default against Tamara as a sanction for her failure to appear for her depositions, and failure to produce the documents requested. The court scheduled a hearing on the motion for June 17, 2008.

On May 28, 2008, appellees offered to reschedule Tamara's deposition for June 4 or 5 if Tamara produced all of the requested documents by June 3. Tamara rejected this offer. Tamara finally appeared for her deposition on June 16, 2008, but she failed to produce any of her personal bank records. Moreover, during her deposition, Tamara testified that she had no knowledge of the facts in this case, including information pertaining to her own finances.

On June 17, 2008, the circuit court granted appellees' motion and entered an order of default as to liability against Tamara as a sanction for Tamara's discovery failure. The circuit court properly granted the motion as a discovery sanction because Tamara completely failed to respond to any discovery requests until June 16, 2008, when she sat for her deposition and produced some documents. At that point, trial was scheduled for June 18, 2008. According to the scheduling order in the record, the discovery deadline expired on February 21, 2008. As to Tamara's belated attempt to cooperate in discovery on the eve of trial, we conclude that it was too little, too late. Providing documents two days before trial, and four months after

the discovery deadline, constitutes a total failure of discovery within the purpose of Rule 2-432(a). Holding otherwise would abdicate the utility and effectiveness of scheduling orders and would necessitate a postponement of the trial date or unduly prejudice the discovering party. Tamara's lack of diligence is not excused by her pending motion to dismiss and motion for a protective order. Pac. Mortgage & Inv. Group, Ltd. v. Horn, 100 Md. App. 311, 325 (1994); Md. Rule 2-432(a) (stating that "[a]ny such [discovery] failure may not be excused on the ground that the discovery sought is objectionable unless a protective order has been obtained"). Therefore, we uphold the order of default against Tamara.

After the circuit court granted the motion for default, the following colloquy occurred.

> THE COURT: [Tamara]. I guess what the Court is trying to decide now with respect to the [sic] because the trial still needs to go forward on the issue of damages and that is to whether or not to permit participation. . . .
>
> [APPELLEES' COUNSEL]: Yes, Your Honor. We very much would like to try to proceed on the issue of damages. We have sufficient documentation to support our claim and to support our allegations and support our --
>
> THE COURT: Well, what about the idea of her participating -- normally, you can participate on damages even if there is a judgment of default.
>
> [APPELLEES' COUNSEL]: Your Honor, certainly she should be precluded from

> testifying about things that she has not produced any information on.
>
> THE COURT: Oh, well yeah. Okay, yes. I mean that part is understood.
>
> [APPELLEES' COUNSEL]: But I personally don't think that given the totality of the conduct, Your Honor, that she should be permitted to participate at all. I don't think that her conduct and we hadn't talked about failure to comply with the TRO, I don't think her conduct is any less contemptuous than [Giannasca's]. It just seems to me that this has been a pattern of behavior from all these [appellants] and the only way effective way for Your Honor to (inaudible).

Tamara's counsel then argued against the sanction. Afterwards, the circuit court stated that,

> if she wants to put on [the] defense [that she doesn't know anything] she would have had to produce all the documents and produce all the information. So, no. I mean, that may be a defense and it may be a credible defense, but I think if you're going to produce that defense, then you need to produce some information cause even though it rings true because you know, all the information needs to be produced if that was going and all the documents needed to be produced if that was going to be the claim. So, no I'm not going to permit her to participate in the damages case. I'm not going to because the whole tone and tenner [sic] of things is one of contemptuousness. It's just -- I mean, in fact

> actually, it is similar to I won't do this, but I still want to be able to get my way. No, I'm not going to do that. So, no she can't be -- so the motion will be granted in full.

The court did not enter a written order.

The basis of the preclusion is not entirely clear. It may have been part of the sanction for failure of discovery or it may have been based on a finding of contempt. If it was part of the overall sanction for failure of discovery, it was permitted by the rules, procedurally, but nevertheless, we conclude that completely precluding Tamara or her counsel from participating in the damages hearing was an abuse of discretion. *See infra* Part III.B.

iv. TJB and MS: On June 18, 2008, appellees filed a petition for constructive civil contempt and request for sanctions against TJB and MS because TJB and MS failed to comply with a TRO, and Tamara, TJB and MS's representative, failed to appear for her deposition. The petition sought "the entry of a finding of Constructive Civ[il] Contempt as well as a Default Judgment and the imposition of the sanction of preclusion from further participation in th[e] case . . . ." On June 18, 2008, the court entered a show cause order, requiring a representative of TJB and MS to appear on June 23, 2008. No representative of TJB or MS appeared at the June 23, 2008 hearing. After hearing argument, the court stated:

> Timing on this is horrendous on both sides. The Court has serious concerns about this. At the same time, the Court needs to have an accurate record about what is, and an opportunity to

> actually review that record. I think [Tamara's] obviously indifferent to the concerns of the Court. . . . But there needs to be a little bit more clarity than there is with references to what is said where about precisely what's going on. And I say that with some hesitance because I think that in addition to the timing that this was done, . . . it is an indication of a game. But at the same time, I'm concerned about going through a process that an appellate court is going to reverse. . . .

Following the court's comments, the court discussed the timing of the decision with appellees' counsel, then held a bench conference. Upon ending the bench conference and returning to the record, the court stated: "The sanctions are granted."

Based on appellees' petition and the transcript of the June 23 hearing, we conclude that the sanction of preclusion was granted as a result of a constructive civil contempt finding. Nevertheless, the court never issued a written order, and did not include a purge provision, as required by the rules. Furthermore, the court erred to the extent that it, de facto, converted the civil contempt proceeding to a criminal contempt proceeding. *See* Bryant, 387 Md. at 50; Dorsey, 356 Md. at 350-51. Consequently, we vacate the court's finding of constructive civil contempt against TJB and MS, and the sanctions imposed. We also vacate the sanction of prohibition against participation at the damages hearing on the additional ground that it was an abuse of discretion. *See infra* Part III.B.

