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https://mdcourts.gov/data/opinions/coa/2018/42a17.pdf

ADMINISTRATIVE LAW – DUE PROCESS – RIGHTS AFFORDED TO DETAINEES

Facts:

On April 19, 2016, Officer Christopher Ditoto pulled the Respondent over near the intersection of Light Westbury Boulevard in Saint Mary's County, at approximately 2:05 am, for operating a motor vehicle without activating her headlights. During the course of the stop, Officer Ditoto detected a strong odor of alcohol and asked Respondent to exit the vehicle to perform field sobriety tests. After Respondent failed to execute the field sobriety tests, he detained her for driving under the influence or while impaired by alcohol and transported her to the Maryland State Police barracks. At the barracks, Officer Ditoto read the DR-15 form (Advice of Rights) to Respondent, which included information regarding the nature of the detention, and the sanctions associated with any refusal to submit to a chemical test. Respondent then signed the form. Respondent also requested to use the restroom prior to taking the alcohol breath test, but Officer Ditoto denied the request. The subsequent test revealed a blood alcohol concentration of 0.18, more than twice the legal limit, of 0.08.

Thereafter, an administrative law judge from the Office of Administrative Hearings heard the matter on August 31, 2016 and November 16, 2016. The Administrative Law Judge considered several arguments, including testimony about the process afforded to the Respondent during her detention, the effect of Officer Ditoto's refusal of Respondent's request to use the restroom, and the alleged effect of Triple X syndrome on Respondent's decision to submit to testing. Ultimately, the Administrative Law Judge granted Respondent's Motion for No Action, finding that the refusal of her request to use the restroom coerced her consent. Thereafter, the Motor Vehicle Administration appealed the decision to the Circuit Court for Saint Mary's County. The circuit court found that there was substantial evidence in the record to support the Administrative Law Judge's decision and determined that the officer's actions in refusing Respondent's request

to use the restroom constituted a "road block" that impacted her ability to exercise her statutory rights under Md. Code (Repl. Vol. 2012), § 16-205.1 of the Transportation Article, ("TRANSP."). *See Forman v. Motor Vehicle Administration*, 332 Md. 201, 215, 630 A.2d 753, 761 (1993).

Held: Vacated and Remanded

The Court of Appeals held that the refusal to use the restroom prior to Respondent's decision to submit to alcohol breath testing did not justify the grant of a Motion for No Action. Specifically, the Court considered the sufficiency of the due process afforded to Respondent by applying the factors articulated in *In re Ryan W.*, 434 Md. 577, 609, 76 A.3d 1049, 1068 (2013). The *Ryan* factors are: "[1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

In evaluating these factors, the Court determined that the first and third factors call for a balance between an individual's interest and the government's interest. In the case at bar, Respondent retained a right to due process before the imposition of State sanctions. However, the State has an equally compelling interest in subjecting suspected drivers to alcohol chemical testing. In weighing these interests, the Court considered the process required by TRANSP. § 16-205.1, which indicates that any person who drives on a roadway in Maryland "is deemed to have consented" to take alcohol breath testing if the person is detained on the suspicion of driving or attempting to drive while under the influence of alcohol, and which also requires that a suspected drunk driver be advised of the sanctions for the refusal to submit to alcohol breath testing and make an informed decision after such advisement. Additionally, the process requires written acknowledgment of the same. Given the advisement requirement, the Court determined that there is a proper balance between the individual's interest and that of the government. In applying the second *Ryan* factor, the Court of Appels found that the statute provides many protections that afford suspected drunk drivers due process. Specifically, the Court noted that drivers may not be subject to involuntary testing and are explicitly informed of this prior to testing. Moreover, the refusal to submit to testing must be the product of a knowing and voluntary decision supported by the circumstances presented.

Finally, in addressing the Respondent's voluntariness arguments, the Court finds that there is a requirement that the "State not mislead the defendant or construct road blocks, thus unduly burdening [the defendant's] decision-making." 332 Md. 201, 218, 630 A.2d 753, 762 (1993). In the instant case, Officer Ditoto read the DR-15 form to Respondent who then signed it. Her only request was to use the restroom prior to testing, which Officer Ditoto denied. Following the denial, Respondent submitted to testing. Notwithstanding these facts, the Court noted that Respondent presented no evidence suggesting that the officer's conduct affected her decision to take the test. Although Respondent alleged that her decision was affected by a condition known

as Trisomy X syndrome or Triple X syndrome, she presented no evidence to support this contention, how it may have influenced her decision to take the test, or that the officer was aware of the condition prior to testing. Accordingly, the Court determined that the Respondent was afforded appropriate due process protections, and that the refusal to grant her request to use the restroom did not justify the Administrative Law Judge's decision.

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Attorney Grievance Commission of Maryland v. Stephen Howard Sacks, Misc. Docket AG No. 42, September Term 2016, filed April 20, 2018. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2018/42a16ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On the Attorney Grievance Commission's behalf, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Stephen Howard Sacks, Respondent, a member of the Bar of Maryland, charging him with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.2(a) (Allocation of Authority), 1.3 (Diligence), 1.4 (Communication), 1.5(a) (Reasonable Fees), 1.15(a), 1.15(c), 1.15(d), 1.15(e) (Safekeeping Property), 1.16(d) (Terminating Representation), 3.1 (Meritorious Claims and Contentions), 3.2 (Expediting Litigation), 3.3(a)(1) (Candor Toward the Tribunal), 3.4(a), 3.4(b), 3.4(c), 3.4(d) (Fairness to Opposing Party and Counsel), 4.1(a)(1) (Truthfulness in Statements to Others), 8.1 (Disciplinary Matters), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC).

A hearing judge found the following facts. Jermaine D. Harris's mother retained Sacks to represent him in a criminal case. On Harris's behalf, Sacks collected from Harris's family $40,350, which included an agreed-upon $14,000 fee. Sacks misrepresented to Harris and his family that the $26,350 that he had collected in excess of the $14,000 fee was "for fees and expenses." Harris retained new counsel, and Sacks failed to provide certain materials to Harris's new counsel. Harris and his mother sued Sacks for breach of contract, and Sacks filed a motion to dismiss, in support of which he fabricated five retainer agreements that falsely purported to have been signed by Harris's mother. Harris filed a complaint against Sacks with Bar Counsel, and Sacks failed to provide to Bar Counsel an accounting of the $40,350 that he had collected on Harris's behalf.

Joy Whyte retained Sacks to assist her with a meeting with an Assistant United States Attorney. After the meeting, which lasted seven minutes, Whyte asked Sacks for a partial refund, and Sacks refused. Whyte filed a complaint against Sacks with Bar Counsel, and Sacks failed to provide to Bar Counsel a complete copy of Whyte's file, or any documents that were related to the $1,250 that Whyte had paid him.

Erick E. Chen retained Sacks to assist him in attempting to have the Federal Bureau of Investigation return certain personal property to him. The hearing judge did not find that Sacks provided any legal services to Chen. Within a month, Chen terminated Sacks's representation

and requested a refund. Sacks refused. Chen filed a complaint against Sacks with Bar Counsel, and Sacks failed to provide to Bar Counsel documents and information that it had requested.

Daniel W. Anderson's fiancé retained Sacks to represent him in an immigration case and criminal cases. On Anderson's behalf, Sacks appeared before the Immigration Court, and misrepresented that he had become involved with the immigration case on a date that was nearly two weeks after he had actually been retained. Subsequently, Sacks also misrepresented to the Immigration Court that he had filed a petition for postconviction relief in one of Anderson's criminal cases. After Sacks filed the petition, he refrained from filing a copy with the Immigration Court in an attempt to deceive the Immigration Court as to when the petition had been filed. Anderson terminated Sacks's representation and requested a copy of his file, which Sacks failed to provide. Despite having been terminated, Sacks appeared at a hearing on Anderson's behalf. Sacks also refused to withdraw his appearance in an appeal in one of Anderson's cases. Anderson filed a complaint against Sacks with Bar Counsel, and Sacks failed to provide to Bar Counsel any bank records that were related to the $14,500 that Anderson's fiancé had paid him.

Anita Range retained Sacks to represent Rondall Range in a criminal case in the District Court of Maryland and in a circuit court. Sacks failed to provide Ms. Range with copies of the retainer agreements—one for the District Court, and one for the circuit court. Ms. Range also retained Sacks to represent her in a child support case. Later, Ms. Range retained a lawyer named Craig Kadish to replace Sacks as Mr. Range's counsel. Kadish requested from Sacks Mr. Range's file and $6,250 that Ms. Range had paid Sacks for his representation of Mr. Range. On the same date, Sacks went to the detention center, met with Mr. Range, and handwrote on a legal pad that Mr. Range wanted Sacks to continue to serve as his counsel. Mr. Range signed the document without reading it. Sacks had Mr. Range sign the document in an attempt to circumvent his decision to terminate Sacks's representation, and to keep the $6,250 that Ms. Range had paid him to represent Mr. Range. Kadish filed a complaint against Sacks with Bar Counsel, and Sacks provided to Bar Counsel a response in which he intentionally misrepresented the terms of his representation of Mr. Range. Sacks attached an altered retainer agreement to his response to Bar Counsel to Kadish's complaint. Sacks failed to provide to Bar Counsel a complete accounting of the funds that Ms. Range and her family had paid him to represent Mr. Range, or related bank records.

William D. Smith retained Sacks to represent him in a domestic matter. Subsequently, Smith terminated Sacks's representation, and requested a refund of any unearned fees. Sacks failed to provide a refund or an accounting of Smith's funds. Smith filed a complaint against Sacks with Bar Counsel, and Sacks failed to provide to Bar Counsel an accounting of Smith's funds.

Despite having not earned the funds, Sacks failed to deposit into an attorney trust account the funds that he had been paid to represent Whyte, Chen, Anderson, the Ranges, and Smith. Sacks misappropriated Whyte's, Chen's, Anderson's fiancé's, Ms. Range's, and Smith's funds.

Sacks entered into a residential lease with Tindeco Wharf, LLC. Later, Tindeco retained Adam M. Spence to represent it with regard to various alleged breaches of the lease by Sacks. Tindeco

informed Sacks that it would not renew the lease. Subsequently, while self-represented, Sacks initiated eight frivolous actions or appeals against Tindeco, its employees, its counsel, and/or various State agencies and officials. During litigation that involved Tindeco, Sacks intentionally perverted the Maryland Rules to attack opposing counsel and parties in an effort to pursue his personal vendetta. During the litigation that involved Tindeco, Sacks made numerous intentional misrepresentations to the courts and opposing counsel, and engaged in a pattern of abusive language toward witnesses and lawyers. Sacks committed crimes, including harassing and threatening witnesses and lawyers, and repeatedly trespassing on Tindeco's property. Spence filed a complaint against Sacks with Bar Counsel, and Sacks failed to provide a substantive response to Bar Counsel.

Sacks failed to appear for a deposition in this attorney discipline proceeding, and Bar Counsel moved for sanctions. Sacks failed to appear at the hearing on the motion for sanctions. The hearing judge granted the motion for sanctions and ruled the averments of the Petition for Disciplinary or Remedial Action were deemed admitted.

The hearing judge concluded that Sacks had violated MLRPC 1.2, 1.3, 1.4, 1.5, 1.15, 1.16(d), 3.1, 3.4(c), 3.4(d), 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(a).

Held: Disbarred.

On the date of oral argument, the Court of Appeals disbarred Sacks in a per curiam order. The Court explained the reasons for Sacks's disbarment in a later opinion.

The Court of Appeals observed that, despite having received two extensions, Sacks failed to file any exceptions to the hearing judge's findings of fact or conclusions of law by the deadline. Accordingly, the Court treated the hearing judge's findings of fact as established, and denied motions and struck filings that Sacks made after the deadline had passed.

The Court held that violated multiple MLRPCs. Specifically, the Court held that Sacks violated MLRPC 1.2(a) by taking actions on Anderson's and Mr. Range's behalf after they had terminated his representation of them. Sacks violated MLRPC 1.3 by taking months to file documents, and failing to appear at a proceeding, on Anderson's behalf. Sacks violated MLRPC 1.4(a)(2) by failing to advise Anderson that a trial court had denied a petition and that he had filed documents, by failing to communicate with Anderson for approximately nine months, and by failing to provide Ms. Range with copies of retainer agreements. Sacks violated MLRPC 1.4(a)(2) and 1.4(b) by failing to communicate to Harris and his family that he was collecting a fee that was almost triple the one that had been agreed upon. Sacks violated MLRPC 1.4(a)(3) by failing to respond to Anderson's and his fiancé's requests for a copy of Anderson's file. Sacks violated MLRPC 1.5(a) by collecting a fee to represent Harris that was almost triple the agreed-upon fee, and by charging Anderson and Mr. Range fees for providing essentially no legal

services. Sacks violated MLRPC 1.15(a), 1.15(c), and 1.15(d) by receiving funds for representing Whyte, Chen, Anderson, the Ranges, and Smith, and failing to deposit the funds into an attorney trust account, despite not having earned them. Sacks violated MLRPC 1.15(e) by failing to deposit funds into an attorney trust account once Whyte and Ms. Range demanded refunds. Sacks violated MLRPC 1.16(d) by failing to return unearned fees and/or provide accountings to Whyte, Chen, Ms. Range, and Smith, and by failing to provide copies of Anderson's and Mr. Range's files. Sacks violated MLRPC 3.1 by asserting frivolous issues in two cases. Sacks violated MLRPC 3.4(c) by knowingly disobeying the discovery rules in two cases. Sacks violated MLRPC 3.4(d) by making frivolous discovery requests, or failing to make reasonably diligent efforts to comply with discovery requests, in two cases. Sacks violated MLRPC 8.1(b) by providing responses to Harris's, Whyte's, Chen's, Anderson's, and Spence's complaints against him that either were late or failed to address several of the allegations, and by failing to provide documents and/or information that Bar Counsel requested as to his representation of Harris, Whyte, Chen, Anderson, Mr. Range, and Smith. Sacks violated MLRPC 8.4(b) by trespassing on Tindeco's property. Sacks violated 8.4(d) by engaging in misconduct that would negatively impact the perception of the legal profession of a reasonable member of the public.

Most significantly, the Court held that Sacks violated MLRPC 8.4(c) in thirteen instances. First, Sacks misrepresented to Harris and his family that the $26,350 that Sacks had collected in excess of the $14,000 fee was "for fees and expenses." Second, Sacks fabricated five retainer agreements that falsely purported to have been signed by Harris's mother. Third, Sacks misrepresented to the Immigration Court that he had become involved with Anderson's immigration case on a date that was nearly two weeks after he had been retained. Fourth, Sacks misrepresented to the Immigration Court that he had filed a petition for postconviction relief before he had done so. Fifth, Sacks failed to file a copy of the petition for postconviction relief with the Immigration Court in an attempt to deceive the Immigration Court as to when he had filed the petition for postconviction relief. Sixth, Sacks had Mr. Range sign a document in an attempt to circumvent his decision to terminate Sacks's representation, and to keep the $6,250 that Ms. Range had paid Sacks to represent Mr. Range. Seventh, Sacks intentionally misrepresented the terms of his representation of Mr. Range in, and attached an altered retainer agreement to, his response to Kadish's complaint against Sacks. Eighth, during the litigation that involved Tindeco, Sacks made numerous intentional misrepresentations to courts and opposing counsel. Ninth, tenth, eleventh, twelfth, and thirteenth, Sacks misappropriated Whyte's, Chen's, Roberts-Marshall's, Ms. Range's, and Smith's funds.

The Court determined that the appropriate sanction for Sacks's misconduct was disbarment. Sacks engaged in copious instances of misconduct while representing seven clients, as well as himself. Sacks violated MLRPC 8.4(c) by, among other things, misappropriating funds, fabricating documents, and making misrepresentations to courts, clients, and opposing counsel. The only mitigating factor—the absence of prior attorney discipline—came nowhere close to constituting a compelling extenuating circumstance that would prevent disbarment. Additionally, there were several aggravating factors, including illegal conduct, a pattern of misconduct, and likelihood of repetition of the misconduct. Given the numerous instances and

wide range of the misconduct, and the injury to multiple clients, disbarment was necessary to protect the public.

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Heather Stanley Christian, M.D. v. Maternal-Fetal Medicine Associates of Maryland, LLC, et al., No. 51, September Term 2017, filed April 23, 2018. Opinion by Greene, J.

https://www.courts.state.md.us/data/opinions/coa/2018/51a17.pdf

CIVIL PROCEDURE – MARYLAND RULE 1-341 ATTORNEY'S FEES – NO SUBSTANTIAL JUSTIFICATION – NO EVIDENCE

CIVIL PROCEDURE – MARYLAND RULE 1-341 ATTORNEY'S FEES – MULTIPLE COUNT CLAIMS

CIVIL PROCEDURE – MARYLAND RULE 1-341 ATTORNEY'S FEES – BUT-FOR TEST

Facts:

Heather Stanley-Christian, M.D. ("Petitioner") brought multiple claims against Maternal-Fetal Medical Associates of Maryland, LLC ("Maternal-Fetal") and its principal, Sheri L. Hamersley, M.D. (collectively "Respondents"), relating to her termination from employment at Maternal-Fetal. Respondents succeeded in having the trial judge dispose of Petitioner's claims and subsequently requested attorney's fees. The hearing judge awarded $300,000 in attorney's fees. Both parties appealed, and the Court of Special Appeals remanded to the hearing judge for an explanation of the basis for the award of attorney's fees. The hearing judge explained, in part, the basis for the award of attorney's fees in an Memorandum Opinion & Order. In the Memorandum Opinion & Order, the hearing judge concluded that each claim brought by Petitioner lacked substantial justification and therefore awarded $300,000 in attorney's fees under Maryland Rule 1-341. Petitioner appealed this order to the Court of Special Appeals. The Court of Special Appeals affirmed the hearing judge's findings of no substantial justification for the fraudulent inducement, negligent misrepresentation, and wrongful termination claims brought by Petitioner. However, the Court of Special Appeals reversed the hearing judge's findings of no substantial justification with respect to Petitioner's breach of contract and tortious interference with contract claims. The Court of Special Appeals then remanded the case, and the Court of Appeals granted *certiorari.*

Held: Affirmed.