At the damages hearing on June 25, the court granted summary judgment against TJB and MS

because they never answered the complaint. Even though we must vacate the judgments entered, and the rulings establishing liability occurred at the damages hearing, those rulings are not affected by the errors. Thus, we affirm the rulings as to liability.

B. Preclusion of Parties from Participating in the Damages Hearing[26]

The circuit court precluded some of the appellants and their counsel from participating in the damages hearing, either as a discovery sanction or as a civil contempt sanction. We question whether totally precluding a party from participating in a hearing is a sanction permitted by either the civil contempt rules or the discovery sanction rules.

Under the civil contempt rules, the court may sanction a party after finding the party in contempt, but the court also must include a purge provision in the order imposing the sanction. Md. Rule 15-207(d)(2). As we previously explained, civil contempt proceedings must include a purge provision because "[a] civil contempt proceeding is intended to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees primarily made to benefit such parties. These proceedings are generally remedial in nature and are intended to coerce future compliance." Roll and Scholl,

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[26] The circuit court did not prohibit GCC or CCE from participating in the damages hearing. Accordingly, we refer only to Giannasca, Stuart, Tamara, TJB, and MS when refering to "appellees" in Part III.B.

267 Md. at 728.[27] The court's prohibition against any participation in the damages proceeding did not provide any mechanism by which the prohibition could be avoided.

The discovery sanction rules explicitly enumerate appropriate sanctions for discovery abuses by stating that:

> Upon a motion filed under Rule 2-432 (a), the court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including one or more of the following:
>
> > (1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order.
> >
> > (2) An order refusing to allow the failing party to support or oppose designated

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[27] In contrast, purge provisions are not required in criminal contempt proceedings. Criminal contempt proceedings are punitive—meant to serve as "punishment for past misconduct . . . ." Roll and Scholl, 267 Md. at 728. However, this case did not involve a criminal contempt proceeding. The pleadings and hearing transcripts clearly reveal that this case involved civil contempt proceedings. By failing to provide a purge provision, a circuit court's contempt finding converts a remedial measure to a punitive measure, essentially converting the civil contempt proceeding to a criminal contempt proceeding. As we previously noted, "a civil contempt proceeding [cannot] be converted, mid-stream, to a criminal [contempt proceeding]." Bryant, 387 Md. at 50.

> claims or defenses, or prohibiting the party from introducing designated matters in evidence; or
>
> (3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party . . . .

Md. Rule 2-433(a).

Default or dismissal are the greatest sanctions under Rule 2-433(a).[28] All of the other sanctions—taking facts as established, prohibiting a party from introducing certain evidence, striking out parts of pleadings—are measures that could lead to default or dismissal. The rules do not expressly permit completely precluding a defaulting party from participating in a damages hearing. Rule 2-433(a)(3) contemplates that further proceedings may be necessary to extend a determination as to liability to a judgment. Id. 2-433(a)(3) (providing that "[i]f, in order to enable the court to enter default judgment, it is

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[28] When the Rule allows the court to enter "a judgment by default that includes a determination as to liability *and all relief sought*," the Rule does not imply that courts possess carte blanche power to enter a judgment as to damages in the amount of the ad damnum pled in the complaint, with or without a hearing on damages, or with or without all parties present at the hearing on damages. Md. Rule 2-433(a)(3) (emphasis added).

necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury").

We also observe that, ordinarily, an order of default as to liability does not carry with it a judgment as to damages. *See* Greer v. Inman, 79 Md. App. 350 (1989). In Greer, the trial court entered an order of default against the defendant, and scheduled a damages hearing. Id. at 352. The defendant appeared pro se at the damages hearing, and attempted to participate. Id. at 352-53. The trial court prohibited the defendant from participating, explaining that she was in default. Id. at 353. On appeal, this Court vacated the damages, and stated:

> It is beyond cavil that the entry of [an order of] default in a claim for unliquidated damages merely establishes the non-defaulting party's right to recover. The general rule, therefore, is that, although the defaulting party may not introduce evidence to defeat his opponents' right to recover at the hearing to establish damages, he is entitled to present evidence in mitigation of damages and cross examine witnesses.

Id. at 357 (citations and quotations omitted); *see also* Miller v. Miller, 70 Md. App. 1, 22 n.11 (1987) (upholding [an order of default] based on a party's failure to answer, and stating that "where the relief to which the party obtaining [default] judgment is entitled remains to be determined, the defaulting

party has the right to participate in any hearing for that purpose and to present evidence on the issue"). The above cases did not involve discovery violations or contempt sanctions, but illustrate the general proposition that damages must be based on something more than a bare recital in a complaint of the relief sought.

Finally, we note that sanctions must be proportionate to the misconduct. Rodriguez v. Clarke, 400 Md. 39, 68-70 (2007); Atty. Grievance Comm'n v. James, 385 Md. 637, 661 (2005); *see also* Storetrax.com, Inc. v. Gurland, 168 Md. App. 50, 88-95 (2006), *aff'd* 397 Md. 37 (2007). In Gurland, Storetrax failed to produce certain evidence requested during discovery. Id. at 90-92. The circuit court sanctioned Storetrax by prohibiting Storetrax from cross-examining a witness only about the evidence that Storetrax failed to produce. Id. at 92. The circuit court did not prohibit Storetrax from participating completely. *See* id. We held that the circuit court did not abuse its discretion.

In the case before us, appellants argue that the complete prohibition against participating in the damages hearing violated due process. We need not reach that question because, assuming that the civil contempt rules or discovery sanction rules allow such a sanction, which we have questioned, we conclude that, in this case, the court abused its discretion.