The Court of Appeals held that a trial court properly found no substantial justification for claims brought by a party when no evidence supported the causes of action alleged. A claim or litigation position lacks substantial justification if a party has no "reasonable basis for believing that the claims would generate an issue of fact for the fact finder," see *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 268, 596 A.2d 1049, 1056 (1991); or the claim or litigation position

"is not fairly debatable, not colorable, or not within the realm of legitimate advocacy," see *URS Corp. v. Fort Myer Construction Corp.*, 452 Md. 48, 72, 156 A.3d 753, 768 (2017). In the present case, the hearing judge found that Petitioner's fraudulent inducement, negligent misrepresentation, and wrongful termination claims failed the objective test set forth in *Inlet Assocs*. and therefore fell outside the realm of legitimate advocacy. After our review of the record, we find that the hearing judge did not commit clear error in making those determinations. No inference based on the evidence presented generated an issue of fact for either the fraudulent inducement or negligent misrepresentation claims. Petitioner only brought her wrongful termination after attempting to negotiate for greater financial benefits with Maternal-Fetal. Therefore, her wrongful termination claim could not be considered a position of legitimate advocacy.

Further, the Court of Appeals held that a court must make specific findings of fact, on the record, regarding the reasonableness of the fees requested by an aggrieved party pursuant to Maryland Rule 1-341. In particular, when a court is faced with multiple counts where some counts satisfy the standard of substantial justification and others do not, the court must determine that the particular attorney's fees imposed are reasonable in light of what the party incurred while defending unjustified claims. In this case, some of the claims brought by Petitioner had substantial justification, and other claims did not have substantial justification. The record contained no explanation of the basis for how the hearing judge determined the award of $300,000 in attorney's fees. The total award amount requested by Respondents was $500,000. The Court of Appeals affirmed the judgment of the Court of Special Appeals and remanded the case to the trial court to make specific findings of fact regarding the amount of attorney's fees awarded for each of the unjustified claims.

Finally, the Court of Appeals held that *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011), was persuasive authority to the extent that the "but-for" test in *Fox* is consistent with Maryland's jurisprudence with regard to Rule 1-341. *See Barnes v. Rosenthal Toyota, Inc*., 126 Md. App. 97, 106, 727 A.2d 431, 436 (1999); *Beery v. Md. Med. Laboratory, Inc.*, 89 Md. App. 81, 102, 597 A.2d 516, 527 (1991). *Fox* involved a request for attorney's fees where some claims were frivolous and others were not frivolous. *Fox*, 563 U.S. at 838, 131 S. Ct. at 2216, 180 L. Ed. 2d at 57. The United States Supreme Court in *Fox* held that a party may not recover for costs if those costs "would have been incurred in the absence of the frivolous allegation." Id. Therefore, the Court of Appeals determined that when granting an award of attorney's fees pursuant to Rule 1-341, a judge may award fees for "the expenses actually incurred as a result" of a litigation position that lacked substantial justification or was brought in bad faith.

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William A. Dabbs, Jr., et al. v. Anne Arundel County, No. 23, September Term 2017, filed April 10, 2018. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/coa/2018/23a17.pdf

TAKINGS – DEVELOPMENT IMPACT FEES – RATIONAL NEXUS / ROUGH PROPORTIONALITY SCRUTINY UNDER NOLLAN AND DOLAN – APPLICABILITY

VESTED RIGHTS – RETROSPECTIVE APPLICATION OF STATUTE – ANNE ARUNDEL COUNTY CODE

VESTED RIGHTS – PROSPECTIVE REPEAL OF STATUTE – ANNE ARUNDEL COUNTY CODE

Facts:

The Circuit Court for Anne Arundel County entered a declaratory judgment in favor of Anne Arundel County (the "County") as to all counts and claims stated in a class action complaint filed against it on 4 November 2011 by "the Dabbs Class" plaintiffs seeking to recover refunds of development impact fees paid previously by them to the County. The case represents the latest installment of a litigation saga traveling two quite kindred paths over more than fifteen years, the first installment represented by *Halle, et al. v. Anne Arundel County* ("*Halle*"). *See Anne Arundel County v. Halle Dev., Inc.*, 408 Md. 539, 971 A.2d 214 (2009).

The County, exercising power granted by 1986 Md. Laws, ch. 350, imposed road and school impact fees on new development within County districts beginning in 1987. These fees were paid usually by land developers and builders. The *Dabbs* Class, whose members were required to pay such fees, sought refunds, under Subtitle 2 of Title 11 of Article 17 Section 210 of the Anne Arundel County Code (the "Ordinance") that had been collected by the County between fiscal years (FY) 1997-2003 and which, following the fiscal year ("FY") of collection, had not been expended or encumbered assertedly on eligible capital projects. The County enacted, however, Bill No. 27-07 (effective 22 May 2007), which amended the Ordinance to codify the County's administrative procedures for calculating and recording capital expenditures and encumbrances, and Bill No. 71-08 (effective 1 January 2009), which amended the Ordinance to remove prospectively the ability to seek or receive refunds provided in § 17-11-210.

The *Dabbs* Class appealed to the Court of Special Appeals the circuit court's entry of judgment in favor of the County. The Court of Special Appeals affirmed in a reported opinion. *See Dabbs v. Anne Arundel County*, 232 Md. App. 314, 157 A.3d 381 (2017). The *Dabbs* Class petitioned the Court of Appeals for a writ of certiorari, which the Court granted to consider two, and only two, questions:

I. Did the lower courts err in determining that ". . . the rough proportionality test [or the rational nexus test] has no application to development impact fees . . . where monetary exactions are imposed," in contravention of *Howard County v. JJM*, 301 Md. 256, 482 A.2d 908 (1984)?

II. Did the lower courts err in permitting the retroactive application of legislation and not finding a taking under Article III, section 40 of the Maryland Constitution?

Held: Affirmed.

The Court of Appeals addressed first the *Dabbs* Class's argument that the Ordinance was subject to scrutiny under the rough proportionality/rational nexus test articulated in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994). It was important in the Court's analysis that the legislatively-authorized impact fees were predetermined, based on a specific monetary schedule, and applied to any person wishing to develop property in the defined districts. The legislation left no discretion in the imposition or the calculation of the fee, i.e., the impact fee ordinance demonstrated how the fees were to be imposed, against whom, and in what amount. Thus, the Court distinguished the present case from *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 133 S. Ct. 2586 (2013), explaining that *Koontz* did not hold that land-use regulations are subject generally to a takings analysis under *Nollan* and *Dolan*. *Koontz*, 570 U.S. at 618-19, 133 S. Ct. at 2603. *Koontz* held, rather, that challenges to governmental demands for money (except application fees) in connection with permit review process for a specific property are subject to nexus and rough proportionality analysis. *Id*. Unlike in *Koontz*, the Ordinance does not direct a property owner to make a conditional monetary payment in order to obtain approval of an application for a permit of any particular kind, nor does it impose the condition on a particularized or discretionary basis. Thus, the Court reaffirmed *Waters Landing, Ltd. P'ship v. Montgomery Cnty*., 337 Md. 15, 650 A.2d 712 (1994), which held that impact fees imposed by legislation made applicable on an area-wide basis are not subject to *Nollan* and *Dolan* scrutiny.

Turning to the second question posed by the *Dabbs* Class, the Court made clear that Bill No. 27-07, codifying the County's procedures for calculating and recording capital expenditures and encumbrances, did not work a substantive change in policy interfering with any vested rights of the Dabbs Class to refunds. Bill No. 27-07 codified the County's pre-existing (though unwritten until Bill No. 27-07) administrative procedures for counting eligible capital project encumbrances and did not change County policy. *Cf. Dua v. Comcast Cable of Maryland, Inc*., 370 Md. 604, 643, 805 A.2d 1061, 1084 (2002). Bill No. 27-07 (effective 22 May 2007) defined, among other things, the word "encumbrance" as now used in §17-11-201(2). The definition of "encumbrance" utilized before its codification followed generally accepted accounting principles.

The Court found that Bill No. 71-08, i.e., repealing prospectively on 1 January 2009 the impact fee refund provision of § 17-11-210, did not interfere with any rights vested in any *Dabbs* Class member with regard to recovering such refunds. The Court explained that "[a]bsent a contrary intent made manifest by the enacting authority, any change made by statute or court rule affecting a remedy only (and consequently not impinging on substantive rights) controls all court actions whether accrued, pending or future." *Aviles v. Eshelman Elec. Corp*., 281 Md. 529, 533, 379 A.2d 1227, 1229 (1977); *see also State Admin. Bd. of Election Laws*, 342 Md. at 601, 679 A.2d at 103; *Grandison v. State*, 341 Md. 175, 257, 670 A.2d 398, 437 (1995). "If rights were to vest[, however,] during the interim between the enactment of a resolution and its rescission, the County would lose its ability to rescind, at least to the extent that rights had vested." *Boomer v. Waterman Family Ltd. P'ship*, 232 Md. App. 1, 12, 155 A.3d 901, 908 (2017), *aff'd*, 456 Md. 330, 173 A.3d 1069 (2017).

The repeal of the impact fee refund provision of § 17-11-210 took effect on 1 January 2009. Under the prior version of § 17-11-210(b), within 60 days following the end of the sixth fiscal year following when impact fees were collected, the County was to give notice to the public of the availability of unexpended/unencumbered impact fee refunds, if any. Upon the notice's publication, an eligible property owner must apply for a refund within 60 days after publication of the last notice. Then, the County, following its opportunity to assess whether the applicant had paid rightfully the fees and the amount owed, would refund any available unexpended/unencumbered impact fees to the eligible property owner, with interest. Until that occurred, property owners in the district from which funds were collected were not entitled to refunds. The effective date of the repeal of the refund provision of § 17-11-210 occurred well before any impact fees collected through 2003 became ripe for a refund claim. No *Dabbs* Class property owner who paid fees obtained a vested right to a refund before then. Once the repealed sections of § 17-11-210 faded into the mist, any claim to relief traced to a repealed section disappeared as well. *See McComas v. Criminal Injuries Comp. Bd*., 88 Md. App. 143, 149, 594 A.2d 583, 586 (1991).

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Isa Manuel Santiago v. State of Maryland, No. 10, September Term 2017, filed March 27, 2018. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2018/10a17.pdf

EXPERT WITNESS TESTIMONY – MARYLAND RULE 5–702(3) – SUFFICIENT FACTUAL BASIS

CRIMINAL LAW – FIFTH AMENDMENT – APPLICABILITY

EVIDENCE – MARYLAND RULE 5–403 – RELEVANCE

Facts:

On May 25, 2004, Isa Manuel Santiago ("Mr. Santiago") was indicted in the Circuit Court for Charles County for the murder of LaToya Taylor. Mr. Santiago's first trial ended in a mistrial prior to any evidence being presented. During his second trial, the jury acquitted Mr. Santiago of first-degree murder but convicted him of second-degree murder, use of a handgun in the commission of a crime of violence, and being a felon in possession of a firearm. Following sentencing for these convictions, Mr. Santiago noted an appeal. The Court of Special Appeals reversed the judgment of the trial court due to the failure to either hearken or poll the jury. *Santiago v. State*, 183 Md. App. 770 (2008). The State filed a petition for writ of certiorari, which the Court of Appeals granted. *State v. Santiago*, 407 Md. 529 (2009). The Court of Appeals held that "a jury verdict, rendered and announced in open court, that is neither polled nor hearkened is not properly recorded and is therefore a nullity" and the Court of Appeals remanded the case to circuit court for a new trial. *State v. Santiago*, 412 Md. 28, 32, 42 (2009).

During the third trial, Mr. Santiago moved to exclude the testimony of the State's cellular communication expert, Allen Hagy ("Mr. Hagy"). Mr. Hagy worked for Cingular Wireless, Mr. Santiago's cellular phone provider, and was responsible for analyzing Mr. Santiago's cellular phone records. During his investigation, Mr. Hagy determined that Mr. Santiago's phone records from the night of the murder were geographically inconsistent because the records displayed calls, only minutes apart, connecting to cell sites both in northern and southern Maryland. Mr. Hagy amended the records and created a spreadsheet ("2003 Index") displaying his findings. At Mr. Santiago's second trial, Mr. Hagy brought the 2003 Index and testified about his methodology. At the third trial, Mr. Hagy was permitted to testify about his methodology even though the 2003 Index had been destroyed.

Mr. Santiago also filed a motion in limine during the third trial arguing that the State should be precluded from introducing into evidence his automobile insurer's ("State Farm") investigation of Mr. Santiago's insurance claim because introduction of the records would violate Mr. Santiago's Fifth Amendment right against self-incrimination. The day after Ms. Taylor's disappearance, Mr. Santiago made a claim with State Farm that his Jeep Cherokee automobile

had been stolen. State Farm's records indicated that the claim was ultimately denied due to Mr. Santiago's failure in both "comply[ing] with the conditions of the policy requiring the assistance and cooperation of the insured in submitting to an examination under oath" and "providing material documents and information." State Farm's records also indicated that there were questions as to "concealment and material misrepresentation . . . following the loss" and "whether the cause and origin of the loss was accidental." At the third trial, the trial court found that "there was no indication that [Mr. Santiago] was compelled to make any self-incriminating statements, and the Fifth Amendment only protects against compelled self-incrimination. [Mr. Santiago] affirmatively made a claim. . . . [N]o one has tried to force him to testify." The trial court further determined that the State Farm records were "highly relevant, and [the records are] probative to show consciousness of guilt . . . . [T]he prejudice is not outweighed by the probative value."

In 2015, the prosecution presented its case for a third time and a jury convicted Mr. Santiago on all remaining counts. The trial court sentenced Mr. Santiago to a thirty-year prison term for second-degree murder, a twenty-year consecutive prison term for use of a handgun, and a five-year cumulatively consecutive prison term for illegal possession of a firearm. The collective prison term totaled fifty-five years. Mr. Santiago appealed his conviction to the Court of Special Appeals, which unanimously affirmed the judgment of the trial court in an unreported opinion. *Santiago v. State*, No. 1694, Sept. Term, 2015, 2017 WL 347604, at *1 (Md. Ct. Spec. App. Jan. 24, 2017). Mr. Santiago then petitioned the Court of Appeals for a writ of certiorari, which was granted on May 9, 2017. *Santiago v. State*, 453 Md. 9 (2017).

Before the Court of Appeals, Mr. Santiago argued that: (1) the trial court erred in finding that Mr. Hagy had a sufficient factual basis to testify about Mr. Santiago's phone records; and (2) the trial court erred in admitting evidence of Mr. Santiago's silence during an investigation by his automobile insurer that was related to and concurrent with the police investigation. The State countered, contending that: (1) the trial court correctly determined that Mr. Hagy's experience and knowledge provided a sufficient factual basis; and (2) the State Farm records did not infringe on Mr. Santiago's Fifth Amendment right against self-incrimination and that the records were highly probative of Mr. Santiago's consciousness of guilt.

Held: Affirmed.

The Court of Appeals determined that due to the Mr. Hagy's many years of experience and his particularized knowledge of Cingular's network, he had a sufficient factual basis to testify about Mr. Santiago's phone records at his third trial even though the 2003 Index was unavailable. Thus, the trial court did not err in admitting the expert testimony under Maryland Rule 5-702(3), and the Court affirmed the judgment of the Court of Special Appeals.

The Court of Appeals held that the trial court did not err when it found that Mr. Santiago's Fifth Amendment right was not infringed when Mr. Santiago filed an automobile insurance claim and failed to comply with the insurer's policies because he was not compelled to make self-

incriminating statements, he voluntarily and affirmatively made the claim to his automobile insurer, and there was no police involvement during the claim.

The Court of Appeals held that the trial court did not err when it admitted Mr. Santiago's failure to submit to an examination under oath for his voluntary automobile insurance claim as evidence of Mr. Santiago's consciousness of guilt because the admission of this failure was relevant. Thus, the Court affirmed the Court of Special Appeals.

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Jerry Harris v. State of Maryland, No. 9, September Term 2017, filed April 12, 2018. Opinion by McDonald, J.

Adkins, J., concurs and dissents.

https://mdcourts.gov/data/opinions/coa/2018/9a17.pdf

CRIMINAL PROCEDURE – MISSING WITNESS INSTRUCTION

Facts:

Petitioner Jerry Harris was charged with various offenses arising out a home invasion and robbery at an apartment in Baltimore City. None of the victims of the crime identified Mr. Harris as a participant in the robbery. The only evidence linking him to the crime was a latent fingerprint examination that matched prints found on pill bottles at the apartment to prints on file for his left hand, which had previously been disabled in an industrial accident. During the State's case, a police detective who interviewed Mr. Harris following his arrest testified, over a defense objection, that Mr. Harris had requested an attorney at that time. In the defense case, Mr. Harris denied participation in the robbery and testified that he had been at his mother's home on the night of the robbery, but his mother did not testify.

At the suggestion of the trial court, the prosecutor requested a missing witness instruction that advised the jury that it could infer from the mother's absence that she would have testified unfavorably to Mr. Harris. The trial court gave that instruction and, after a lengthy deliberation, the jury convicted Mr. Harris of some of the charges related to the robbery and acquitted him of others.