The complete prohibition against participation converted the damages hearing into an ex parte proceeding. A party's right to be present at a hearing or trial is a substantial right. That right is independent of the ability to present evidence. When

a party and counsel are precluded from participation, counsel cannot present argument and make objections, thereby preserving the record. As a result, an appellate court must scour the record of the proceeding, looking for reversible error, a function normally not undertaken by an appellate court. Certainly, a circuit court may impose sanctions which, *inter alia*, consist of prohibiting a particular claim or defense, prohibiting the use of information called for in discovery and not disclosed, ordering that facts sought to be discovered are taken as established, dismissing the action, and determining liability, all as appropriate to remedy a violation. Rarely, however, will a prohibition against participation in terms of making arguments and objections be justified.

The discovery and other violations in this case can be found to be wilful and egregious and justify the imposition of harsh penalties, on remand. In doing so, however, the court and parties must comply with the rules and, at the least, permit counsel to participate to preserve a record for further appellate review, if further review is sought by any party.

We are aware of Davis v. Chatter, Inc., 270 S.W.3d 471, 479-80 (Mo. Ct. App. 2008)—the only case, of which we are aware, that upheld a trial court's decision to completely preclude a party from a hearing. That court observed, however, that, based on its review of the record, the trial court had not committed any apparent error. Id. We have not reached the same conclusion in this case.

IV. *Punitive Damages and Other Remedies in the Court's Order*

The circuit court erred when it awarded punitive damages to McCrary against CCE in the absence of an award of compensatory damages. The circuit court also erred when it failed to apportion punitive damages.[29]

A. Awarded Punitive Damages in the Absence of Compensatory Damages

Maryland law clearly establishes that a party cannot recover punitive damages absent an award of compensatory damages. *See, e.g.*, Shabazz v. Bob Evans Farms, Inc., 163 Md. App. 602, 639 (2005). In this case, the circuit court awarded compensatory damages against Giannasca, Stuart, Tamara, GCC, TJB, and MS in favor of CCE. The circuit court then awarded compensatory damages against CCE in favor of McCrary, MRCC, and MCC. Finally, the circuit court awarded punitive damages against Giannasca, Stuart, Tamara, GCC, TJB, and MS in favor of McCrary, CCE, MRCC, and MCC. The circuit court did not award compensatory damages against Giannasca, Stuart, Tamara, GCC, TJB, and MS in favor of McCrary, MRCC, and MCC. Thus, the circuit court erred when it awarded punitive damages against Giannasca, Stuart, Tamara, GCC, TJB, and MS in favor of McCrary, MRCC, and MCC because the circuit court did not award compensatory damages against

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[29] We use the word apportion because it is commonly used in this context. It is used to mean assessing punitive damages on an individualized basis.

Giannasca, Stuart, Tamara, GCC, TJB, and MS in favor of McCrary, MRCC, and MCC.

B. Failed to Apportion Punitive Damages

Appellants argue that the circuit court erred when it awarded punitive damages because it awarded punitive damages jointly and severally, thus failing to apportion the punitive damages award. We agree.

The Court of Appeals' decision in Schloss v. Silverman, 172 Md. 632 (1937), is our starting point. In Schloss, a plaintiff sued a partnership and its two partners. Id. at 634-35. The jury returned a verdict in favor of the plaintiff, and against the partnership and both partners. Id. at 635. In doing so, the jury awarded punitive damages against the three defendants in one sum. *See* id. at 642-45. The Court of Appeals reversed the judgment against both partners and the partnership. Id. at 645. The Court awarded a new trial to the plaintiff against only one of the partners, dismissing the other partner and the partnership outright. Id. The Court also vacated the punitive damages award, explaining:

> The evidence showed a wide disparity in the financial worth of those defendants. It showed that the financial worth of the partnership was $ 68,038.78; the financial worth of the [sole remaining defendant was] $ 7,686.17. The jury may therefore, in awarding exemplary damages and determining the amount which would sufficiently punish the defendants, have been influenced by the net worth of the two individual defendants and the partnership. And since it cannot be assumed that they attempted

> to make the "punishment fit the crime," rather than the offenders, it does not follow that they would have awarded the amount in exemplary damages against one defendant worth less than $ 8,000, that they did against three worth over $ 68,000.

Id. at 644. This decision was not based on an individualized determination as to tortfeasors, but was based on the fact that the total amount may have been influenced by the fact that the jury thought it was punishing two defendants, rather than one.

The Court followed Schloss in Nance v. Gall, 187 Md. 656 (1947), *modified by* 187 Md. 674 (1947). In Nance, the plaintiff sued a railroad company and its employee for a tort. Id. at 659. The jury awarded punitive damages in one sum against the employee and the company. Id. at 674. On appeal, the Court of Appeals reversed the judgment as to liability against the company, and upheld the judgment as to liability against the employee. Id. at 677. The Court reversed the punitive damages award against the company and the employee and remanded for further proceedings. Id. Relying on Schloss, the Court explained that

> the jury could not apportion its judgment so as to make a part of it applicable to [the employee] and a part applicable to the [employer]. It could only render a joint judgment, and each would be responsible for the entire judgment. . . .
>
> * * *
>
> We cannot free ourselves of the impression that the jury intended, by its verdict, to inflict

> punishment on both the [company] and [employee], and would not have rendered the verdict . . . if the action had been instituted solely against [the employee]. We do not think that a judgment rendered against two defendants should be imposed alone upon one of those defendants. Under the [J]oint Tort Feasor Act . . . he could have collected from the other defendant one-half of the judgment to be paid. To let the judgment stand against him alone would take from him this possible recoupment.

Id. The Nance Court, consistent with the fact that tortfeasors are jointly and severally liable for compensatory damages in this State, applied joint and several liability to punitive damages, but reversed on the same grounds as in Schloss. *See* id. 676-77.

Nearly thirty years later, in Cheek v. J. B. G. Properties, Inc., 28 Md. App. 29, 43-44 (1975), we stated, in dicta, "the reasonable view [is] that a jury should be permitted to vary the damages depending upon the degree of culpability since punitive and exemplary damages are not compensation for injury; instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Id. (citation and quotations omitted). We concluded our dicta by stating that "Maryland should . . . permit[] apportionment of punitive damages." Id. at 45.