Mr. Harris appealed, arguing that his convictions should be reversed because the missing witness instruction should not have been given and the detective should not have mentioned his invocation of the right to counsel during a custodial interview. In an unreported opinion, the Court of Special Appeals affirmed the Circuit Court, holding that there was a sufficient factual basis for the trial court to give a missing witness instruction and that admission of the detective's testimony, while error, was harmless. The Court of Appeals granted certiorari.

Held: Reversed.

The Court held that it was an abuse of discretion for the trial court to give a missing witness instruction concerning the absence of the defendant's mother under the circumstances of this case and reversed Mr. Harris' conviction.

In a missing witness instruction, the trial court instructs the jury that, if a potential witness would be expected to have information important to an issue in the case and is "peculiarly available" to

one party, but the witness is not called by that party to testify, the jury may infer that the witness would have testified adversely to that party. The Court first noted that, when given with respect to a potential defense witness in a criminal case, the missing witness instruction may be in conflict with constitutional principles that place the burden of proof on the prosecution, that forbid comment on the failure of a defendant to testify, and that confer a right on a defendant to confront adverse witnesses. The Court also noted that the rationale of the missing witness instruction – that the imagined testimony of an absent witness would be adverse to a particular party – is questionable. For those reasons, numerous federal and state court jurisdictions have abandoned the missing witness instruction, particularly as to a potential defense witness in a criminal case. The Court concluded that a missing witness instruction that invites the jury in a criminal case to draw an inference adverse to the defendant based on the defendant's failure to produce evidence should rarely, if ever, be given.

The Court observed that the missing witness instruction had been given in this case on the initiative of the trial court and solely on the basis of the mother-child relationship. The trial court did not follow a procedure recommended in a prior Court of Appeals decision for determining whether to give such an instruction. The Court concluded that the trial court had abused its discretion in giving the missing witness instruction. The Court observed that Mr. Harris had not been identified by the victims as one of the robbers and the only evidence tying him to the crime was testimony of a latent fingerprint examiner who matched prints on his disabled left hand to pill bottles in the victim's apartment that had been lifted and examined by one of the robbers. Accordingly, the Court also concluded that the error was not harmless and reversed Mr. Harris' conviction.

Because Mr. Harris' conviction was reversed on the basis of the missing witness instruction, the Court did not reach the question whether the detective's erroneous reference to his invocation of his right to counsel was harmless error.

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Brian Grimm v. State of Maryland, No. 37, September Term 2017, filed April 20, 2018. Opinion by Watts, J.

Adkins, J., concurs.

https://www.mdcourts.gov/data/opinions/coa/2018/37a17.pdf

FOURTH AMENDMENT – PROBABLE CAUSE – DETERMINATION OF DRUG DETECTION DOG'S RELIABILITY – STANDARD OF REVIEW

Facts:

In the Circuit Court for Anne Arundel County, the State charged Brian Grimm with possession of heroin with intent to distribute and other drug-related crimes. Grimm filed a motion to suppress drugs that had been found in a Honda that he had been driving. At a hearing on the motion to suppress, Sergeant Christopher Lamb of the Maryland Transportation Authority Police testified that he initiated a traffic stop of the Honda and requested a K-9. Officer Carl Keightley of the Maryland Transportation Authority Police, a K-9 handler, and Ace, his K-9 partner, arrived at the scene of the traffic stop. Ace scanned the Honda and alerted to it. Sergeant Lamb searched the Honda and found drugs inside.

Officer Keightley testified that Ace was trained to recognize the odors of multiple drugs. After Ace's initial training, he was trained once a week using "narcotic aids"—i.e., substances that the crime laboratory had tested and determined to be drugs. The Maryland Transportation Authority Police certifies dogs and their handlers every six months. Officer Keightley and Ace had been certified five times, and were certified as of the date of the traffic stop. As of the date of the hearing, Ace had performed dog scans during approximately 100 traffic stops.

Without objection, the circuit court admitted into evidence: Ace's certifications; Ace's training records; Ace's field reports, which Officer Keightley completed every time that he utilized Ace; the Maryland Transportation Authority Police Narcotic/Explosive K-9 Certification Guidelines; and the Maryland Transportation Authority Police K-9 Standard Operating Procedures, which included guidelines for training dogs and handling explosive aids and narcotic aids. According to Ace's field reports, during a certain timeframe, Ace had alerted to a vehicle on 51 occasions. Of those 51 occasions, no drugs were found in the vehicle on 19 occasions. Officer Keightley testified that a "non-productive response" occurs when a drug detection dog alerts to a vehicle or building, and an officer searches the vehicle or building, but does not find any contraband. Officer Keightley explained that Ace might alert where drugs used to be, but are no longer, inside a vehicle. Indeed, with regard to 10 of the 19 non-productive responses to vehicles, during interviews, at least one of the vehicle's occupants admitted that drugs had recently been in the vehicle. Thus, Ace had only 9 non-productive responses where there was no discovery of drugs, and no admission that drugs had recently been in the vehicle. In response to Ace's non-productive responses, Officer Keightley extended Ace's searching time during training.

After the traffic stop in this case, Officer Keightley received an e-mail from a member of the K-9 Unit with a recommendation by Officer Michael McNerney concerning an issue as to the calculation of Ace's training hours. Before receiving the e-mail, Officer Keightley would indicate in Ace's training records that he was trained for seven hours on one day each week. In the e-mail, however, Officer Keightley was advised that there was a new method of calculating the number of hours of Ace's training, and that Officer Keightley should count only the time from when the first narcotic aid was set to when the last test was conducted. Under the new calculation method, Ace had not received the sixteen hours of monthly training that was required for certification, and Officer Keightley and Ace were decertified. After Officer Keightley received the e-mail, he trained Ace on two additional days. Afterward, Officer McNerney recertified Officer Keightley and Ace.

The State called Sergeant Mary Davis, the Montgomery County Police Department's K-9 Unit's head trainer, as a witness. The parties stipulated that Sergeant Davis was an expert in K-9 training and handling. Sergeant Davis explained that Maryland law does not require drug detection dogs to be certified, and that there are no State-wide requirements for drug detection dog performance. Although Maryland law does not require that drug detection dogs be certified, Sergeant Davis developed a process for certifying drug detection dogs in the Montgomery County Police Department's K-9 Unit. Sergeant Davis testified that she did not observe any major changes in the process of training Ace, including the training routine and the types of narcotic aids that were used, after the traffic stop in this case occurred. Sergeant Davis testified that Officer Keightley and Ace performed satisfactorily during training. Sergeant Davis testified that she would not have decertified Officer Keightley and Ace as a result of the issue with the calculation of Ace's training hours, as Ace's skills were not affected by the way in which Ace's training hours were calculated. Similarly, Sergeant Davis testified that the issue with regard to the calculation of the number of Ace's training hours did not affect Officer Keightley's and Ace's most recent certification before the traffic stop.

According to Sergeant Davis, during Ace's training, he was placed in a total of 209 scenarios. Of those, Ace falsely alerted on only 24 occasions. Sergeant Davis explained that she expected false alerts to occur, and that she did not think that any particular number of false alerts was unacceptable. Sergeant Davis testified that Ace's false alerts during training were not significant in light of the reasons for Ace's false alerts. According to Sergeant Davis, on multiple occasions, Ace falsely alerted when he was asked to search for a long period of time in an environment where there was no controlled dangerous substance.

Sergeant Davis testified that the recording of the traffic stop from the dashboard camera in Sergeant Lamb's vehicle contained no evidence that Ace's alert was false. Sergeant Davis testified that, to a reasonable degree of certainty, based on her training, knowledge, and experience as a K-9 trainer, Officer Keightley and Ace were "competent to be working the street and deploying, and making probable cause decisions on the street."

Grimm called as a witness Ted Cox, the former head trainer of the Baltimore Police Department's K-9 Unit and the Maryland Transportation Authority Police's K-9 Unit, and one of the people who provided Ace's initial training. The parties stipulated that Cox was an expert in

K-9 training and handling. Cox testified that, in his opinion, after reviewing Ace's training records and the recording of the traffic stop, Ace was unreliable. According to Cox, the Maryland Transportation Authority Police's K-9 Unit had failed to maintain Ace's maintenance training for over a year. According to Cox, within a certain timeframe, during Ace's training, he performed 179 scans. Of those, Ace falsely alerted to vehicles 15 times, and falsely alerted indoors 29 times, for a total of 44 false alerts. Cox stated that Ace's number of false alerts—44—was five or six times more than the number of false alerts that Cox found acceptable, which was four percent.

According to Cox, Ace was "imprinted on" human scent because, during his training, the narcotic aids were not properly maintained. Cox testified that Ace's training records contained no evidence that human scent had been used as a distracter—a substance that a drug detection dog is "extincted" off of during training. Cox also opined that the narcotic aids were not replenished often enough to ensure that they were still "producing" a narcotics odor.

Grimm called as a witness Officer McNerney, a trainer of the Maryland Transportation Authority Police's K-9 Unit, and one of the people who provided Ace's initial training. The circuit court admitted Officer McNerney as an expert in the field of K-9 training and handling. Officer McNerney opined that Ace was unreliable based on his high number of false alerts. Officer McNerney extended to Officer Keightley an offer to train Ace, as to which Officer Keightley did not follow through. Officer McNerney testified that, before the traffic stop in this case, Ace was not trained seven hours a week, or sixteen hours a month. At some point during Ace's training, Officer McNerney noticed that Officer Keightley was cueing Ace. According to Officer McNerney, because Officer Keightley knew where the narcotic aids were, he cued Ace by subconsciously slowing down and walking behind him. Officer McNerney opined that it was a disfavored practice for handlers to set the narcotic aids, as that can lead to cueing. Officer McNerney also testified that he believed that the narcotic aids had not been replaced for years. Officer McNerney opined that it was important to use fresh narcotic aids during training.

The circuit court denied the motion to suppress, expressly accepting Sergeant Davis's opinion that Ace was competent to make a probable cause determination. The circuit court explicitly found Sergeant Davis to be the most credible witness, as she had no ties to this case, and was unbiased. The circuit court found that Cox and Officer McNerney were credible as well, but determined that both of them had some bias that arose from their experiences with the Maryland Transportation Authority Police's K-9 Unit.

Grimm pled guilty to possession of heroin with intent to distribute, and reserved the right to appeal the suppression issue. The Court of Special Appeals affirmed the conviction. The Court of Special Appeals held that an appellate court reviews for clear error a trial court's determination as to whether a drug detection dog is reliable. Addressing the merits, the Court of Special Appeals rejected Grimm's contention that the circuit court clearly erred in making certain findings of fact, such as the circuit court's finding that Sergeant Davis was the most credible witness. The Court of Special Appeals also rejected Grimm's assertion that, in light of alleged evidence of deficiencies in Ace's training, the circuit court clearly erred in finding that Ace was reliable.

Grimm petitioned for a writ of *certiorari*, and the State conditionally cross-petitioned for a writ of *certiorari*. The Court of Appeals granted the petition and the conditional cross-petition.

Held: Affirmed.

The Court of Appeals held that the ultimate question of probable cause to conduct a warrantless search of a vehicle based on a drug detection dog's alert is reviewed de novo; *i.e.*, the standard of review as to the issue of probable cause to search based on a drug detection dog's alert is *de novo*. A determination of probable cause involves a two-step process. First, a court must identify all of the relevant historical facts that were known to the officer at the time of the search and, if necessary, any relevant or disputed background facts. Second, the court must determine whether those facts give rise to probable cause to search. The Court of Appeals concluded that the issue of a drug detection dog's reliability is a factual question, specifically, a question involving a background fact that falls somewhere between a clear legal issue and a simple fact. Accordingly, an appellate court reviews for clear error a trial court's finding as whether a drug detection dog is, or is not, reliable.

The Court of Appeals explained that a trial court is better positioned than an appellate court to determine whether a drug detection dog is reliable. The issue of a drug detection dog's reliability requires a trial court to, among things, assess the credibility of witnesses; to review, where available, a recording of the drug detection dog's scan; to determine the weight to be given documentary evidence, such as the drug detection dog's training records, field reports, and certifications; to consider the qualifications of any experts, and assess their credibility and opinions about the evidence; and to determine whether, under the totality of the circumstances, the drug detection dog is reliable.

The Court of Appeals determined that circumstances of this case demonstrated that a trial court is better-equipped than an appellate court to determine a drug detection dog's reliability. The circuit court admitted into evidence a recording of the traffic stop from the dashboard camera in Sergeant Lamb's vehicle. With the recording, both the circuit court and the expert witnesses were able to view the entirety of Ace's scan of the Honda. The recording was played during the testimony of both Sergeant Davis, one of the State's experts, and Cox, one of Grimm's experts. Sergeant Davis and Cox pointed out and explained various events in the recording, such as the circumstance that Ace was barking before Officer Keightley commanded him to search. Sergeant Davis testified that Ace's barking was simply a sign that he was excited, and explained that Officer Keightley calmed Ace before commanding him to search. By contrast, Cox opined that a dog barking excessively may cause a loss of energy and affect the dog's performance. Although the Court of Appeals had access to both the recording and a transcript of Sergeant Davis's and Cox's testimony, the Court of Appeals lacked the circuit court's ability to view the recording simultaneously with Sergeant Davis and Cox, with them making observations about the recording while testifying. Additionally, because the Court of Appeals could only read a

transcript, rather than see and hear testimony firsthand, the Court of Appeals lacked the circuit court's ability to assess the witnesses' attitude and demeanor, which may have been indicative of bias and were relevant to a credibility determination.

In addition to the circuit court being in a superior position to determine Ace's reliability, the Court of Appeals's conclusion was supported by the Supreme Court's holding in *Florida v. Harris*, 568 U.S. 237, 248-50 (2013), in which the Supreme Court essentially followed the two-step process for appellate review of the issue of probable cause—namely, (1) identifying all of the relevant historical facts that were known to the officer at the time of the search, and (2) determining whether those facts give rise to probable cause to search. Additionally, in *Harris*, instead of re-weighing the evidence or independently determining the credibility of the officer who handled a drug detection dog, the Supreme Court summarized the evidence of the drug detection dog's training and his proficiency in finding drugs.

Addressing the merits, the Court of Appeals held that that the circuit court did not clearly err in finding that Ace was reliable, and that the circuit court correctly concluded that Sergeant Lamb had probable cause to search Grimm's vehicle. The evidence substantiated the circuit court's finding that Sergeant Davis was the most credible witness. The record included numerous examples of Sergeant Davis's qualifications, which were objectively superior to Cox's and Officer McNerney's. The evidence also substantiated the circuit court's finding that Sergeant Davis was neutral and unbiased, as she was not paid for her testimony, apart from what she was paid for being on duty while testifying; additionally, unlike Cox and Office McNerney, she had never been a member of the Maryland Transportation Authority Police's K-9 Unit.

The Court of Appeals explained that Ace's training records alone constituted more than enough evidence to support the circuit court's reliability determination. In testifying about Ace's alleged false alerts, Sergeant Davis and Cox referenced training records from different time periods. Specifically, Sergeant Davis testified about Ace's training records from a period during which Ace was in a total of 209 scenarios, and falsely alerted on only 24 occasions. By contrast, Cox testified about Ace's training records from a period during which Cox calculated that Ace was in a total of 179 scenarios, and falsely alerted on 44 occasions. The Court of Appeals did not need to determine which of these two time periods was more indicative of Ace's reliability, as Sergeant Davis testified that Officer Keightley and Ace performed satisfactorily during the course of training.

Estate of Charles Howard Zimmerman, Robert Clayton Stevens, Personal Representative v. Erich E. Blatter, et ux., No. 62, September Term 2017, filed April 20, 2018. Opinion by Watts, J.

Hotten, J., dissents.

http://www.mdcourts.gov/data/opinions/coa/2018/62a17.pdf

ACTIONS TO QUIET TITLE – MD. CODE ANN., REAL PROP. (1974, 2015 REPL. VOL., 2016 SUPP.) ("RP") § 14-108 – RP §§ 14-601 TO 14-621 – MARYLAND RULES 12-801 TO 12-811 – RETROACTIVE APPLICATION VERSUS PROSPECTIVE APPLICATION – REMAND

Facts:

This case concerns a dispute over title to a six-acre parcel of real property ("the Disputed Property") located along the boundary of two farm properties in the Liberty Election District in Frederick County, Maryland. Specifically, to the east of the Disputed Property lies a farm that was formerly owned by the Estate of Charles Howard Zimmerman ("the Estate"), Petitioner, which consists of three tracts of land at 8260 Dollyhyde Road in Mount Airy, Maryland ("the Zimmerman Farm"). By a deed dated January 1, 2013, Robert Clayton Stevens, the Estate's personal representative, on the Estate's behalf, conveyed the Zimmerman Farm to George C. Stevens ("George") and himself in his individual capacity. To the west of the Disputed Property lies a farm that is known as the Laughlin Farm, which is currently owned by Erich E. Blatter and Dr. Susan V. M. Maharaj, Respondents, located at 7977 Timmons Road in Union Bridge, Maryland ("the Laughlin Farm"). Neither the Estate nor Respondents is the record owner of the Disputed Property. Indeed, apparently, the record owner of the Disputed Property is an individual who has been deceased for more than 100 years, with no known personal representative.