We retreated from that dicta in Meleski v. Pinero International Restaurant, Inc., 47 Md. App. 526 (1981). Meleski involved a partnership called Fort George Associates ("FGA"). Id. at 528. The partners in FGA were John Collins, Elizabeth Meleski, Arthur

Meleski, and Charles H. Steffey, Inc. Id. at 529. FGA owned a liquor license that it sold to the plaintiff. Id. at 529-31. Collins, a lawyer, consummated the sale, promising the plaintiff that he would not only sell the liquor license, but also would assist plaintiff with forming an entity to receive the license, preparing the contract for the license, and appearing before local administrative bodies. Id. at 530. Collins and Elizabeth signed the contract on behalf of FGA. Id. at 529. Unbeknownst to the plaintiff, the license actually expired approximately one month before FGA sold it to the plaintiff. Id. at 531. Consequently, the plaintiff sued the partners, the partnership, and Collins individually[30] for fraud and deceit. Id.

The trial court "allow[ed] the jury to consider a separate award [of punitive damages] as to each defendant . . . ." Id. at 547 (quotations omitted). Accordingly, the jury awarded the plaintiff $11,250 in punitive damages against Arthur, $11,250 in punitive damages against Elizabeth, $22,500 in punitive damages against Charles H. Steffey, Inc., and $22,500 in punitive damages against Collins. Id. at 532.

When reviewing the trial court's actions on appeal, we began by recognizing that "there is considerable logic to support the individualization of punitive damage awards in cases where multiple defendants are all liable for one sum in compensatory damages but there are shown different degrees of complicity among the individual defendants in the wrongdoing giving rise to punitive damages." Id. at 547. We then

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[30] At that point, Collins was not a partner in FGA. Id. at 531.

noted Cheek's "strong dicta." Id. at 548. Nevertheless, we explained that

> we are now squarely faced with the issue of, not whether Maryland should permit apportionment of punitive damages, but whether it does permit it. We conclude that it does not -at least where, as in this case, the defendants are in a principal-agent relationship. The reason for our conclusion is the Maryland rule . . . that liability for punitive damages, where there are multiple defendants who are in a principal-agent relationship, is joint and several without regard to their relative culpability. As this rule presently stands it does not permit the application of and cannot co-exist with a so-called apportionment rule that allows a separate award against each of several defendants measured by each defendant's individual culpability.

Id. at 548 (quotations omitted).

> Relying on Nance, we explained that
>
> [w]e do not now believe that Nance can be read so broadly as to allow us to effect a change in that rule so as to permit individualized awards of punitive damages in cases where, as here, the defendants are in a principal-agent relationship. Only the Court of Appeals or the Legislature is free to change this long standing Maryland rule . . . .

Id. at 549-550. Accordingly, we vacated the individualized judgments, and ordered a new trial to

determine the amount of punitive damages that should have been assessed jointly and severally against the defendants. Id. at 551.

Approximately five months later, in Embrey v. Holly, we again reversed a judgment where the jury levied separate punitive damages awards against an employee and his employer. 48 Md. App. 571 (1981). In doing so, we stated that "[w]e feel obligated . . . to right a wrong that stems from dicta in Cheek[, 28 Md. App. 29 (1975)]." Id. at 602-03. We stated that "what ought to be the law, as we opined in Cheek, and what [the law] is are two decidedly different things." Id. at 603. We quoted from Meleski as follows:

> [L]iability for punitive damages, where there are multiple defendants who are in a principal-agent relationship, is joint and several without regard to their relative culpability. As this rule presently stands it does not permit the application of and cannot co-exist with a so-called "apportionment" rule that allows a separate award against each of several defendants measured by each defendant's individual culpability.

Id. (quoting Meleski, 47 Md. App. at 548).

In Embrey v. Holly, 293 Md. 128 (1982), the Court of Appeals reversed our decision and upheld the trial court's actions, stating that "the nature of punitive damage is such that . . . this award should be apportioned between multiple wrongdoers in a proper case depending upon the degree of culpability and pecuniary status of each." Id. at 141. The Court concluded by holding "that it is entirely proper to

permit a jury to apportion punitive damages among multiple defendants . . . ." Id. at 143. In a footnote, the court commented that "[a]ny indications contrary to the apportionment rule just articulated which have been perceived in the addendum to Nance v. Gall, 187 Md. 656, 674-77 (1946), are hereby disapproved. *Compare* Meleski v. Pinero Restaurant, 46 Md. App. 526, 544-51 (1981), *with* Cheek v. J. B. G. Properties, Inc., 28 Md. App. 29, 43-44 (1975)." Id. at 143 n.17.

We considered Embrey in Exxon Corp. v. Yarema, 69 Md. App. 124 (1986), *disapproved of on other grounds*, Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 455-60 (1992). Exxon presented the issue of whether the Uniform Contribution Among Tortfeasors Act ("UCATA") requires a court to reduce a defendant's punitive damages award by the amount of a co-defendant's settlement. Id. at 134. We held that UCATA does not apply to punitive damages. Id. at 138. Before reaching this holding, we recognized that UCATA only applies to situations involving the common liability of multiple jointfeasors. Id. at 136. We then reasoned that UCATA must not apply to punitive damages because punitive damages are not assessed jointly and severally. Id. at 136-38. In doing so, we cited Embrey and Cheeks for the proposition that,

> [b]ecause of the exemplary nature of punitive damages, defendants may not be held jointly and severally liable for such damages. Instead, punitive or exemplary damages may be awarded in different amounts against several defendants or they may be awarded against one or more of the defendants and not others, depending, not upon the damages sustained by the plaintiff,

> but upon the differing degree of culpability or the existence or nonexistence of malice on the part of the defendants.

Id. (citations omitted).

In Owens-Illinois, Inc. v. Armstrong, the Court of Appeals confronted an issue similar to the issue that arose in Exxon. 326 Md. 107 (1992). Armstrong presented the issue of whether a trial court could reduce a compensatory damages award by the amount of the plaintiff's settlement with a co-defendant, including the amount of punitive damages in the settlement. Id. at 125. Using the same reasoning that we employed in Exxon, the Court held that "[b]ecause a compensatory award is a joint and several liability against all the joint tortfeasors while a punitive damage award is an individual liability, the settlement of a punitive damage claim by one tortfeasor will not reduce the compensatory or punitive damage award against the nonsettling tortfeasors." Id. at 127-28. To conclude that "a punitive damage award is an individual liability," the Court relied on Embrey's holding that "punitive damages could be awarded in different amounts against each defendant or that they could be awarded against one defendant and not another, depending on evidence presented as to the degree of culpability, the existence or nonexistence of malice, and the financial worth of each defendant." Id. at 127.

This line of cases indicates that the circuit court should have apportioned the punitive damages award between appellants in accordance with their degree of culpability and ability to pay such an award.

The rationale behind punitive damages also supports this conclusion. We allow courts to award punitive damages "to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of the serious risk of monetary liability." Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 454 (1992). Indeed, punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Cheeks, 28 Md. App. at 44. Accordingly, "to be fair and effective," punitive damages "must relate to the degree of culpability exhibited by a particular defendant and that party's ability to pay." Embrey, 293 Md. at 141-42. In light of these principles, it is appropriate that trial courts apportion punitive damages in accordance with the defendants' degree of culpability and ability to pay.

Appellees argue that this case should not fall under the general rule requiring apportionment of damages because this case involves a conspiracy. Appellees reason that apportioning punitive damages is not required in conspiracy cases because

> where two or more persons conspire to carry out a fraud . . . each of them is liable to the defrauded party irrespective of the degree of his activity in the fraudulent transaction or whether he shared in the profits of the scheme. In order to establish liability of a participant in a fraud, it is not necessary to show that he was a party to its contrivance at its inception. If it is shown that he knew of the fraudulent scheme and willfully aided in its execution, he is chargeable with the consequences. All persons

> who participate in such a transaction are jointly liable for the ensuing injury regardless of the degree of culpability.

Etgen v. Washington Count Bldg. & Loan Ass'n, 184 Md. 412, 418 (1945). We recognize that several other jurisdictions employ appellees' suggested reasoning, and allow circuit courts to award punitive damages jointly and severally in conspiracy cases. Allred v. Demuth, 890 S.W.2d 578, 581 (Ark. 1994); Jemison v. Nat'l Baptist Convention, USA, Inc., 720 A.2d 275, 286 (D.C. 1998); United States Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc., 865 S.W.2d 214, 221-22 (Tex. App. 1993). Secondary sources have noted the approach used by these jurisdictions. Jerome H. Nates et al., Damages in Tort Actions § 40.06(4) (2008); Linda L. Schlueter, Punitive Damages § 4.4(b)(2)(b)(1) (5th ed. 2005). Nevertheless, the Maryland cases outlined above and the rationale behind punitive damages persuade us to apply the general rule, and hold that the circuit court should have apportioned the punitive damages award, despite the fact that this case involved a conspiracy. While the degree of culpability of co-conspirators may be the same, their ability to pay is not necessarily the same. Moreover, with respect to the level of culpability, co-conspirators are similar to the parties in a vicarious liability relationship, as in Embrey, *supra*.

C. Remaining Remedies

In addition to awarding compensatory and punitive damages, the circuit court's Second Revised Order and Judgment instituted four additional provisions.

1. Order Paragraph #13

Paragraph #13 of the Second Revised Order and Judgment reads "13. [Giannasca] is hereby removed as Manager of [CCE]." We must vacate the nonliability portions of the judgment because we have determined that the court erred in prohibiting all participation in the proceeding. We note, however, that we perceive no reversible error specific to this provision.

2. Order Paragraphs #14 and #15

Paragraph #14 and paragraph #15 of the Second Revised Order and Judgment read:

> 14. [Appellants Giannasca and Stuart] are permanently enjoined from taking any action of any kind on behalf of [CCE], including but not limited to initiating or filing any pleading in any legal action executing any contract or other document, or otherwise taking action of any kind which may have any effect on the assets or liabilities of [CCE].
>
> 15. A constructive trust shall be imposed in favor of [appellees] on any and all assets, including interests in any entity acquired by [Stuart, Giannasca, Tamara, MS, TJB, and GCC] directly or indirectly derived from funds or assets of [CCE], including but not limited to those two parcels of real estate located in New Orleans, Louisiana, pledged as security for the "Boxer" Mortgage as part of the Entergy Project financing, and located at 1544 Tchoupitoulas Street and 1556 Tchoupitoulas Street.

Our comments with respect to paragraph # 13 also apply to these provisions.

3. Order Paragraph #16

Paragraph #16 in the Second Amended Order and Judgment reads: "16. [Appellants Stuart, Giannasca, Tamara, MS, TJB, and GCC] shall disgorge any revenues and profits from any assets acquired with funds or assets of [CCE]."

This provision is unclear. The provision may have been intended to provide a source of payment from appellants to appellees. It can also be read as awarding additional damages. The court's intent may be clarified on remand, as deemed appropriate.

Conclusion

To summarize, we affirm the judgment as to liability against Giannasca, Stuart, Tamara, TJB, and MS. We vacate the non-liability portions of the judgment against Giannasca, Stuart, Tamara, TJB, and MS.

We affirm the judgment as to liability against CCE and GCC. CCE and GCC have not raised any assertions of error. Nevertheless, we shall vacate the non-liability portions of the judgment because the amount of damages will be affected by the amount of damages assessed against other parties on remand, if the amount of damages differs from that originally entered.

While we perceive no reversible error specific to provisions #13, 14, and 15 in the Second Revised

Order, we shall vacate those provisions subject to being reinstated on remand, if warranted. We shall vacate provision #16 for the same reason and because it is unclear.

On remand, the court may conduct a proceeding to determine damages and enter a final judgment. Before doing so, the court may also determine whether sanctions should be reimposed, and if so, the nature and extent of such sanctions, not inconsistent with this opinion.