On June 4, 2014, on the Estate's behalf, Stevens filed in the Circuit Court for Frederick County a complaint against Respondents seeking to quiet title to the Disputed Property, alleging that the Estate owned the Disputed Property through adverse possession. Respondents also claimed ownership of the Disputed Property, and filed a counterclaim against the Estate for trespass. No record owner of the Disputed Property was made a party to the action to quiet title. Following a two-day bench trial, the circuit court denied the counterclaim and ruled that, as between the parties, the Estate had the right to possess and use the Disputed Property by adverse possession. The circuit court noted that it could not rule that the Estate had "absolute ownership" of the Disputed Property because no record owner had been made a party to the action. On November 2, 2015, the circuit court issued an order consistent with its oral ruling, denying the counterclaim and determining that, "as between the parties[,]" the Estate had the right to possession and use of the Disputed Property by way of adverse possession. In other words, the circuit court's ruling would not be effective against the record owner of the Disputed Property or any other person

with an interest in the Disputed Property, and the circuit court did not determine ownership of the Disputed Property.

Respondents appealed. On June 26, 2017, in an unreported opinion, the Court of Special Appeals vacated the circuit court's judgment and remanded this case to the circuit court with instructions to dismiss this case. The Court of Special Appeals determined that, although the circuit court correctly observed that the action to quiet title lacked a necessary party, i.e., the record owner of the Disputed Property, the circuit court erred in proceeding with "trial to determine which party to the action had a superior right to possess the Disputed" Property. Thereafter, the Estate filed a motion for reconsideration, which the Court of Special Appeals denied. On September 19, 2017, the Estate filed in the Court of Appeals a petition for a writ of *certiorari*, which the Court granted.

In the meantime, while the case was pending in the Court of Special Appeals, but before that Court issued its unreported opinion, effective October 1, 2016, the General Assembly amended the statute governing actions to quiet title, Md. Code Ann., Real Prop. (1974, 2015 Repl. Vol.) ("RP (2015)") § 14-108, and added a new subtitle governing actions to quiet title, Md. Code Ann., Real Prop. (1974, 2015 Repl. Vol., 2016 Supp.) ("RP") §§ 14-601 to 14-621. And, effective April 1, 2017, the Court of Appeals adopted a new chapter in the Maryland Rules, Maryland Rules 12-801 to 12-811, governing actions to quiet title.

Both before and after October 1, 2016, RP § 14-108(b) has provided that "[a]ny person who appears of record, or claims to have a hostile outstanding right, shall be made a defendant in the proceedings." In other words, a record owner of a property is required to be joined as a defendant in an action to quiet title. Importantly, however, the new subtitle and Maryland Rules governing actions to quiet title provide specific procedures by which a plaintiff may proceed with an action to quiet title even where there exists a person required to be joined as a defendant, *e.g.*, a record owner, who is deceased with no known personal representative. Stated otherwise, although a record owner of a property may be deceased with no known personal representative, as of October 1, 2016, Maryland law provides a mechanism by which a plaintiff may nevertheless proceed with seeking to quiet title to the property. Under those circumstances, RP § 14-610(b) provides:

> (1) If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff shall state those facts in an affidavit filed with the complaint.
>
> (2) If the plaintiff states in an affidavit under paragraph (1) of this subsection that a person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (naming the deceased person), deceased, and all persons claiming by, through, or under the decedent".
>
> (3) If the plaintiff states in an affidavit under paragraph (1) of this subsection that a person is believed to be dead, the plaintiff may join the person as a defendant, and may also join "the testate and intestate successors of _____ (naming

> the person), believed to be deceased, and all persons claiming by, through, or under the person believed to be deceased".

Consistently, Maryland Rule 12-805(b)(2) provides: "If a person required to be named as defendant . . . is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff shall state those facts in an affidavit filed with the court." And, Maryland Rule 12-805(b)(3) provides that, where a plaintiff avers in an affidavit that a person is dead or believed to be dead, then the plaintiff "may join as defendants" the person's "testate and intestate successors" and all persons who would claim "by, through or under" the person.

Held: Reversed and remanded.

The Court of Appeals held that RP §§ 14-601 to 14-621 and Maryland Rules 12-801 to 12-811 apply retroactively to all cases that were pending when the statutes and Maryland Rules became effective, including this case, which was pending in the Court of Special Appeals. Specifically, the Court concluded that the new statutes and Maryland Rules apply retroactively because they govern procedures that are related to actions to quiet title and are remedial in nature, they do not impair any substantive or vested rights, and neither the General Assembly nor the Court, in enacting the new statutes and adopting the new Maryland Rules, respectively, had shown a contrary intent. With respect to RP §§ 14-601 to 14-621, the General Assembly did not express any intent to limit the applicability of the statutes to actions to quiet title that were initiated after October 1, 2016. And, with respect to Maryland Rules 12-801 to 12-811, the Court's Rules Order explicitly provided for retroactive application, stating "that the rules changes hereby adopted . . . shall take effect and apply to all actions [that were] commenced on or after April 1, 2017 and, insofar as practicable, to all actions [that were] then pending[.]"

The Court of Appeals further held that, when applied to this case, the new statutes and Maryland Rules did not require dismissal for the failure to join a deceased record owner who has no known personal representative. To be sure, under RP § 14-108(b), a record owner is required to be made a defendant to an action to quiet title. Nevertheless, under the circumstances of this case, dismissal is not automatically required; rather, the Court determined that the proper course of action was to reverse the Court of Special Appeals's judgment and remand the case to that Court with instructions to vacate the circuit court's judgment and remand the case to the circuit court for further proceedings, so that the Estate could follow the procedures that are outlined in the new statutes and Maryland Rules concerning joinder of a defendant who is a deceased record owner with no known personal representative. In other words, on remand, the Estate would be permitted to file an amended complaint that is accompanied by the necessary affidavit described in RP § 14-610(b) and Maryland Rule 12-805(b).

The Court of Appeals determined that it is evident that the new statutes and Maryland Rules governing actions to quiet title are procedural and remedial in nature—i.e., that they fall within the exceptions to the presumption of prospective application, and that the new statutes and Maryland Rules do not impair any substantive or vested rights, and thus apply retroactively. RP §§ 14-601 to 14-621 and Maryland Rules 12-801 to 12-811 clearly establish procedures and rules of practice that are related to actions to quiet title, and are not substantive in nature. Among other things, the new statutes and Maryland Rules prescribe specific procedures by which a plaintiff may file an action to quiet title and include all necessary defendants, despite the existence of a defendant who is not known to the plaintiff or a deceased defendant, whether that deceased defendant has a personal representative.

The Court of Appeals concluded that a review of the new statutes and Maryland Rules confirmed that they establish uniform procedures and rules of practice concerning actions to quiet title, i.e., that they effect a change in procedure only. The procedures govern the process by which plaintiffs file an action to quiet title and join all necessary defendants, and relate generally to the filing and adjudication of actions to quiet title. Additionally, the Court determined that the new statutes and Maryland Rules do not substantively change the law with respect to the ability to quiet title, or otherwise create or alter a substantive right with respect to actions to quiet title. The ability and right to seek to quiet title, i.e., a substantive right, has long been provided for in RP § 14-108 and its predecessors, and nothing in the new statutes or Maryland Rules disturbs that right. Indeed, rather than creating a new right or obligation as to the ability to quiet title, the new statutes and Maryland Rules effect a change only in procedure by establishing, for the first time, uniform procedures and rules of practice that relate to actions to quiet title.

The Court of Appeals concluded that RP §§ 14-601 to 14-621 and Maryland Rules 12-801 to 12-811 are remedial in nature because they improve and facilitate the process by which a plaintiff seeks to quiet title by establishing uniform rules of practice and procedure governing actions to quiet title and standardizing existing law concerning actions to quiet title across the State. The Court also determined that the new statutes and Maryland Rules do not impair or interfere with any vested or substantive rights.

The Court of Appeals observed that, even when analyzed in accordance with the two-part test concerning retroactivity of statutes—and not under one of the exceptions to the presumption of prospective application—the presumption of prospective application is also readily overcome by the clear intent that the new statutes and Maryland Rules governing actions to quiet title be procedural and remedial in nature and apply retroactively, and that retroactive application does not contravene any Constitutional right or prohibition.

The Court of Appeals concluded that there was no issue preclusion with respect to the complaint to quiet title or counterclaim. As a practical matter, because the Court was vacating the circuit court's judgment, there was no longer a final judgment on the merits concerning the complaint or the counterclaim, and any facts or issues that were decided by the circuit court, and that were encapsulated by that soon-to-be vacated judgment, were no longer conclusive in any action. And, for purposes of the remand, the Court refrained from expressing an opinion as to the merits of either party's claim to the Disputed Property or as to Respondents' counterclaim for trespass,

but noted that the counterclaim barely made out a cause of action, consisting of only six one-sentence paragraphs.

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Melissa Rodriguez, et al. v. Larry Cooper, et al, No. 27, September Term 2017, filed April 12, 2018. Opinion by McDonald, J.

https://mdcourts.gov/data/opinions/coa/2018/27a17.pdf

TORTS – CAP ON NONECONOMIC DAMAGES

SOVEREIGN IMMUNITY – MARYLAND TORT CLAIMS ACT – REPRESENTATION OF STATE PERSONNEL IN TORT ACTIONS

Facts:

This case arose out of the murder of a State prisoner, Philip E. Parker, Jr., by a fellow prisoner while they were both in State custody on a prison transport bus. Mr. Parker's estate and parents (Melissa Rodriguez and Philip E. Parker, Sr.) – the Petitioners in this appeal – brought suit against the State and various State officials and employees in the Circuit Court for Baltimore City. After a jury trial, and various post-trial and appellate proceedings, they obtained a judgment against the State under the Maryland Tort Claims Act ("MTCA") based on the jury's finding that certain correctional officers were negligent, and a judgment against one correctional officer, Respondent Sgt. Larry Cooper, based on the jury's finding that he was grossly negligent. The Circuit Court limited the judgment against the State pursuant to the statutory cap under the MTCA, and limited the judgment against Sgt. Cooper pursuant to the cap on noneconomic damages in Maryland Code, Courts & Judicial Proceedings Article ("CJ"), §11-108. The Circuit Court declined to include the State in the judgment against Sgt. Cooper because the waiver of the State's sovereign immunity in the MTCA does not extend to actions or omissions that are grossly negligent.

Petitioners appealed. With respect to the statutory cap on noneconomic damages, Petitioners argued (1) that Sgt. Cooper had waived the statutory cap on noneconomic damages, (2) that the cap was limited to personal injury actions and wrongful death actions based on simple negligence and that, in finding Sgt. Cooper grossly negligent, the jury had found that he acted intentionally, and (3) that the cap did not apply to actions against the State or its employees. With respect to the State's sovereign immunity, Petitioners argued that the State should be included on the judgment against Sgt. Cooper because the representation of Sgt. Cooper and the State by State lawyers posed a conflict of interest that waived the State's sovereign immunity.

The Court of Special Appeals affirmed the Circuit Court. The Court of Appeals granted certiorari.

Held: Affirmed.

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The Court of Appeals stated that it was not clear that a litigant could waive the statutory cap on noneconomic damages, but even if that was possible, Sgt. Cooper had not done so in this case. In the Circuit Court, Sgt. Cooper had filed a motion for remittitur of the jury verdict against him based on the statutory cap under CJ §11-108, together with a motion for judgment notwithstanding the verdict ("JNOV"). When the Circuit Court granted the JNOV in his favor, there was no longer a judgment against which to pursue the remittitur. There was no need or obligation on Sgt. Cooper to press the motion for remittitur until the JNOV was reversed in a previous appeal and he renewed his motion under CJ §11-108 when the case was remanded to the Circuit Court following the reversal. The Court further held that the cap on noneconomic damages is not limited to judgments based on simple negligence. Nor are actions against the State or State personnel excluded from the statute.

The Court also held that the representation of Sgt. Cooper by the Attorney General's Office, pursuant to a statutory authorization at Sgt. Cooper's request, did not waive the sovereign immunity of the State and make the State responsible for the judgment against Sgt. Cooper.

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Victoria Seaborne-Worsley v. Jeffrey Mintiens, No. 26, September Term 2017, filed April 20, 2018. Opinion by McDonald, J.

https://www.mdcourts.gov/data/opinions/coa/2018/26a17.pdf

TORTS – NEGLIGENCE – IMPUTED CONTRIBUTORY NEGLIGENCE

Facts:

Petitioner Victoria Worsley filed a complaint against Respondent Jeffrey Mintiens in the District Court of Maryland sitting in Baltimore County, alleging negligence after she sustained injuries from a car accident with Mr. Mintiens. The accident occurred in the parking lot of a restaurant in Maryland. Ms. Worsley's husband had driven himself and Ms. Worsley to the restaurant parking lot in Ms. Worsley's car, stopped two and a half feet behind Mr. Mintiens parked truck, and exited the vehicle, leaving Ms. Worsley in the passenger's seat. While Ms. Worsley was still in her car, Mr. Mintiens' backed his own truck out of its parking space, and the back of his truck struck the passenger's side door of Ms. Worsley's car. Ms. Worsley sustained injuries as well as damages to her car.

At trial, Mr. Mintiens admitted to drinking three beers at the restaurant that evening before getting behind the wheel and that he had failed to look in the passenger's side window of his truck before backing out of his parking space. However, Mr. Mintiens argued that Ms. Worsley's husband was negligent when he parked Ms. Worsley's car two and a half feet behind Mr. Mintiens' truck, and that Ms. Worsley's husband's negligence was a proximate cause of Ms. Worsley's injuries. Mr. Mintiens argued that the doctrine of imputed negligence, under which the owner-passenger of a car may be held liable for the permissive-driver's negligent operation of the car, should apply in this case, and Ms. Worsley should be found contributorily negligent and barred from recovery. The District Court agreed and found that under the doctrine of imputed negligence, Ms. Worsley – as the owner of the car present in the vehicle who had allowed her husband to drive – was responsible for her husband's negligent operation of the car. Accordingly, the District Court imputed Ms. Worsley's husband's negligence to Ms. Worsley, found her contributorily negligent, and barred her from recovery for her injuries.

The Circuit Court affirmed, holding that there was nothing in the record to rebut the presumption that Ms. Worsley, the owner-passenger, retained the right to control the operation of the car while her husband operated it. Because there was nothing to rebut that presumption, the Circuit Court ruled that the District Court was correct to impute Ms. Worsley's husband's negligence to Ms. Worsley and find her contributorily negligent and barred from recovery. Ms. Worsley petitioned the Court of Appeals for a writ of certiorari, which the Court granted.

Held: Reversed.

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The Court of Appeals held that the doctrine of imputed negligence does not apply when an injured owner-passenger seeks to recover for injuries suffered in an accident in which the owner-passenger was not at fault. The Court recognized that the original purpose of the doctrine was to ensure compensation for innocent victims of automobile accidents and to spread risk. However, the Court reasoned, with compulsory insurance laws, automobile insurance policies extending coverage beyond the owner of the car to most permissive drivers, and a fund created by the Maryland legislature to provide a source of compensation to those injured by uninsured motorists, the doctrine of imputed negligence has become in large measure obsolete. Moreover, the Court recognized, in the context of the modern automobile, the doctrine of imputed negligence has lost much of its grounding. The fiction of owner control, the often arbitrary application of the concept of "owner," and the erosion of the doctrine of imputed negligence over time in Maryland jurisprudence as well as in other jurisdictions have made application of the doctrine less compelling. In this case, the Court held, application of the doctrine would bear no relation to the doctrine's original purpose, as its application in this case would prevent a party injured in a car crash from recovery even though she herself was not found to be at fault. Accordingly, the Court held that the doctrine of imputed negligence does not apply to deem an owner-passenger of a motor vehicle contributorily negligent based on the negligence of a permissive driver of the owner-passenger's vehicle.

COURT OF SPECIAL APPEALS

Devon Jordan Taylor v. State of Maryland, Case No. 2190, September Term 2016, filed April 2, 2018. Opinion by Harrell, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/2190s16.pdf

APPELLATE PROCEDURE – PRESERVATION – MARYLAND RULE 4-325(e) – SUBSTANTIAL COMPLIANCE

POST CONVICTION – BELATED APPEAL – DIRECT APPEAL

POST CONVICTION – CRIMINAL PROCEDURE – ANTI CSI EFFECT JURY INSTRUCTION – HARMLESS ERROR

Facts:

On the early morning of 13 June 2008, the victim was alone in her apartment in Salisbury. At approximately 1:00 a.m., there was a knock on her door. She opened it "just a crack" and saw a nude man masturbating, while standing to the left on her patio and looking at, but not facing directly, her. As she was shutting the door, the man tried unsuccessfully to push his way in. The victim locked the door and dialed 9-1-1. The man broke the lock on the door and entered the apartment. He wore only a t-shirt hanging around his neck, which he pulled over the lower part of his face upon entering the apartment. The shirt, according to the victim, fell to his neck and revealed his full face during the encounter. The victim ran to her kitchen and retrieved a 12-inch-blade knife. The man approached her and "grabbed or touched her arm" holding the knife. She was able to twist her arm free, which, in the process, caused the knife to make contact with the intruder, without inflicting apparent injury. The victim was able to see clearly the man's face because her living room lights, and possibly her kitchen lights, were on during the encounter in the apartment.

The man backed-off when the knife touched him. Then, he noticed the victim's purse on the kitchen counter. He seized the purse, containing the victim's wallet, and fled the apartment. The victim testified that the incident lasted "three to four minutes." Officer Eric Baker arrived at the scene at 1:03 a.m., shortly after the man fled. He observed "golf-ball sized holes or dents" in the victim's apartment door. The victim told Officer Baker that the intruder was "medium skinned

with no tattoos or scars, and that he had a grey t-shirt around his neck." The officer did not seize the knife for forensic testing.