JUDGMENT AFFIRMED AS TO LIABILITY OF ALL APPELLANTS; JUDGMENT OTHERWISE VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-HALF BY APPELLANTS OTHER THAN CCE AND ONE-HALF BY APPELLEES OTHER THAN CCE.

APPENDIX B

IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

CASE NO. 24-C-07-001253

[Dated April 28, 2008]

MR CRESCENT CITY, LLC, et al.,	)
Plaintiffs,	)
vs.	)
GIANNASCA CRESCENT CITY, LLC, et al.,	)
Defendants.	)

OFFICIAL TRANSCRIPT OF PROCEEDINGS

(Motions Hearing)

Baltimore, Maryland
Monday, April 28(2008

BEFORE:

HONORABLE ALFRED NANCE,
ASSOCIATE JUDGE

APPEARANCES:

For the Plaintiffs:
KENNETH FRANK, ESQUIRE

For the Defendants, Edward V. Giannasca, II, and Stuart C. "Neil" Fisher:

WILLIAM J. MURPHY, ESQUIRE
JOHN CONNELLY, ESQUIRE

For the Defendant, Tamara J. Fisher:

WILLIAM MCDANIEL, ESQUIRE

RECORDED BY: DIGITAL MEDIA

CHRISTOPHER W. METCALF, CVR
Official Court Reporter
515 Courthouse East
111 N. Calvert Street
Baltimore, MD 21202

* * *

[p.22]

MR. FRANK: Okay.

THE COURT: So I think that's what he said. So, proceed.

MR. FRANK: Thank you. Your Honor. But I think it's inescapable that if we conclude that there are sufficient facts to tie her to the conspiracy, Crescent City, which was the LLC involved, in its operating agreement provided that it had an office in Maryland.

It provided that Mr. Giannasca was the manager. He was a Maryland resident Mr. McCrary was a 50-percent owner. He was a Maryland resident. If that doesn't create a reasonable expectation that you might be sued in Maryland for misappropriating funds from that LLC, then I don't know what would, Your Honor.

THE COURT: Anything else?

MR.. FRANK: Not on that subject, Your Honor.

THE COURT: Mr. McDaniel.

MR. MCDANIEL: Well, I come back. Your Honor, to the point -- I mean, there's a lot of atmospherics in the complaint and here today from Mr. Frank about her being a partner, or the partner is located, and so forth, but we're talking about due process. So we're talking about a constitutional issue

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and we're talking about bringing an out-of-state resident who has never done anything in Maryland --

THE COURT: Well, we appreciate that you're raising a constitutional issue and Maryland is a state that is very concerned about when persons are brought into its courts and whether or not they were notified. However, the bases for Ms. Fisher's connection with this case is around that which is labeled "conspiracy" and conspiracy is an unlawful agreement between two or more persons. It does not mean that her feet was on the shores, but she was part of the agreement and did something, worked toward something with the parties for the purpose of manifesting that unlawful

agreement and the action which was agreed thereto. The pleading is around not just that they knew -- as I read the pleadings, not just that Mr. McCrary was a Maryland resident, or that Giannasca was a Maryland resident, is that the agreements that were done and that was the basis of the action occurs in Maryland and with a connection to her, and that she helped facilitate the conspiracy.

So I come back to you and ask (a) does she dispute that it is pled that, in fact, is that at least two of the parties involved were Maryland residents?

MR. MCDANIEL: No, sir.

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THE COURT; Does she dispute that she was involved with the agreement, which comes out of Maryland, for the purchase of the property and being an owner of the property, although the property was in Maryland -- I mean, in Louisiana?

MR. MCDANlEL: No, sir.

THE COURT: Does she dispute that there was an allegation in -- does she dispute that it is pled that there was, in fact, a meeting in Maryland between Giannasca, Fisher, and McCrary on the proceeds lack thereof, the non-forthcoming of moneys from the insurance?

MR. MCDANIEL: No, I don't believe so, Your Honor.

THE COURT: Okay. Well, let's assume that that part is three steps. The question becomes as to whether or not then it is pled, that is, as a part of that, is that there were actions and activities diverting what was in existence at the time of that meeting -- the alleged meeting -- the pled allegations -- that there was diversion of those funds, and those funds happened to be with two, who is not only her husband but suggested to be her partner, and then in her accounts.

MR.. MCDANIEL: Those are pled. What is

[p.25]

missing, Your Honor, is any specific pleading that she was aware that this conspiracy was going forward and participated in it, how she participated in it. It really comes down --

THE COURT: Does all actions in a conspiracy -- civil conspiracy, criminal conspiracy, but we're talking about civil here -- does all actions step-by-step in a conspiracy, do they have to all be pled?

MR. MCDANIEL: Oh, no, sir, but to get jurisdiction, you have to --

THE COURT: Does she have notice of that the expectation that that which is out of the agreement that's alleged to be unlawful occurred in Maryland and involved Maryland residents?

MR. MCDANIEL: I don't think there's any specific facts to show that she had any such knowledge. It

really is an argument of constructive knowledge, that because her name was on --

THE COURT: Well, then, I'm confused. I mean, case law says that it can be actual knowledge, or constructive knowledge. Then they go into this willful blindness discussion that I saw argued.

MR. MCDANlEL; Well, to be willfully blind, though, you've got to have a basis that the

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person is aware of what there is they're closing their eyes to.

THE COURT: She woke up one morning and there was five million dollars in the account, and she goes, "I don't want to know where it comes from. I'm just going to help spend it"?

MR. MCDANIEL: Well, I think the allegations of the complaint are that the money went into the account and came out. There are no allegations other than -- what they're seeking to do is hold her in this case on a constructive knowledge theory; that because she was -- this is a dissolved corporation, which she is not paying any attention to. It's dissolved. It's not doing business.

THE COURT: If she is the only signature on the account and you're going to tell me it came out of the account, then, although I'm a country lawyer in Maryland, I don't know how she is going to say it came out of the account without her knowing about it, didn't get into her account without her knowing about it, and

that the willful blindness argument doesn't apply.

MR. MCDANIEL: Somebody drew a check on that account and it wasn't her.

THE COURT: It's getting better every day. Anything else you want to argue?

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MR. MCDANIEL: No, I think Your Honor understands my points.

THE COURT: Well, I do appreciate the argument and you have raised reasonable concerns that the judge, this Court, and this circuit, and this state is concerned about.

MR. MCDANIEL: Thank you, Your Honor.

THE COURT: Thank you. The Court notes -- is there something further from you, Mr. Frank?

MR. FRANK: I would just like to add one thing, Your Honor, on the subject Mr. McDaniel was just talking about. There actually are facts alleged in the complaint that do allege her knowledge and they are, as follows. There is an affidavit of Mr. McCrary attached to our memorandum in which be says that Mr. Giannasca told him that the money was used -- the insurance proceeds were used to acquire property known as the "Entergy project." Also, in our memorandum, there is a copy of a lawsuit that Ms. Fisher filed in which she alleged that she is the owner of the Entergy project and, in fact, Mr. Fisher--

THE COURT: And it's your allegation in your pleading is that the funds that went into that project were the funds in question and that is pled.

MR. FRANK.: That's correct, Your Honor.

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THE COURT: All right. I remember seeing that, but I thought you wanted to bring it up earlier and Mr. McDaniel wanted to deal with that, and I just wanted to be the judge here.

Mr. McDaniel, do you want to say anything about the Entergy project?

MR. MCDANIEL: No. I have nothing further to add, Your Hanor.

THE COURT: Thank you very much. The Court had an opportunity to review the motions and the responses to the motions, as well as the court file. The Court recognizes that the pleadings here is, is that "TH" Fisher is a named party, as well as Market Street Properties Palm Beach, LLC, are movants before the Court at this time.

The Court, in review of the facts and circumstances, recognizes that the argument is, is that plaintiff has not pled facts sufficient to constitute a conspiracy. or that plaintiffs have not demonstrated Ms. Fisher's or Market Street's knowing participation in a conspiracy and that plaintiffs have not alleged an overt act in Maryland by conspirators in furtherance of the conspiracy.

There are a number of things which the Court can refer to, but I do say the following, is that

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a conspiracy is an agreement., an unlawful agreement, or an agreement to commit an unlawful act, if you will, and the question is whether or not the actions or activities is in furtherance of that unlawful agreement, or that agreement to commit an unlawful act as agreed to by the parties.

The Entergy project, the towers properties, and the activities in MaryLand by Giannasca and "Neil" Fisher and the parties in question are the foundation of all of the allegations in the complaints. While this Court has, as well as several other members of the Bench have, heard portions of this case, it has always been part of the allegations themselves.

The Court, as the questions have indicated, that, in fact, is that it's well-pled -- and the Court notes is that it has been noted by plaintiff that in paragraphs 47 and 57, it refers to conversations of Giannasca and Fisher and McCrary in Baltimore and the Baltimore office. What it is well-pled here is, is that there was an agreement between the parties, which included "TJ" Fisher, for the purpose of purchasing property in Louisiana, which the Court will refer to as the "towers." From that led the question of insurance on that property and the main basis for the argument and disputes here is, in fact,

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the actual proceeds from that insurance.

It is important to note is that "TJ" Fisher was a part owner in tile towers, as well as alleged owner or part owner -- well, owner, the sale owner of the projects which are alleged to have been the recipients of the proceeds from the conspiracy. In addition to that, there was a meeting in Maryland, which it is alleged by plaintiff that McCrary was advised and told that there would be no proceeds forthcoming. That is the first step, if you will, as to the deceit.

It is alleged by plaintiffs that, in fact, at that time not only did Giannasca and "'Neil" Fisher know, but that, in fact, that they and "TJ" Fisher knew at that time and had begun the diversion of the proceeds from the insurance of the said towers, if you will; that under the circumstances, not only was there furtherance of the agreement, the agreement that was advised and made activity in Baltimore, but there was diversion of the funds as a result of the unlawful agreement into accounts held by, orchestrated, or controlled by "TJ" Fisher most notably as to the Market Street Properties, or the Entergy project, if you will.

It is alleged, as a result of the agreement, that, in fact, the funds, whether it's the

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five million dollars, or whether or not it's the 1.2 or two million dollar diversions, if you will, at points in time, is that it has a direct allegation, if you will, or an allegation of a direct connection with that of "TJ" Fisher.

While it is raised and there is an attachment, if you will, as to "Neil" Fisher supporting, if you will,

confirming, if you will, the co-activity of "Neil" Fisher and "TJ" Fisher in this alleged conspiracy, that is, the businesses involved by "Neil" Fisher, which are well-documented in proceedings here in Maryland not only in the Circuit Court for Baltimore City, but the Bankruptcy Court here in Maryland, and bankruptcy courts and state courts in the State of Louisiana.

What the Court notes, if you will, is, is that if we look at those facts and circumstances, the Court does find that it is well-pled is that there is activity in Maryland which supports the allegations of the conspiracy. What we do note, if you will, is that given Giannasca and "Neil" Fisher's activity in Maryland, the connection of "TJ" Fisher prior to, during, and after, that the scheme to deceive and defraud is well-pled resulting thereof, and the agreement and the conspiracy is well-pled to defraud

[p.32]

the plaintiffs in this case. The activities. again, and actions occurring and originating in Maryland, and actions in furtherance of the conspiracy is well-pled in the actual amended complaints.

The Court again notes, if you will, is that "TJ" Fisher owned and/or controlled that which was the recipients -- the alleged recipients -- of the funds and which appears to be documented by exhibits as attached to responses thereto.

(Unintelligible) is that both sides have made use of the Mackie case and we do appreciate your citing to the Court and the elements of conspiracy and the commission of that conspiracy. It is an overt act in

furtherance of the agreement and the resulting suffering of actual injury, A fraudulent conspiracy is a confederation of two or more persons to cheat and defraud a design that has actually been executed by the confederates with resulting damage to their victim.