Later, Detective Corporal Richard Kaiser became the lead investigator regarding the incident. During his review of the police case file compiled to that point, he noticed that the apartment door had not been processed for fingerprints or the holes/dents photographed. Detective Kaiser contacted the property manager for the apartment complex and learned that a maintenance person had replaced the victim's door, moving her former door to another apartment in the complex. He went to the location of the "suspect" door and dusted its knob for prints. No usable fingerprints were recovered. Detective Kaiser noted also that the door had several "golf ball size[d]" dents in it. He too did not seize the victim's kitchen knife for forensic examination nor attempt to secure any fingerprints from inside the apartment.

On 12 July 2008, one month after the incident, the victim identified, from a photo array after "4 seconds," Appellant, Devon Taylor, as the intruder. The State charged Taylor in the Circuit Court for Wicomico County with first, third, and fourth-degree burglary, attempted second-degree rape, robbery, second-degree assault, indecent exposure, malicious destruction of property, and theft less than $100. At the close of the evidence at Taylor's trial, during jury instructions, the trial Judge administered, *sua sponte*, to the jury that "[t]here is no legal requirement that the State offer scientific evidence as part of its case, such as DNA, fingerprinting, blood typing, fiber analysis, hair follicle analysis, or anything of that nature." Taylor's counsel, in response, stated "[y]our honor, I would just except to the [c]ourt's scientific evidence instruction," to which the judge responded "[a]ll right."

During deliberation, the jury sent a note to the judge indicating "we are evenly split, six guilty, six innocent. Is it imperative to come to a unanimous verdict or is a hung jury okay?" The judge brought the jury back to the courtroom and, in response to the note, charged them with a modified *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154 (1896), instruction, coupled with a § 2:01 instruction from the Maryland Criminal Pattern Jury Instructions, reminding the jury of their duty to deliberate. The jury convicted ultimately him of all charges, save attempted second-degree rape. Taylor was sentenced to a total of thirty years executed time.

On 1 December 2016, Taylor's post-conviction public defender (joined by the State and accepted by the circuit court) entered into a consent order that, among other forms of relief, allowed Taylor to file a belated notice of appeal from his 2008 conviction (because his trial counsel failed to file a timely appeal that he and Taylor agreed would be pursued) and an application for review of his 2008 sentence, in exchange for waiving his right to pursue any further post-conviction relief. Taylor filed, on 29 December 2016, a notice of appeal.

On appeal from his 2008 conviction, Taylor argued: (1) the trial court erred when propounding to the jury an anti-CSI effect instruction; (2) the trial court committed reversible error by coercing the jury to come to a verdict; and, (3) the trial court considered evidence impermissibly in sentencing Taylor to thirty years executed time when the sentencing guidelines called for 1-5 years. In response, among other things, the State contended that Taylor failed to preserve adequately the appellate challenge to the anti-CSI effect jury instruction.

Held: Affirmed

The Court, first, addressed whether Taylor's objection (failing to state the grounds for the objection) to the circuit court's anti-CSI effect instruction was sufficient under Md. Rule 4-325(e). The Court held that Taylor's general objection failed to comply strictly with Md. Rule 4-325(e), but complied substantially with the rule. No ground need be stated "where the record makes clear that all parties and the court understood the reason for the objection." *Exxon Corp. v. Kelly*, 281 Md. 689, 694 n. 6, 381 A.2d 1146, 1149 n. 6 (1978).

In the limited and unique context of this case (given the limited field in Maryland of the anti-CSI effect reported jurisprudence in 2008), the Court believed that the trial judge could infer reasonably the grounds for Taylor's objection, consistent with his appellate argument. Specially the Court inferred that the trial judge and trial counsel were conversant with *Evans v. State*, 174 Md. App. 549, 570-71 922 A.2d 620, 632-33 (2007) (the sole reported case, at that time, on the anti-CSI effect topic), including *Evans*' concern that such an instruction might be problematic if it operated "ultimately to relieve the State of its burden of persuasion in a criminal case." The judge administered, *sua sponte*, the CSI effect jury instruction and then asked counsel whether there were "any additions or exceptions," prompting Taylor's timely objection. The judge acknowledged Taylor's objection. The purpose of Md. Rule 4-325(e) is "to afford the trial judge and opposing counsel ample opportunity to be informed of the nature and grounds of the exception" such to allow the court an opportunity to address the deficiency. *Sergeant Co. v. Pickett*, 283 Md. 284, 288, 388 A.2d 543, 546 (1978). The trial court appeared to comprehend the thrust of Taylor's exception, within the context of *Evans*. Notably, this was also not the first occasion for this judge to give such an instruction. It did not strain credulity to imagine that Taylor's counsel wanted to impress on the jury that the State had not met its burden of proof because it lacked forensic evidence; however, the judge's instruction minimized that argument and could be interpreted as implying that such a void was of no legal consequence in the fact-finder's analysis of whether the State met its burden of proof.

The Court then considered the propriety *vel non* of the trial judge's anti-CSI effect instruction. In the unique procedural posture of the case, i.e., reaching the appellate court through a belated appeal granted as post-conviction relief through a consent disposition, the Court had to decide what anti-CSI effect review standard to apply – that existing at the time Taylor's conviction occurred (2008), or the law existing during the pendency of Taylor's belated appeal (2016 and beyond). Because relief granted under the Uniform Post-Conviction Act contemplates that belated appeals insure remedially that a defendant receive a full review of his or her case as if his or her appeal had been pursued timely and properly, *Wilson v. State*, 284 Md. 664, 671–72, 399 A.2d 256, 260 (1979), the Court concluded that a belated appeal, granted as post-conviction relief, restores the availability of appeal. The Court viewed the applicability of the law existing at the time a belated appeal is granted (restoring the timeliness of the appeal) no different than if a post-conviction court were to grant a new trial.

The Court, through a retrospective application of *Robinson v. State*, 436 Md. 560, 580, 84 A.3d 69, 81 (2014), *Stabb v. State*, 423 Md. 454, 31 A.3d 922 (2011), and *Atkins v. State*, 421 Md. 434, 26 A.3d 979 (2011) (the current "gold standard" on anti-CSI effect jurisprudence), authorized by *Allen v. State*, 204 Md. App. 701, 42 A.3d 708 (2012) (allowing for a retrospective application of *Stabb* and *Atkins* to all cases pending on direct review in which the issue was preserved), concluded that the trial judge in this case administered erroneously the anti-CSI effect jury instruction. The circumstances of Taylor's trial did not present a situation necessitating a "curative instruction." *See Stabb*, 423 Md. at 473, 31 A.3d at 933. Moreover, the trial judge gave the instruction preemptively, before closing arguments by counsel (which *Stabb*, *Atkins*, and *Robinson* warned against).

The Court, relying on *State v. Armstead*, No. 1148, 2018 WL 67986, ___ Md. App. ___, ___ A.3d. ___ (Md. Ct. Spec. App. Feb. 1, 2018), was satisfied that the trial judge's error, however, was harmless. There was a *direct eyewitness* identification of Taylor by the victim as the perpetrator, which had been found in many cases to be sufficient unto itself to permit a jury to find guilt beyond a reasonable doubt. *See Belton v. State*, 152 Md. App. 623, 639, 833 A.2d 54, 64 (2003). Thus, although the trial judge erred in giving preemptively an anti-CSI effect instruction, this error was harmless, beyond a reasonable doubt.

Taylor failed to object to the trial court's "continue to deliberate instruction," failing to preserve the issue for the Court's review. The Court declined to review this appellate challenge to the instruction, under the plain error doctrine, because it did not find Taylor's challenge compelling, extraordinary, exceptional or fundamental. The trial judge's alleged coercive language, before and after he administered the MPJI-CR 2:01 language, did not rise to a level undermining the fairness of Taylor's trial. The Court held that the entirety of the instruction adhered to the spirit of MPJI–Cr 2:01.

Finally, the Court found that the trial judge considered permissibly reliable evidence when sentencing Taylor. There is nothing in Maryland law mandating that the principles of the Maryland Sentencing Guidelines bind sentencing judges. *Teasley v. State*, 298 Md. 364, 370, 470 A.2d 337, 340 (1984). Trial judges may view, therefore, along with past criminal convictions or criminal contacts with the justice system, "reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried." *Logan v. State*, 289 Md. 460, 481, 425 A.2d 632, 643 (quoting *Henry v. State*, 273 Md. 131, 147-48, 328 A.2d 293, 303 (1974)). The trial judge considered permissibly, when sentencing Taylor, his prior courtroom contact with Taylor; the similarity in nature of Taylor's previous adult convictions to his present crimes; and Taylor's 13 juvenile contacts – especially given that Taylor was 20 years old at the time of his present convictions.

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Marquise Holt v. State of Maryland, No. 1841, September Term 2016, filed April 5, 2018. Opinion by Kenney, J.

https://mdcourts.gov/data/opinions/cosa/2018/1841s16.pdf

CRIMINAL LAW – MARYLAND RULE 4-215 – DISCHARGE OF COUNSEL

CRIMINAL LAW – IMPERFECT SELF-DEFENSE – JURY INSTRUCTION

Facts:

Appellant was convicted of attempted first-degree murder and other related crimes for an incident when two groups engaged one another in anticipation of a fight and shots were fired. Earlier in the day, appellant had had an encounter with a member of the opposing group, during which one member of the opposition brandished a gun and appellant engaged in fisticuffs with another. Later that evening, upon learning that the other group wanted to fight, appellant marshaled his forces and drove to a housing complex to confront the other group. As appellant's group entered the grounds, the opposing group, armed with at least a knife and a baseball bat, jumped over a fence and ran towards appellant's group. Witnesses provided conflicting accounts of what occurred, but according to one witness, appellant and another man, almost immediately and without any words exchanged, pointed handguns at the opposing group and fired shots. No one was struck.

Before trial, appellant wrote a letter to his private counsel stating his intent to discharge him and requesting for him to withdraw his appearance. Counsel filed a motion to withdraw and provided the letter to the court. At a status hearing where neither appellant nor his counsel was present, a public defender indicated to the court that he had had contact with appellant and proffered an account that alleged ethical violations against counsel. At the next status hearing, counsel informed the court that appellant had changed his mind and had expressed desire for counsel to stay on representing him. The case proceeded to trial.

Held:

An inquiry of appellant under Rule 4-215(e) was not required, even though he had written a letter to his attorney stating his intent to discharge him, because the last word on discharge, which came from counsel without the appellant present, was that appellant had changed his mind and now wanted counsel to stay on representing him.

A request for permission to discharge counsel, triggering the requirements under Rule 4-215(e), is any statement from which a court could conclude reasonably that the appellant may be inclined to discharge counsel. Maryland appellate courts have espoused a broad interpretation of

what constitutes such a request: a statement does not need to be in writing or worded in a particular manner; it may come from either the appellant or counsel.

A Rule 4-215(e) inquiry is not mandated unless the defendant or counsel indicates that the defendant has the present intent to seek a different legal advisor. Here, as in *Garner v. State*, 414 Md. 372 (2010), the last word to the trial court indicated that any desire of appellant to discharge counsel had expired by the second hearing, where counsel informed the court that appellant still wanted his representation. By contrast, the last word to the trial court in *State v. Davis*, 415 Md. 22 (2010) (the defense counsel's statement), and *Williams v. State*, 435 Md. 474 (2013) (the defendant's letter), indicated a desire to discharge counsel.

Appellant was not entitled to an imperfect self-defense jury instruction when he voluntarily engaged a rival group that wanted to fight. Appellant failed to generate a jury instruction on imperfect self-defense because he failed to produce "some evidence" to support two elements of imperfect self-defense: (1) that he subjectively believed he was in imminent or immediate danger of death or serious bodily harm; and (2) that he was a non-aggressor.

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Patrick Joseph Thomas A/K/A Patrick Joseph Patrick v. State of Maryland, No. 1115, September Term 2016, filed April 4, 2018. Opinion by Friedman, J.

https://mdcourts.gov/data/opinions/cosa/2018/1115s16.pdf

CRIMINAL LAW – HOMICIDE – MANSLAUGHTER – EVIDENCE

Facts:

On the night and early morning hours of June 25-26, 2015 Patrick Thomas sold four bags of heroin to Colton Lee Maltrey. Later on the morning of June 26, 2015, Maltrey was found dead of an apparent overdose. Maltrey's body was discovered in the bathroom of his mother's house, next to four empty bags that had contained the heroin sold to him by Thomas. The medical examiner later determined that prior to his death, Maltrey had consumed both alcohol and narcotics.

Thomas was convicted on an agreed statement of facts of heroin distribution, manslaughter, and reckless endangerment. On appeal he challenges the sufficiency of the evidence to sustain his manslaughter conviction.

Held: Reversed

The Court of Special Appeals held that the evidence was insufficient to convict Thomas of involuntary manslaughter based on either an unlawful act or a grossly negligent act theory. To support a conviction for manslaughter, the evidence must show a direct causal connection between the defendant's actions and the victim's death.

For unlawful act manslaughter, the State must prove that the defendant's unlawful act was the legal cause of the victim's death. Although Thomas sold the heroin to Maltrey, Maltrey injected himself with an amount that he chose, at another time and in another place, and in conjunction with his ingestion of alcohol. Because the causal chain was broken, the evidence cannot support criminal liability for manslaughter.

The Court further determined that while the facts supported a finding that Thomas' sale of heroin to Maltrey was negligent, they did not show the wanton or reckless disregard for human life that is necessary to prove gross negligence.

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Adnan Syed v. State of Maryland, No. 2519, September Term 2013, and *State of Maryland v. Adnan Syed*, No. 1396, September Term 2016, filed March 29, 2018. Opinion by Woodward, C.J.

Graeff, J., dissents.

https://mdcourts.gov/data/opinions/cosa/2018/2519s13.pdf

CRIMINAL LAW – POST-CONVICTION – SCOPE OF REMAND ORDER – ABUSE OF DISCRETION

CRIMINAL LAW – POST-CONVICTION – REOPENING OF POST-CONVICTION PROCEEDING – ABUSE OF DISCRETION

CRIMINAL LAW – POST-CONVICTION – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL – WAIVER – NATURE OF RIGHT INVOLVED – NON-FUNDAMENTAL – GENERAL WAIVER PRINCIPLES APPLY

CRIMINAL LAW – POST-CONVICTION – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL – DUTY TO SEEK PLEA OFFER – FAILURE TO ESTABLISH STATE WOULD HAVE OFFERED A PLEA

CRIMINAL LAW – POST-CONVICTION – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL – DUTY TO INVESTIGATE A POTENTIAL ALIBI WITNESS – DEFICIENT PERFORMANCE

CRIMINAL LAW – POST-CONVICTION – INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL – DUTY TO INVESTIGATE A POTENTIAL ALIBI WITNESS – PREJUDICE

Facts:

At trial, the State adduced evidence that Adnan Syed, appellant/cross-appellee, and Hae Min Lee ("Hae") were students at Woodlawn High School and had a romantic relationship, but ended it sometime before January 1999. Thereafter, on January 13, 1999, Syed asked Hae for a ride after school, and Hae agreed. During lunch that day, Syed gave his friend Jay Wilds his car and cell phone, and instructed Wilds that he would call him when he was ready to be picked up. Shortly after school ended at 2:15 p.m., Syed drove Hae's car to the Best Buy parking lot off of Security Boulevard, where Syed, according to the State, strangled Hae sometime between 2:15 and 2:35 p.m.

At 2:36 p.m., Syed called Wilds from a payphone in the Best Buy parking lot and instructed Wilds to pick him up at the Best Buy. When Wilds arrived, Syed showed Wilds Hae's lifeless

body in the trunk of her car. Syed instructed Wilds to follow him as Syed drove Hae's car and parked it at the Interstate 70 Park and Ride.

Later that evening, Syed and Wilds picked up Hae's car and drove to Leakin Park, where the two dug a shallow grave. According to the State, Syed's cell phone received two calls that placed Syed in Leakin Park at the time of the burial. After burying Hae's body, Syed and Wilds abandoned Hae's car behind an apartment complex. When Hae's car was later recovered, police found a map book with a map of Leakin Park torn out in the backseat, with Syed's partial palm print on the back cover of the map book.

A jury convicted Syed of first degree murder, robbery, kidnapping, and false imprisonment, and Syed was sentenced to a total term of life imprisonment plus thirty years. Syed's convictions were subsequently upheld on direct appeal.

In 2010, Syed filed a petition for post-conviction relief raising nine claims of ineffective assistance of trial counsel, sentencing counsel, and appellate counsel. After a hearing, the post-conviction court denied Syed post-conviction relief on January 6, 2014. Syed filed a timely application for leave to appeal to this Court, requesting review of his ineffective assistance of counsel claims for trial counsel's failure to contact a potential alibi witness, Asia McClain, and to pursue a plea deal. While his application was pending, Syed filed a request that this Court remand the case for additional fact-finding in light of a January 13, 2015 affidavit from McClain.

After granting leave to appeal on February 6, 2015, this Court issued an order on May 18, 2015, staying Syed's appeal and granting his request to remand the case for further proceedings. Pursuant to our order's instructions, on June 30, 2015, Syed filed a timely motion to reopen post-conviction proceeding based upon McClain's affidavit. Thereafter, Syed filed a Supplement on August 24, 2015, requesting the court reopen the post-conviction proceeding to consider new claims of ineffective assistance of trial counsel and a *Brady* violation, both concerning the reliability of the cell tower location evidence. After granting Syed's request and conducting a hearing, the post-conviction court held, among other things, that Syed's trial counsel was deficient for failing to investigate McClain as a potential alibi witness, but that such deficiency did not prejudice Syed. The court, however, granted Syed a new trial on the basis that trial counsel was ineffective for failing to properly challenge the reliability of the cell tower location evidence.

After granting the State's application for leave to appeal and Syed's conditional application for leave to cross-appeal, the Court of Special Appeals affirmed the judgment of the circuit court, but on the ground that Syed's Sixth Amendment right to effective assistance of counsel was violated by trial counsel's failure to investigate McClain as a potential alibi witness.

Held: Affirmed.

I. The State's first issue was whether the post-conviction court abused its discretion by exceeding the scope of the Court's May 18, 2015 remand order.

The Court's May 18, 2015 remand order provided that "[i]n the event that the circuit court grants a request to re-open the post-conviction proceedings, the circuit court may, in its discretion, conduct any further proceedings it deems appropriate." The Court held that because the post-conviction court granted Syed's motion to reopen as to his claim of ineffective assistance of counsel for failure to investigate a potential alibi witness, it was within the court's discretion to conduct any further proceedings it deemed necessary. Further proceedings, according to the Court, included Syed's Supplement, because it was, in effect, a separate motion to reopen pursuant to Maryland Code (2001, 2008 Repl. Vol.), § 7-104 of the Criminal Procedure Article ("CP"), and because it would be in the interests of judicial economy for the post-conviction court to hear all of the Syed's claims under CP § 7-104 in one proceeding.

II. The State's second issue was whether the post-conviction court abused its discretion by reopening Syed's post-conviction proceeding to consider his new claim, set forth in the Supplement, of ineffective assistance of counsel for the failure of trial counsel to properly challenge the reliability of the cell tower location evidence.

CP § 7-104 provides that a court "may reopen a post[-]conviction proceeding that was previously concluded if the court determines that the action is in the interests of justice." In *Gray v. State*, 338 Md. 366, 382 n.7 (2005), the Court of Appeals gave several examples of when the "interests of justice" would support a reopening of a post-conviction proceeding. The Court of Special Appeals concluded that the *Gray* Court did not limit the broad discretion that the General Assembly provided pursuant to CP § 7-104 and thus, reviewed the post-conviction court's decision to determine whether it was "violative of fact and logic." Id. at 384.

In Syed's case, if the post-conviction court found that Syed's new claim was not waived and he adduced sufficient evidence to demonstrate ineffective assistance of counsel on that claim, Syed would be entitled to post-conviction relief. Therefore, the Court held that it was not "violative of fact and logic" for the post-conviction court to conclude that it was in the "interests of justice" to reopen Syed's post-conviction proceeding and consider his new claim. *See id*. at 382 n.7, 384.

III. The State's third issue was whether Syed's new claim of ineffective assistance of counsel for trial counsel's failure to properly challenge the reliability of the cell tower location evidence was waived, because such claim was not raised at Syed's first post-conviction proceeding.

The Court recognized that the Court of Appeals in *Curtis v. State*, 284 Md. 132 (1978), created a dual framework for analyzing whether a petitioner's claim has been waived: A court must examine whether the "nature of the right involved" is recognized by the Supreme Court as requiring an intelligent and knowing waiver and thereby a fundamental right governed by CP § 7-106(b), *see id*. at 137-38, or, whether the "nature of the right involved" is governed by "pertinent case law, statutes, or rules[,]" and thereby a non-fundamental right governed by the "general legal principles" of waiver. *See State v. Torres*, 86 Md. App. 560, 568 (1991). The Court framed the question in the instant appeal as follows: Where the *issue* of ineffective

assistance of trial counsel has been raised and decided in a previous post-conviction proceeding, does a petitioner, absent a knowing and intelligent waiver, have the right to raise such *issue again but on a different ground* in a reopening of that proceeding?

In *Curtis*, the Court of Appeals determined that the issue of ineffective assistance of counsel was premised on a fundamental constitutional right, and thus "a criminal defendant cannot be precluded from having this issue considered because of his mere failure to raise the issue previously." 284 Md. at 150. There, the issue of ineffective assistance of trial counsel was not raised in Curtis's first petition for post-conviction relief. *Id.* at 134-35. By contrast, Syed raised the issue of ineffective assistance of trial counsel at his first post-conviction hearing. The cell tower ground, however, was not one of the seven grounds supporting these ineffective assistance of trial counsel claims. The Court, therefore, concluded that the question of waiver regarding the failure to raise the issue of ineffective assistance of trial counsel was not present in the instant case.

In *Curtis*, the Court of Appeals identified non-fundamental rights as those that "fall within the category of tactical decisions by counsel or involve procedural defaults." *Id*. at 147. The Court of Special Appeals then held that the cell tower ground was based on a non-fundamental right, because the selection of a particular ground to support a claim of ineffective assistance of counsel is a quintessential tactical decision made by post-conviction counsel. Thus, under the general principles of waiver governing non-fundamental rights, the failure to assert the cell tower ground at Syed's first post-conviction hearing would constitute a waiver of a claim based on that ground, unless it was not possible to have raised it at that time. Because Syed's post-conviction counsel could have raised the cell tower ground at the first post-conviction proceeding, the Court held that Syed waived this claim of ineffective assistance of trial counsel.

IV. Syed's first claim was that his right to effective assistance of counsel was violated when trial counsel failed to pursue a plea deal with the State.

The Court explained that a defendant has a right to effective assistance of counsel during "the plea-bargaining process[,]" but a defendant does not have a "right to be offered a plea. . . ." *Lafler v. Cooper*, 566 U.S. 156, 162, 168 (2012). The Court held that, assuming that defense counsel has the duty to pursue a plea offer when requested, the failure to pursue a plea offer cannot prejudice a defendant without evidence demonstrating that, if defense counsel had requested a plea offer, the State would have made a plea offer. *Cf. Delatorre v. United States*, 847 F.3d 837, 846 (7th Cir. 2017).

In Syed's case, the Court determined that the post-conviction court was not clearly erroneous when it found that Syed had failed to adduce evidence demonstrating that the prosecutor was prepared to make a plea offer if Syed's trial counsel had requested one. Moreover, the Court determined that there was sufficient evidence to support the post-conviction court's factual finding that the Baltimore City State's Attorney's Office did not have a policy of always offering a plea deal. Accordingly, the Court affirmed the post-conviction court's ruling that Syed failed to establish an ineffective assistance of counsel claim based on trial counsel's failure to pursue a plea offer.

V. Syed's second claim was that his right to effective assistance of counsel was violated when trial counsel failed to investigate McClain as a potential alibi witness.

A. The Court stated that the first issue was whether trial counsel's failure to investigate McClain as a potential alibi witness constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court's research revealed no controlling Maryland case on such issue, and therefore, the Court proceeded to analyze cases outside of Maryland. The Court held that, once a defendant identifies potential alibi witnesses, defense counsel has the duty "to make some effort to contact them to ascertain whether their testimony would aid the defense." *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991). Such identification normally includes names and addresses of potential alibi witnesses, but need not if sufficient information is provided or acquired to enable defense counsel to contact the witnesses. The identification also includes sufficient information to suggest that the witness's testimony could provide the defendant with an alibi.

The Court held that Syed's trial counsel had the duty to make an effort to contact McClain. The Court determined that this duty arose when Syed told trial counsel about McClain, gave trial counsel McClain's contact information, and gave trial counsel McClain's affidavits, which demonstrated that McClain's testimony had the potential to provide Syed with an alibi. The Court then ruled that trial counsel's failure to attempt to contact McClain was manifestly unreasonable when the State claimed that Syed murdered Hae between 2:15 p.m. and 2:35 p.m. on January 13, 1999, and trial counsel was aware that McClain saw Syed in the library from "2:15 – 3:15" that day. Accordingly, the Court held that trial counsel's failure to make any effort to contact McClain as an alibi witness fell below the objective standard of a reasonably competent attorney acting under prevailing norms, taking into consideration all of the circumstances existing at the time of counsel's conduct with a strong presumption of reasonable professional assistance.

B. As to the prejudice prong of *Strickland*, the Court determined that it had to analyze the impact McClain's testimony may have had in light of "the totality of the evidence before the judge or jury." 466 U.S. at 695. Hence, the Court determined that the impact of McClain's testimony must be analyzed in light of the State's theory of the case: Syed murdered Hae in the Best Buy parking lot between 2:15 p.m. and 2:35 p.m. on January 13, 1999.

The Court acknowledged that the State presented a strong circumstantial case against Syed, which was largely based on the testimony of Wilds, Syed's actions after the murder, and Syed's cell phone records. The glaring weakness, however, was the State's lack of any direct evidence placing Syed and Hae in the Best Buy parking lot on January 13, 1999, between 2:15 p.m. and 2:35 p.m. The Court reasoned that McClain's testimony would have directly contradicted the State's theory of the case by placing Syed at the Woodlawn Public Library at the exact time the State theorized that Syed murdered Hae; a critical element the State had to prove to convict Syed. When considering McClain's testimony in light of all of the other evidence the State presented to the jury, the Court held that, if McClain's testimony had been presented to the jury, it would have "alter[ed] the entire evidentiary picture." *Id*. at 696. The Court, therefore, held that "the jury was deprived of the [opportunity] to hear testimony that could have supplied [ ]

'reasonable doubt'" in at least one juror's mind leading to a different outcome: a hung jury. *Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008). Under the circumstances of the case *sub judice*, the Court concluded that there was a reasonable probability that, but for trial counsel's deficient performance, the result of Syed's trial would have been different.

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Terrence Newman v. State of Maryland, No. 2629, September Term 2016, filed April 4, 2018. Opinion by Moylan, J.

https://mdcourts.gov/data/opinions/cosa/2018/2629s16.pdf

FIRST-DEGREE MURDER – RULE 5–403 – THE STANDING EPITHET "UNFAIR" DELIMITS THE NOUN "PREJUDICE" – NEED FOR THE EVIDENCE AS A NON-FACTOR – CHERCHEZ THE ADVERB – APPELLATE DEFERENCE AS A CRITICAL DECISIONAL FACTOR

Facts:

At approximately 3:00 p.m. on October 15, 2015, the appellant, Terrence Newman, joined a gathering hosted by the Archibald siblings—Dustin, Ronald, and Reba—in Catonsville's Gilston Park. Upon his arrival, appellant was greeted by Dustin, Dustin's girlfriend Nicole Hokanson, and appellant's ex-girlfriend Reba. Ronald arrived at 4:30, but left shortly thereafter. Carlita Coleman—Reba's friend and the ultimate homicide victim—arrived circa 5:00. Appellant furnished drinks throughout the revelry. Prior to Carlita's arrival, he shared with Dustin and Nicole a bottle of slightly-watered down vodka and a half-bottle of wine. When these provisions were exhausted, appellant procured two gallons of vodka. Dustin and Nicole retired from the festivities at 7:00, leaving Reba, Carlita, and appellant. Reba sat alone at a picnic table, while appellant and Carlita finished the majority of one of the gallons of vodka and engaged in an escalating session of sexual play. By 7:30, Reba departed, leaving Carlita and appellant—both of whom she described as "flat out drunk"—alone in the park.

To all but appellant, Carlita's three-week disappearance following the night of October 15 went largely unnoticed. In fact, had it not been for appellant's pangs of conscience, he may well have committed a perfect crime. Ultimately, however, appellant proved true the idiom "a guilty conscience needs to confess." Appellant initially confessed to Dustin, admitting that he had strangled Carlita after she had hit him in the nose. After watching Carlita breathe her last breath, appellant recounted, he dragged her lifeless body into the woods where he covered it with leaves. Appellant expressed misgivings about having shared with Dustin the homicidal happenings of October 15, leading Dustin to fear for his safety. Nicole, whose counsel Dustin sought, advised him to alert the police. Upon his doing so, the police discovered the corpse of Carlita Coleman. To aid the police in identifying appellant, Dustin furnished them with a Facebook photograph, which depicted appellant flexing his right bicep.

Appellant was initially detained at the Baltimore County Detention Center. There, he again confessed, this time in vivid detail, to two fellow inmates. By appellant's account, Carlita and he had entered the park's wooded area intent on engaging in sexual intercourse. Shortly after Carlita and he had commenced intercourse, the former attempted to withdraw. In an attempt to "fight off" appellant, Carlita began scratching at his neck. Appellant responded by placing Carlita in chokehold until her once-flailing arms went limp.

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Appellant was convicted by a jury sitting in the Circuit Court for Baltimore County of first-degree murder, and was sentenced to life imprisonment. On appeal, appellant contends that (i) the Facebook photo Dustin had given to the police was so prejudicial that its admission in evidence was erroneous, *see* Md. Rule 5–403 (hereafter, "5–403"), and (ii) the court abused its discretion when, at the State's behest, instructing the jury as to the legal effect of severe voluntary intoxication—to wit, its precluding convictions for specific intent crimes.

Held: Affirmed.

Give that appellant's Facebook photograph did not pose a danger of *unfair* prejudice, the Court of Special Appeals held, *a fortiori*, that the trial court did not abuse its discretion in admitting the photograph in evidence. The Court further held that the trial court properly instructed the jury as to the legal effect of severe voluntary, as the instruction given was both (i) generated by the evidence and (ii) a correct statement of law.

Contrary to appellant's iteration, 5–403 permits a trial court *at its discretion* to exclude relevant evidence where such evidence poses so great a danger of *unfair* prejudice as to *substantially* outweigh its probative value. Having neglected consideration of the underscored requirements, appellant's 5–403 challenge is facially invalid.

Referring only to the *prejudicial* effect of the evidence at issue, appellant conspicuously omits the necessary epithet "unfair." In so doing, appellant fails to make the critical distinction between "legitimate prejudice" and "unfair prejudice." While legitimately prejudicial evidence is self-same with evidence that incriminates a defendant of the crime for which he is tried, unfairly prejudicial evidence tends either to prove a defendant's general bad character or to inflame the passions of the jury. Given that *legitimately* prejudicial evidence is invariably probative of guilt, to omit the essential qualifier "unfair" is erroneously to construe 5–403's balancing test as one that "measure[s] probative value against itself." *Oesby v. State*, 142 Md. App. 144, 166 (2002).

Appellant invokes the necessity principle, seemingly in an attempt to distinguish between the probative value/legitimate prejudicial effect, which, absent the qualifier "unfair," would occupy both pans of the balancing scale. Under appellant's construction, probative value differs from prejudicial effect insofar as the former is limited to evidence which the State *needs* in order to satisfy the burden of production, while the latter exceeds that threshold. This abuse of the necessity principle erroneously ignores the fact that in a jury trial the burden of proof encompasses not only the burden of production, but also the burden of ultimate persuasion. While the State need only satisfy the former burden to prevail on appeal against a sufficiency challenge, more may well be needed to convince a jury of a defendant's guilt beyond a reasonable doubt. Contrary to appellant's formulation, necessity is only a factor if and when the relevant evidence at issue *unfairly* prejudices the appellant. Absent unfair prejudice, the State's need for the evidence is immaterial.

Even in cases involving *unfair* prejudice, in order for an appellant to prevail on a 5–403 challenge, that appellant must overcome two additional hurdles. First, to justify the exclusion of relevant evidence, the "danger of unfair prejudice" must not simply outweigh "probative value," but must do so "substantially." Even should an appellant convince an appellate court that the danger of unfair prejudice *substantially* outweighed its probative value, he must also satisfy the highly deferential abuse-of-discretion standard of review. This requires, *inter alia*, that an appellant demonstrate that a finding that the probative value was outweighed *only moderately* would have been so egregious as to constitute an abuse of discretion.

In this case, appellant rightly concedes that the photograph is relevant, and therefore possesses probative value. Not only was the photograph integral to the police's identifying appellant, but it corroborated the close relationship between appellant and members of the Archibald family. The Court did not find, moreover, that it is redolent of unfair prejudice. While it does depict appellant flexing a muscle, he appears neither menacing not intimidating. The photograph merely depicts the same robust defendant whom the jury saw throughout the four-day trial. Finding no danger of unfair prejudice, the Court held *a fortiori* that the trial court did not abuse its discretion in admitting the photograph.

Where an appellant challenges the affirmative giving of an instruction, the Court considers whether (i) the instruction was a correct statement of law and (ii) the instruction was generated by the evidence. The jury instruction in this case was indisputably correct. The court properly instructed the jury that though voluntary intoxication generally does not excuse criminal conduct, the jury could not convict appellant of first or second-degree murder of the specific intent variety if he was so intoxicated at the time he performed the homicidal *actus reus* that he was incapable of forming a specific intent. Moreover, evidence of appellant's intoxication was abundant.

Appellant's umbrage at the State's having requested and the court's having given the instruction seems to stem from his hope that, had the jury not been enlightened as to the legal effect of voluntary intoxication, it may have acquitted appellant, concluding that his inebriation rendered Carlita's death the result of an unfortunate accident. Due process does not, however, guarantee appellant the right to a legally unenlightened jury. Given that the State charged appellant not only with first and second-degree murder of the specific intent variety, but also with depraved heart and gross criminal negligence second-degree murder (both general intent crimes), moreover, the State was entitled to the instruction.

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Shaarei Tfiloh Congregation v. Mayor and City Council of Baltimore, No. 2645, September Term 2015 & No. 2572, September Term 2016, filed April 27, 2018. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2018/2645s15.pdf

STATUTORY CONSTRUCTION – DISTINCTION BETWEEN EXCISE TAX AND PROPERTY TAX

STATUTORY CONSTRUCTION – DISTINCTION BETWEEN FEE AND TAX

ADMINISTRATIVE LAW – ADMINISTRATIVE EXHAUSTION AND FINALITY

Facts:

In 2012, the General Assembly passed legislation colloquially known as the "Rain Tax", which—at that time—required the imposition of stormwater remediation fees in the State's 10 largest jurisdictions to comply with requirements imposed by the Environmental Protection Agency to decrease pollution entering the Chesapeake Bay. Pursuant to that mandate, Baltimore City ("the City") enacted Article 27 of the City Code in early 2013, obligating the City's Department of Public Works ("DPW") to assess stormwater remediation fees on all properties not exempted under State or City laws.