There can be no doubt that it is at least well-pled in this case and, therefore, should be properly proceeded to trial. The motion to dismiss for lack of personal jurisdiction of "TJ" Fisher and Market Street Properties, et al., is denied. Thank you very much.

Somebody is on a microphone -- we'll find

[p.33]

it in a minute -- that's shaking. That's all right.

All right. There is a motion to vacate default. Let's go to that which is 44 in the court file, if you will, or 44000.

MR. MURPHY: Your Honor, I believe that's the motion to vacate default as to Mr. Giannasca.

THE COURT: I'll hear from you, sir.

MR. MURPHY: Thank you, Your Honor. Your Honor, this motion has been pending for quite some time at this point and I just want to go back--

THE COURT: I suspect you filed it on Friday afternoon. Go right ahead.

MR. MURPHY: I want to go back and explain a little bit the procedural posture of this situation with

Mr. Giannasca, and I would ask the Court, because the Court has had a lot of involvement with "Neil" Fisher, and although we represent both of them, both Mr. Giannasca and Mr. Fisher have directed me to make it clear to the Court that Mr. Giannasca's situation should be adjudged separately.

THE COURT: The Court agrees is that Giannasca is a separate individual and a separate defendant in the matter before the Court.

MR. MURPHY: Initially. when this lawsuit was filed, he did not have counsel representing him in

* * *

APPENDIX C

**IN THE
COURT OF APPEALS
OF MARYLAND**

**Petition Docket No. 349
September Term, 2009**

**(No. 1282, Sept. Term, 2007
Court of Special Appeals)**

STUART C. FISHER, et al.	)
	)
v.	)
	)
MCCRARY CRESCENT CITY, et al.	)
	)

O R D E R

The Court having considered the motion for reconsideration filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsideration be, and it is hereby, denied.

/s/ Robert M. Bell
Chief Judge

DATE: March 12, 2010

Judge Murphy did not participate in the consideration of this matter.

APPENDIX D

IN THE
COURT OF APPEALS
OF MARYLAND

Petition Docket No. 349
September Term, 2009

(No. 349, Sept. Term, 2009
Court of Special Appeals)

STUART C. FISHER, et al.	)
	)
v.	)
	)
MCCRARY CRESCENT CITY, et al.	)
	)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: December 11, 2009

Judge Murphy did not participate in the consideration of this matter.

APPENDIX E

In the
COURT OF SPECIAL APPEALS

No. 1282
September Term, 2007

[Dated September 1, 2009]

Stuart Fisher a/k/a Neil Fisher et al.	)
	)
Appellants	)
	)
vs.	)
	)
McCray Crescent City et al.	)
	)
Appellees	)
	)

ORDER

Upon consideration of Appellants' Motion for Reconsideration of the Court's reported opinion filed on June 8, 2009 in the captioned appea[, it is this 1st day of September, 2009, by the Court of Special Appeals,

ORDERED that the Motion for Reconsideration is denied.

For the Court

(CHIEF JUDGE'S SIGNATURE
APPEARS ON ORIGINAL ORDER)
Peter B. Krauser
Chief Judge

APPENDIX F

Court of Special Appeals
No. 01282, September Term, 2007

[Dated September 1, 2009]

Stuart C. Fisher a/k/a Neil Fisher)
vs.)
McCrary Crescent City, LLC et al.)
)

MANDATE

JUDGMENT: June 8, 2009: Judgment affirmed as to liability of all appellants; judgment otherwise vacated. Case remanded to the Circuit Court for Baltimore City for further proceedings not inconsistent with this opinion. Costs to be paid one-half by appellants other than CCE and one-half by appellees other than CCE. Reported opinion by Eyler, James R., J.

July 7, 2009: Motion for Reconsideration filed by counsel for the appellants.

September 1, 2009: Motion for Reconsideration denied.

September 01, 2009 Mandate issued.

From the Circuit Court: for **BALTIMORE CITY**
24C070001253

STATEMENT OF COSTS:

Appellant(s):	
Lower Court Costs-	60.00
Filing Fee of Appellant-	50.00
Brief of Appellant-	388.80
Record Extract-10 COPIES	2,810.04
Reply of Appellant-	57.60
Appellee(s):	
Brief of Appellee-	151.20
Appendix of Appellee-10 COPIES	2,356.80

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this **first** *day of* **September 2009**

/s/ Leslie D. Gradet
Clerk of the Court of Special Appeals

COSTS SHOWN ON THIS MANDATE ARE TO BE SETTLED BETWEEN COUNSEL AND <u>NOT THROUGH THIS OFFICE.</u>

APPENDIX G

MD Code, Courts and Judicial Proceedings, § 6-103

§ 6-103. Conduct in State; tortious injury

(a) If jurisdiction over a person is based solely upon this section, he may be sued only on a cause of action arising from any act enumerated in this section.

(b) A court may exercise personal jurisdiction over a person, who directly or by an agent:

(1) Transacts any business or performs any character of work or service in the State;

(2) Contracts to supply goods, food, services, or manufactured products in the State;

(3) Causes tortious injury in the State by an act or omission in the State;

(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State;

(5) Has an interest in, uses, or possesses real property in the State; or

(6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation, or agreement located, executed, or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

(c)(1)(i) In this subsection the following terms have the meanings indicated.

(ii) "Computer information" has the meaning stated in § 22-102 of the Commercial Law Article.

(iii) "Computer program" has the meaning stated in § 22-102 of the Commercial Law Article.

(2) The provisions of this section apply to computer information and computer programs in the same manner as they apply to goods and services.

CREDIT(S)

Acts 1973, 1st Sp. Sess., c. 2, § 1; Acts 2000, c. 61, § 6, eff. April 25, 2000; Acts 2000, c. 11, § 1, eff. Oct. 1, 2000.