For the third and fourth quarters of 2013, DPW charged Shaarei Tfiloh Congregation ("the Congregation") $240 total per quarter for three properties it owned in the City. The Congregation challenged those charges before DPW, arguing that their imposition constituted a property tax and that such a tax violated the Congregation's right to the free exercise of religion. DPW disagreed, but pursuant to Article 27's provision allowing for a reduced fee rate for religious organizations' qualifying structures, granted the Congregation a reduction to $150 total per quarter. The Congregation appealed to the City's Board of Municipal and Zoning Appeals ("the Board") without success. Exhausting its administrative appeals, the Congregation sought judicial review before the Circuit Court for Baltimore City. The circuit court affirmed the Board but concluded that the stormwater remediation fee was an excise tax, not a fee, permitted by the State's enabling law.

The Congregation timely appealed to the Court of Special Appeals, seeking review as to whether the Board (1) incorrectly concluded that the charges imposed under Article 27 were valid; (2) erred in finding that Article 27 is not a land use ordinance; (3) ignored the protections afforded to religious institutions pursuant to Article 36 of the Maryland Declaration of Rights; and (4) failed to follow its own rules of procedure.

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Held: Affirmed.

The Court of Special Appeals first held that the City's enactment of Article 27 was valid under the State's enabling statute. Although labeled a fee, this Court concluded that the stormwater remediation fee is a tax given that its primary purpose is to raise revenue and because property owners' sole obligation is to pay the charge. It is an excise tax, and not a property tax as the Congregation contended, because the charge relates to the use of property instead of the value of property or property ownership. Turning to the remaining issues, this Court held that Article 27 does not violate Article 36 of the Maryland Declaration of Rights and because it is not a land use ordinance, it does not implicate the Religious Land Use and Institutionalized Persons Act of 2000. Finally, based on the record, this Court determined that the Board did not fail to follow its established procedures.

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Jonathan Rose v. Andrea Rose, No. 432, September Term 2017, filed February 1, 2018. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2018/0432s17.pdf

CHILD SUPPORT – USE OF "SHARED PHYSICAL CUSTODY" TO CALCULATE SUPPORT UNDER MARYLAND CHILD SUPPORT GUIDELINES – APPLICATION OF FAMILY LAW ARTICLE SECTION 12-201(n).

Facts:

As part of their divorce, Jonathan Rose and Andrea Rose executed a comprehensive Separation and Property Settlement Agreement ("Agreement"). The Agreement provided that child support would be recalculated annually using the Maryland Child Support Guidelines. Although a Consent Custody Order entered into by the parties provided Jonathan with 35%-36% of the annual overnights with the children, Andrea presented evidence that Jonathan never kept the children more than 35% of the overnights. Accordingly, Andrea argued that Jonathan was not entitled to have his child support calculated under the "shared physical custody" provisions of the Guidelines. The circuit court decided not to receive evidence concerning the actual number of overnights Jonathan kept the children. Instead, the court calculated child support by relying on the number of overnights awarded in the Consent Custody Order, and therefore used the shared physical custody formula.

Held: Reversed and remanded.

The plain language of section 12-201(n)(1) of the Family Law Article ("FL") requires a parent to keep a child more than 35% of the overnights in order to receive the benefit of shared physical custody for child support purposes. If a parent establishes that he or she actually keeps the child overnight for more than 35% of the year, the court's analysis should begin and end with FL § 12-201(n)(1).

If, on the other hand, a parent cannot demonstrate that he or she keeps the child for more than 35% of the overnights even though the extant visitation order awards that parent more than 35% of the overnight visitation, the court may, in its discretion, nevertheless use the shared physical custody child support formula as authorized by FL § 12-201(n)(2). In exercising its discretion under FL § 12-201(n)(2), the court may consider evidence concerning the parent's failure to keep the child more than 35% of the overnights as awarded in the visitation order.

On remand, the circuit court should make the threshold factual determination under FL § 12-201(n)(1) whether Jonathan actually kept the children for more than 35% of the overnights in a year. If there were legally sufficient evidence that Jonathan kept the children more than 35% of

the overnights, the statutory definition of "shared physical custody" in FL § 12-201(n)(1) would be satisfied and child support would be calculated accordingly. If, on the other hand, the evidence demonstrated that Jonathan had not met the 35% of actual overnights threshold, Jonathan may request the court to use the shared physical custody child support formula based on the amount of visitation awarded in the Consent Custody Order, but *only if* the court determines that the Consent Custody Order on its face gives Jonathan 35% or more of the overnights. Assuming that the Consent Custody Order awards Jonathan more than 35% of the overnights, the court may then exercise its considered discretion pursuant to FL § 12-201(n)(2) to calculate child support based on shared physical custody.

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Celso Monterroso Romero v. Josefa Perez, No. 2477, September Term 2016, filed April 4, 2018. Opinion by Friedman, J.

https://mdcourts.gov/data/opinions/cosa/2018/2477s16.pdf

ALIENS, IMMIGRATION, AND CITIZENSHIP – SPECIAL IMMIGRANTS – BURDEN OF PROOF

ALIENS, IMMIGRATION, AND CITIZENSHIP – SPECIAL IMMIGRANTS – PROCEDURE

Facts:

Romero filed a Special Immigration Juvenile (SIJ) status petition for his son, R.P., in the Circuit Court for Baltimore City. The court found four of the five necessary factors for R.P., but found that Romero had not proved the fifth factor, that reunification with his mother was not viable due to abuse, neglect, or abandonment, under any possible burden of proof. In making these findings, the court commented that there was no articulated burden of proof under Maryland law for the findings required in an SIJ case.

Held: Affirmed.

When petitioned by an applicant seeking SIJ status, the Circuit Court must make individual factual findings on each of the five factors required by 8 C.F.R. § 204.11. SIJ petitioners must prove each of the SIJ factors by a preponderance of the evidence. The court found that R.P. had not proven the existence of the fifth SIJ factor—abuse, neglect, or abandonment—by a preponderance of the evidence, and this finding was not clear error.

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Whiting-Turner Contracting Company v. Commissioner of Labor & Industry, No. 2655, September Term 2016, filed April 26, 2018. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2018/2655s16.pdf

GENERAL DUTY CLAUSE – RECOGNIZED HAZARD – SUBSTANTIAL EVIDENCE

Facts:

The Whiting-Turner Contracting Company, appellant, was a general contractor on a construction project at the Westfield Montgomery Mall, in Bethesda, Maryland. The project involved the construction of additional floors in an existing garage structure to facilitate a theater and food court expansion. To construct the additional floors, Whiting-Turner developed a plan to remove four pre-stressed concrete sections, known as double tees, from the existing second floor and roof of the garage, which would enable Whiting-Turner to position a crane inside the garage. Each double tee section was 60-feet long, 9-feet wide and weighed approximately 42,800 pounds.

For the second-floor double tees, Whiting-Turner's plan was to raise, or "jack," the double tees at a level position so that it could slide or skate the double tees onto the parking deck adjacent to their location. To support and remove the double tees, Whiting-Turner employed the use of four jacking towers at each of the four corners of the double tee, and four shoring towers were positioned to the outside of the jacking towers. Each shoring tower had the capability to support 44,000 pounds. Positioned at the top of the towers, Whiting-Turner utilized a combination of W8x10 and W8x31 beams.

At one point during the removal process of the western double tee located on the second floor of the garage, the workers noticed that one of the beams was curled on top of the towers, meaning that it was slightly bent. This signaled that the double tee was unstable, and the beam would need to be replaced. To facilitate the replacement, the site foreman instructed the workers to jack the double tee to take the weight off the southeast shoring tower, and once the weight was adjusted, workers would then switch out the bent beam. Before removing the beam, workers heard a loud crack followed by the sound of steel crashing. As a result of the collapse, one worker died and a second worker, who was pinned by the falling structure, sustained serious bodily injuries.

Maryland Occupational Safety and Health ("MOSH"), a division of the Department of Labor, Licensing and Regulation, issued a Citation alleging a violation of the General Duty Clause as set forth in Md. Code (2016 Repl. Vol.) § 5-104(a) of the Labor and Employment ("LE") Article. On agency review, the Commissioner for Labor & Industry, appellee, upheld the citation, and the Circuit Court for Baltimore County affirmed.

Held: Reversed and remanded.

Judgment of the circuit court reversed and remanded with instructions to reverse the Commissioner's Final Order and Decision.

Pursuant to LE § 5-104(a), "[e]ach employer shall provide each employee of the employer with employment and a place of employment that are: (1) safe and healthful; and (2) free from each recognized hazard that is causing or likely to cause death or serious harm to the employee."

To establish a violation of the General Duty Clause, MOSH must prove: (1) a condition or activity in the workplace presented a hazard to employees; (2) the hazard was "recognized"; (3) the hazard was likely to cause death or serious physical harm; and (4) "'feasible means to eliminate or materially reduce the hazard existed.'" *SeaWorld of Florida, LLC v. Perez,* 748 F.3d 1202, 1207 (D.C. Cir. 2014) (quoting *Fabi Constr. Co. v. Sec'y of Labor,* 508 F.3d 1077, 1081 (D.C. Cir. 2007)). *Accord Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n,* 489 F.2d 1257, 1265 (D.C. Cir. 1973). If MOSH fails to produce evidence showing each element of a violation, the record does not contain substantial evidence to support a finding in MOSH's favor. *SeaWorld,* 748 F.3d at 1263.

"Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry." *Kelly Springfield Tire Co. v. Donovan,* 729 F.2d 317, 321 (5th Cir. 1984). *Accord St. Joe Minerals Corp. v. Occupational Safety & Health Review Comm'n,* 647 F.2d 840, 845 (8th Cir. 1981) ("A hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry.") (quoting *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977)). Whether a work condition constitutes a recognized hazard is a question of fact. *SeaWorld,* 748 F.3d at 1208.

MOSH failed to prove that Whiting-Turner's (1) failure to utilize gooser braces and (2) use of the spacer beams were "recognized" hazards. With respect to the gooser braces, MOSH's sole evidence to support its theory that the lack of gooser braces was a recognized hazard was the manufacturer's brochure for the shoring tower, which stated that the positioning of gooser braces "start when the extension frame is put at a 2′ or more extension." The brochure, however, did not suggest that the use of gooser braces was a safety requirement or that the failure to use them could cause injury. With respect to the spacer beams, MOSH's expert testified that he had not previously seen a set up of the spacer beams similar to that utilized by Whiting-Turner. The expert, however, did not testify that this set up was a recognized hazard within the industry. Indeed, he testified that Whiting-Turner's use of "the W8x10 [spacer beam] did not fail in the normal jacking operation," but rather, it failed only when "the SE jack was used to raise the double tee." There was not substantial evidence in the record to support a finding of a recognized hazard to support a citation for a violation of the General Duty Clause.

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Brian Blood v. Columbus US, Inc., No. 1962, September Term 2016, filed April 30, 2018. Opinion by Wright, J.

https://mdcourts.gov/data/opinions/cosa/2018/1962s16.pdf

LABOR AND EMPLOYMENT – WHAT ARE WAGES – WAGE LIEN – WAGE PAYMENT ACT

Facts:

On December 1, 2015, Brian Blood, a former joint owner of an IT business who had entered into a Vice President contract with Columbus US, Inc, resigned from his position. At the end of December, Blood notified Columbus that if he did not receive notification from Columbus that they had notice of his resignation, he would deem the non-competition clause from his Vice President contract waived. After corresponding with Columbus US, Inc. between January 2016 to April 2016, Blood sent Columbus a "Notice to Employer of Intent to Claim Lien for Unpaid Wages." Blood argued that Columbus did not timely and regularly pay him wages owed for his non-competition. Blood claimed that because of his non-competition after his resignation from Columbus, he was owed at least $53,333.32 in unpaid wages. On May 19, 2016, Columbus filed a complaint for an order denying Blood's Claim of Lien for Unpaid Wages, and argued that Blood's remuneration was conditioned on a covenant not to compete and, therefore, was not recoverable under the Wage Payment Act. Blood again filed a second Notice to Employer of Intent to Claim a Lien for Unpaid Wages. After Columbus failed to respond within 30 days, Blood recorded the wage lien against Columbus. After Columbus learned of the recorded wage lien, it filed a Petition to Extinguish a Recorded Wage Lien, which was later amended to a Complaint to Extinguish Recorded Wage Lien.

The case came before the circuit court on September 2, 2016. Blood maintained that his remuneration did not constitute a *quid pro quo* and fell within the scope of the Wage Payment Act. Columbus averred that the non-competition clause in Blood's Vice President contract was a quid pro quo because it conditioned payment on Blood's non-competition with Columbus. After analyzing *Stevenson v. Branch Banking and Trust Corp*., 159 Md. App. 620 (2004) and *Aronson & Co. v. Fetridge*, 181 Md. App. 650 (2008), the circuit court found that the language "in exchange for" in Blood's contract rendered it a *quid pro quo*. Additionally, the court found that Blood's contract was distinguishable from the contract at issue in Aronson. The circuit court denied Blood's claim for a Wage Lien.

Held: Affirmed

The Court of Special Appeals affirmed the judgment of the Circuit Court for Frederick County.

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The Court held that the phrase "in exchange for," made it clear that the alleged compensation did not vest during Blood's employment, and was therefore not a "wage." The Court also held that Blood's Vice President contract did not fit neatly under its decisions in *Stevenson* and *Aronson*. The Court held that Blood did not have a Wage Payment Act claim because his non-competition compensation was not "wages due for work that [Blood] performed before the termination of [his] employment[.]"

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Brandywine Senior Living at Potomac LLC, et al. v. Ronald A. Paul, et al., No. 2428, September Term 2016, filed April 30, 2018. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2018/2428s16.pdf

LAND USE – CONDITIONAL USE – MODIFICATION OF PLANS DURING HEARING – CONSIDERATION OF DEPARTING CONDITIONAL USE WHEN DETERMINING WHETHER A NEIGHBORHOOD HAS BEEN ALTERED

Facts:

Brandywine Senior Living at Potomac, LLC ("Brandywine") sought conditional use approval to build a 3-story residential care facility on a property ("Property") in the Potomac area of Montgomery County. Various neighbors, including the Pauls, opposed the project. The Pauls are the only parties whose property directly abuts the project site. The Property was formerly home to a tennis club, which operated pursuant to a prior special exception/conditional use. The Property is adjacent to the Manor Care/Arden Courts assisted living complex and the Falls Road Golf Course. The Bullis School and the Normandie Farms Restaurant are also in the neighborhood. The neighborhood is zoned R-2, large lot residential.

The Montgomery County Board of Appeals approved the conditional use. Various neighbors filed a petition for judicial review. The Montgomery County Circuit Court affirmed in part and reversed in part. The circuit court determined that the hearing examiner did not err by permitting Brandywine to modify its application during the hearing. The circuit court reversed the decision of the hearing examiner on the basis that the hearing examiner improperly considered the departing conditional use. All parties appealed to this Court.

Held: Affirmed in part and reversed in part.

First, the Court of Special Appeals considered whether the hearing examiner erred by permitting Brandywine to submit modified plans during the hearing in response to various issues raised by the opposing parties. The Pauls asserted that the hearing examiner committed prejudicial legal error by failing to hold a fair and impartial hearing. They argued that the hearing examiner encouraged Brandywine to modify the application, thereby impermissibly aligning himself with Brandywine. Brandywine and the County assert that the hearing examiner did not require changes and that modification of the application was permitted. The Court of Special Appeals agreed with Brandywine and the County that Brandywine's amendment of the application was not improper and that the hearing examiner did not improperly align himself with the applicant by inviting Brandywine to modify its plans to enhance compatibility with neighbors.

Second, the Court of Special Appeals addressed the neighbors' challenges to specific findings of the hearing examiner. The neighbors argued that the hearing examiner inappropriately considered the departing tennis facility when determining whether the proposed use conformed with the master plan and was compatible with the surrounding residential neighborhood. The Court of Special Appeals held that the hearing examiner did not err by considering the current state of the neighborhood (including the departing conditional use) when evaluating whether the neighborhood would be altered. The Court further observed that the hearing examiner emphasized that the particular neighborhood included a restaurant, another assisted living facility, a golf course, and a school, rendering the neighborhood far from entirely residential.

The Court of Special Appeals also affirmed the hearing examiner's determinations with respect to noise impacts and adequacy of storm drainage. These findings were supported by evidence and the Court declined to re-weigh the conflicting evidence presented with respect to these issues.

Finally, the Court considered whether the hearing examiner properly evaluated the proposed project's effect on the economic value of the Pauls' property. The Court determined that the departing conditional use could be considered in this context because the determination of the effect of economic value must consider the current value as a baseline, and the current value is affected by the current neighboring use (the tennis court). The Court also held that the hearing examiner applied the correct standard when considering the proposed conditional use on the economic value of the neighboring property.

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Dan's Mountain Wind Force, LLC v. Allegany County Board of Zoning Appeals, No. 804, September Term 2016, filed April 3, 2018. Opinion by Friedman, J.

https://mdcourts.gov/data/opinions/cosa/2018/0804s16.pdf

LAND USE – ZONING VARIANCES – UNIQUENESS

LAND USE – ZONING VARIANCES – PRACTICAL DIFFICULTY AND UNNECESSARY HARDSHIP

Facts:

Dan's Mountain Wind Force purchased and leased property on Dan's Mountain to build and operate a wind farm. The Allegany County Zoning Code has minimum separation and setback requirements for wind turbines, and Wind Force applied for several variances from each to construct 17 wind turbines and a substation at the site. Wind Force entered into leases with all of the property owners whose residences fell within the minimum separation and setback distances from the proposed construction sites.

In its application and in hearings before the Allegany County Board of Zoning Appeals, Wind Force presented evidence and expert testimony to demonstrate that while Dan's Mountain was an ideal location for a wind farm, there were many specific factors that limited the specific locations on which turbines could be placed. Wind Force presented ten factors that, it argued, uniquely affected the sites on Dan's Mountain and limited the locations on which turbines could be placed.

The Allegany County Board of Zoning Appeals found that, *first*, the factors proved by Wind Force were each shared by the other surrounding properties on Dan's Mountain—that is, the other applicant properties—and that the factors cited by Wind Force were therefore not unique. *Second*, the Board also found that the number of variances requested, 26, was simply too many to grant, given that the purpose of zoning law is uniformity. *Finally*, the Board found that the effect of the setback and minimum separation requirements on Wind Force did not present an unnecessary hardship.

Wind Force took an administrative appeal to the Circuit Court for Allegany County, which affirmed.

Held: Reversed.

Under Maryland law, zoning variances are subject to a two-step test: *first*, the property must be unique, and *second*, that uniqueness must cause a practical difficulty or unnecessary hardship for the applicant. This two-step test must be repeated for each variance request. There is no magic

number of variance requests that is "too high;" for some projects 26 variances may be too many, and for some 26 may be appropriate.

A little discussed element of the variance analysis, and particularly of the uniqueness analysis, is the element of nexus. That is, the unique aspect, or aspects, of the property must relate to—have a nexus with—the aspect of the zoning law from which a variance is sought. Further, aspects of a given property may combine to have a unique effect on the property, and if that effect has a nexus with the area of zoning law from which a variance is sought, that suffices to satisfy the uniqueness analysis.

Therefore, a body conducting a variance analysis must conduct the following inquiry to determine whether the property is unique: *first*, are the unusual factors identified by the applicant, in fact, features of the subject property; *second*, does the effect, or effects, of the those factors, taken together, have a nexus with the area of zoning law from which a variance is sought; and *third*, is that effect unique as compared to similarly situated properties.

The Board erred in its uniqueness analysis in three ways: *first*, by failing to properly identify each property's unusual attributes and compare them to other properties; *second*, by failing to understand and apply the requirement of nexus; and *third*, by using too generalized an analysis.

The Board further erred in its analysis of the second prong of the variance test. The Board applied the stricter unnecessary hardship test. The unnecessary hardship standard is appropriate when the requested variance is a "use variance," while the more lenient practical difficulty standard is appropriate when the requested variance is an "area variance." Wind Force here requested area variances, and therefore the practical difficulty standard was appropriate.

The case is remanded to the Allegany County Board of Zoning Appeals to reopen the case and review the requests for variances under the correct legal framework.

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O'Brien Atkinson, IV, et al. v. Anne Arundel County, No. 788, September Term 2016, filed March 28, 2018. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2018/0788s16.pdf

LOCAL GOVERNMENTS – CHARTER COUNTIES – CHARTER PROVISIONS – TENETS OF INTERPRETATION

Facts:

The Charter for Anne Arundel County ("Charter") grants public safety employees the right to bargain collectively and submit to binding arbitration any resulting labor disputes concerning the "terms and conditions of employment." In 2014, the Anne Arundel County Council ("County Council") adopted Bill 85-13. Certain provisions of the Bill, enacted as § 6-1-308(b)(2)-(4) and (i)(4)-(6) of the Anne Arundel County Code ("Code"), exclude employee health insurance benefit options and health insurance plans from collective bargaining and arbitration.

After the County Administrator, relying on the new law, declined to negotiate employee health insurance benefit options and plans, aggrieved members of the public safety unions affected by Bill No. 85-13 ("Appellants") filed a declaratory judgment action in the Circuit Court for Anne Arundel County against Anne Arundel County ("County"). Appellants alleged that the County Council exceeded its legislative authority in enacting Bill 85-13. The County filed a counterclaim for declaratory judgment, asserting that the County Council's passage of Bill 85-13 was a lawful exercise of its legislative powers. The parties filed cross-motions for summary judgment. After a hearing, the circuit court denied Appellants' motion and granted summary judgment in favor of the County. Appellants noted a timely appeal to the Court of Special Appeals, asking: (1) whether laws enacted pursuant to Bill 85-13 that prohibit collective bargaining and arbitration over employee health insurance benefit options and plans violate the form and structure of the County's annual budget and appropriation process established under Charter Article VIII, §§ 811 and 812; and (2) whether the circuit court erred when, rather than apply the plain meaning of the phrase "terms and conditions of employment" contained in Charter § 812, it deferred to the County Council to define the scope of the law.

Held: Reversed and remanded.

The Court of Special Appeals held that the phrase "terms and conditions of employment," as employed in the Anne Arundel County Charter, is a term of art that includes health insurance benefits. In so holding, the Court reaffirmed that interpreting ambiguities in county charters is a justiciable issue. Then, after concluding that the County Charter creates a two-step process by which the County must submit terms and conditions of employment to collective bargaining and arbitration, the Court held that the County Council may not restrict the scope of negotiations to

the point that Appellants' right to "bargain" over health insurance benefits is rendered meaningless. Because the appeal came from an erroneous grant of summary judgment, however, the Court determined that the record was not developed sufficiently to define the scope of collective bargaining rights intended under Charter §§ 811 and 812 and remanded the case for further proceedings.

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Benjamin L. Kirson, et al. v. Devon Johnson, No. 1861, September Term 2016, filed April 2, 2018. Opinion by Nazarian, J.

https://www.courts.state.md.us/data/opinions/cosa/2018/1861s16.pdf

TORTS – PLAINTIFF'S BURDEN OF PROOF OF A SUBSTANTIAL FACTOR

NOTICE OF HOUSING CODE VIOLATIONS

Facts:

Devon Johnson sued his former landlords, Benjamin L. Kirson, individually and as trustee of assets of BenLee Realty, LLC (collectively the "Landlords"), in the Circuit Court for Baltimore City. He alleged that he had been poisoned by lead-based paint during the time he lived in a home that the Landlords owned and managed. At the close of Mr. Johnson's case, the Landlords moved for judgment, and the trial court denied the motion. After a six-day trial, a jury returned a verdict in Mr. Johnson's favor and awarded damages totaling $1,628,000. The Landlords moved for judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial, and moved to reduce the amount of non-economic damages. The trial court denied their JNOV motion but reduced the non-economic damages to $1,173,000.

Held: Affirmed.

The Court of Special Appeals held that the circuit court properly denied the Landlords' motions for judgment. The Landlords, citing *Bartholomee v. Casey*, 103 Md. App. 34, 56 (1994) and *Johnson v. Rowhouses*, 120 Md. App. 579 (1998), framed the issue as one of notice, arguing they didn't have notice of deteriorating paint conditions in a specific portion of the house therefore they can't be liable for any lead exposure that occurred there. They argued as well that the Housing Code's prohibition of defective conditions applies only to interior surfaces, and that both *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70 (2003) and section 703 of the Housing Code concern only deteriorated lead-based paint found inside a property, not outside. Therefore, they argued, they were entitled to judgment unless Mr. Johnson could connect the lead in his blood to paint that chipped or flaked at specific places *inside* the Property. The Court concluded that a lead-paint plaintiff is not required to prove that lead from a specific place within a property substantially contributed to his or her injuries. Rather, a plaintiff is required to produce evidence from which a jury can find that lead-based paint was present at the property and that exposure from the lead in that property substantially contributed to his or her related injuries. The Court also held that a tenant is not required to show that a landlord had notice of Baltimore City Housing Code violations in order to establish a prima facie case of negligence in a lead-based paint case.

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The Retina Group of Washington, P.C. v. Gustavo Crosetto, No. 2385, September Term 2016, filed April 27, 2018. Opinion by Eyler, Deborah S., J.

https://mdcourts.gov/data/opinions/cosa/2018/2385s16.pdf

MEDICAL MALPRACTICE – CERTIFICATE OF QUALIFIED EXPERT – RESPONDEAT SUPERIOR LIABILITY OF HEALTH CARE PROVIDER PRINCIPAL BASED ON NEGLIGENCE OF AGENT – AGENT MUST BE IDENTIFIED AND AGENT'S BREACH OF THE STANDARD OF CARE MUST BE IDENTIFIED IN CERTIFICATE.

Facts:

Mr. Crosetto was examined by Dr. Desai, a retinal surgeon who is a member of The Retina Group of Washington ("RGW"). Dr. Desai diagnosed a large retinal tear in the left eye that needed prompt repair. At the time of that examination, Mr. Crosetto had an elevated intraocular pressure ("IOP") in the left eye. The repair was performed two days later by Dr. Sanders, another retinal surgeon with RGW. The repair was performed at the Friendship Ambulatory Care Center ("FASC"). There is no evidence that FASC and RGW are related entities. Dr. Sanders sutured the tear and inserted a 20% C3F8 gas tamponade in the vitreous humor to hold the repair in place. The gas bubble would dissipate over a period of weeks. After the surgery was completed, Mr. Crosetto was kept in the recovery room for 45 minutes and then was discharged to home. In follow up visits, he could not see out of his left eye, except for dark and light. Eventually he was diagnosed as having suffered atrophy to the optic nerve of that eye.

In the Health Care Alternative Dispute Resolution Office, Mr. Crosetto and his wife brought a claim for medical negligence against RGW and Dr. Sanders. They filed a certificate of qualified expert and report by Dr. Josephberg who stated that Dr. Sanders breached the standard of care by using the 20% C3F8 gas tamponade, instead of a different gas, and not monitoring the IOP before and after surgery; and that his negligence proximately caused the loss of vision in Mr. Crosetto's left eye. The certificate did not identify any other agent of RGW as having breached the standard of care. The Crosettos unilaterally waived out of arbitration and into circuit court.

After discovery was completed, the Crosettos filed a supplemental certificate of qualified expert, pursuant to section 3-2A-06D of the Courts and Judicial Proceedings Article, also by Dr. Josephberg, that only identified Dr. Sanders as having breached the standard of care. In their joint pretrial statement, they only identified Dr. Sanders as having breached the standard of care. A few weeks before trial, they filed an amended complaint that alleged that Mr. Crosetto's elevated IOP should have been treated with drops prior to surgery. The amended complaint did not identify any health care provider alleged to have acted negligently other than Dr. Sanders.

Soon before trial, the parties met with the assigned trial judge and discussed, among other things, a verdict sheet to be used. The Crosettos proposed a verdict sheet that would allow the jurors to decide the liability of RGW separately from the liability of Dr. Sanders. Counsel for RGW

objected on the ground that RGW's alleged liability was based solely on respondeat superior, and Dr. Sanders was the only agent of RGW identified in the certificates of qualified expert as having breached the standard of care. The court denied the objection and accepted the verdict sheet as proposed by the Crosettos.

At trial, Dr. Josephberg criticized Dr. Desai for not having treated the elevated IOP prior to surgery, although he did not opine to a reasonable degree of medical certainty that Dr. Desai breached the standard of care. He testified that Dr. Sanders breached the standard of care by not treating the IOP and by using the 20% C3F8 gas tamponade. He testified that it was a breach of the standard of care for Mr. Crosetto not to have been monitored for six to eight hours after surgery. At the close of the evidence, RGW moved for judgment to the extent that any liability it might incur would be based on actions or omissions of its agents other than Dr. Sanders.

Using the special verdict sheet that RGW had objected to, the jury returned a verdict answering "no" to the question whether Dr. Sanders breached the standard of care and "yes" to the question whether RGW "by and through any one of its agents (excluding Defendant [Dr. Sanders]) negligently failed to follow one or more standards of care owed to [Mr. Crosetto] before, on, or after the [date of the surgery]." They further found that the violation of the standard of care "by the agents and employees of [RGW] was a proximate cause of the injury to [Mr. Crosetto]" and awarded damages. RGW filed a motion for JNOV, which was denied.

Held:

Judgment in favor of the Crosettos and against RGW reversed. RGW's alleged liability was predicated solely on respondeat superior. There was no evidence of independent negligence, and the jury was asked to decide liability based on respondeat superior. For a defendant health care provider to be liable for medical negligence based on respondeat superior, *i.e.*, for being the principal of an agent health care provider, the plaintiff's certificate of qualified expert must identify the agent, specify the standard of care applicable to the agent, specify that the standard of care was breached, and state that the breach proximately caused the plaintiff's injury. Here, the only agent of RGW identified in the Crosettos' two certificates of qualified expert as having breached the standard of care was Dr. Sanders. No other agent of RGW, including Dr. Desai, was identified. Accordingly, RGW only could be found liable based on the negligence of Dr. Sanders. Because the jury found that Dr. Sanders did not breach the standard of care in his treatment of Mr. Crosetto, RGW could not be found liable. In addition, the evidence at trial was legally insufficient to support a finding of negligence on the part of any health care provider other than Dr. Sanders.

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Claudette Norman-Bradford v. Baltimore County Public Schools, et al., No. 2536, September Term 2016, filed April 30, 2018. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2018/2536s16.pdf

WORKERS' COMPENSATION ACT – APPLICATION TO ORDINARY DISABILITY RETIREMENT BENEFITS – MD. CODE. ANN. (1991, 2016 REPL. VOL.), LAB. & EMPL. ART. § 9-610 OFFSET PROVISION APPLIES

WORKERS' COMPENSATION ACT – MD. CODE ANN. (1991, 2016 REPL. VOL.), LAB. & EMPL. ART. § 9-610 – OFFSET FOR PAYMENT OF BENEFITS THAT ARE "SIMILAR BENEFITS" TO WORKERS' COMPENSATION BENEFITS – APPLICATION TO ORDINARY DISABILITY RETIREMENT BENEFITS

WORKERS' COMPENSATION ACT – MD. CODE ANN. (1991, 2016 REPL. VOL.), LAB. & EMPL. ART. § 9-610 – OFFSET FOR PAYMENT OF BENEFITS THAT ARE "SIMILAR BENEFITS" TO WORKERS' COMPENSATION BENEFITS – APPLICATION TO ORDINARY DISABILITY RETIREMENT BENEFITS – ORDINARY DISABILITY RETIREMENT BENEFITS AWARDED ON THE BASIS OF A PREEXISTING MEDICAL CONDITION

Facts:

Claudette Norman-Bradford suffered an accidental injury while working for the Board of Education of Baltimore County (the "Employer") and suffered injuries to her back, right ankle, hip, knee, and wrist. Her pre-accident medical history included neck, head, and back injuries from various accidents and diagnoses of fibromyalgia and hypertension. She filed a claim with the Workers' Compensation Commission (the "Commission") and was awarded workers' compensation benefits. She also applied for *accidental* disability retirement benefits from the Maryland State Retirement and Pension System ("SRPS"), but was granted an *ordinary* disability retirement instead. The Employer petitioned the Commission to offset Ms. Norman-Bradford's ordinary disability retirement benefits against her workers' compensation benefits, citing the statutory offset provision in Maryland Code (1991, 2016 Repl. Vol.), § 9-610(a)(1) Labor and Employment Article ("LE"). The Commission decided that the Employer was not entitled to an offset, and the Employer petitioned for judicial review in the Circuit Court for Baltimore County. After a hearing on cross-motions for summary judgment, the circuit court granted the Employer's motion and reversed the Commission's decision after finding that the benefits Ms. Norman-Bradford received were "similar," which triggered the statutory offset.

Held: Affirmed.

Ms. Norman-Bradford argued *first* that the circuit court erred in finding that LE § 9-610, not § 29-118 of the State Personnel and Pension Article ("SP"), governs the Employer's right to an offset, and *second* that even if LE § 9-610 applies, the court erred in finding that her ordinary disability retirement benefits and workers' compensation benefits are "similar." The Court of Special Appeals held that circuit court correctly applied LE § 9-610 instead of SP § 29-118 to assess the Employer's right to an offset. The Court reasoned that in light of the 2004 amendment of SP § 29-118, a retiree employed by a county board of education who receives ordinary disability retirement benefits through that employer remains subject to the offset provision in LE § 9-610, not the offset provision in SP § 29-118. As to her second argument, the Court determined that both sets of benefits awarded to Ms. Norman-Bradford were awarded for the same injuries and physical incapacity, and were thus similar. Relying on *Reger v. Washington Cty. Bd. of Educ*., 455 Md. 68 (2017), the Court of Special Appeals held that ordinary disability retirement benefits are "similar" to workers' compensation benefits, and the statutory offset in LE § 9-610 applies, when the record reflects that the same physical incapacity for which ordinary disability retirement benefits were awarded forms the basis for the workers compensation benefits. Additionally, the Court held that when a claimant suffers an injury involving a preexisting condition that is triggered or exacerbated by an accidental injury, LE § 9-610 offset still applies, even if the Maryland State Retirement Pension System and Worker's Compensation Commission awarded benefits for the same injury but found different causes for that injury.

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ATTORNEY DISCIPLINE

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By a Per Curiam Order of the Court of Appeals dated April 10, 2018, the following non-admitted attorney has been excluded from exercising the privilege of practicing law in this state:

BENJAMIN N. NDI

*

By an Order of the Court of Appeals of Maryland dated April 19, 2018, the following attorney has been disbarred:

JEFF A. GODFREY

*

RULES ORDERS AND REPORTS

A Rules Order pertaining to amendments to the One Hundred Ninety-Fifth Report of the Standing Committee on Rules of Practice and Procedure was filed on April 9, 2018.

https://mdcourts.gov/sites/default/files/rules/order/ro195.pdf

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UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

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