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Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Melodie Venee Shuler, Misc. Docket AG No. 81, September Term 2015, filed July 11, 2017. Opinion by Harrell, J.

http://www.courts.state.md.us/opinions/coa/2017/81a15ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

Gale Scoggins, mother of Calvin Keene, retained Respondent Shuler in March 2011 to represent her son in pursuit of a modification of sentence in two criminal cases in the Circuit Court for Prince George's County. Scoggins paid Respondent $750 in cash to obtain her representation of Keene. According to Md. Rule 4-345(e)(1)(B), governing the revisory power of a sentencing court over sentences, the sentencing court's ability to revise/modify a sentence expires five years "from the date the sentence originally was imposed . . . ." Accordingly, because Keene had been sentenced on 14 August 2008, any modification had to be acted on or before 14 August 2013, or the sentencing court would lose its authority to act in such regard.

Respondent was unaware (at all relevant times until at least 14 August 2013) that Keene's prior counsel had filed a motion to reconsider sentence, which remained unacted on until it became a nullity on 14 August 2013. Had she appreciated that this motion could have been brought to a hearing (as is or amended), Scoggins and Keene might have been spared a great deal of angst.

Respondent entered her appearance as Counsel for Keene in the two criminal matters on 8 June 2011; however, her communications with Scoggins became sporadic thereafter. According to Scoggins, many of her telephone and text messages to Respondent seeking status updates went unanswered for weeks at a time. Respondent promised to visit Keene in jail in May of 2012 and to seek a meeting later in April 2012 with the State's Attorney's Office to attempt to gain support for sentence modification. Respondent did none of these things in the time frames promised or otherwise, and continued not to respond timely to Scoggins's emails and letters seeking updates.

After failing to meet the August 2013 deadline, Respondent requested on 2 October 2013 an additional $500 to complete the representation of Keene, stating that Respondent discovered only lately that Keene had been sentenced in two criminal cases, rather than one. The cycle of unfulfilled promises by Respondent to act continued throughout 2014. On 15 October 2014,

Respondent represented to Keene that she was "in the process of filing" a Motion for Post-Conviction Relief on his behalf. At the same time, she solicited an additional $400, noting that the new total fee would be $1,500.

Respondent filed a motion to withdraw as Keene's counsel on 30 April 2015, having filed no motion for relief on behalf of Keene, after she learned that Keene had filed a bar complaint about her representation. Respondent did not respond to Bar Counsel's multiple requests in February and March for a response to the complaint. She did respond, of a sort, to Bar Counsel's third invitation by advising Bar Counsel that she had been diagnosed with pneumonia on or about 26 February 2015. Thereafter, Respondent rebuffed Bar Counsel's investigatory requests for information and indicated that she would respond, if at all, solely to emails. Respondent's intransigence continued to the time of public charges in the matter.

Petitioner, the Attorney Grievance Commission of Maryland, by its Bar Counsel, filed with the Court of Appeals on 25 February 2016 public charges in this matter against Respondent, Melodie Venee Shuler. The charges stemmed from the complaint lodged by Keene. Following two days of evidentiary hearings, the Hon. Ronald A. Silkworth of the Circuit Court for Anne Arundel County concluded that Respondent violated MLRPC 1.1, 1.2, 1.3, 1.4(a), 1.4(b), 8.1, 8.4(a), 8.4(c), and 8.4(d). In addition, he found that the evidence demonstrated, by clear and convincing standard, nine aggravating factors infecting Respondent's misconduct. Respondent did not persuade Judge Silkworth, by a preponderance of the evidence, of the existence of any mitigating factor.

Petitioner filed no exceptions and sought disbarment. Respondent filed written exceptions alleging that: Keene knew about the five-year deadline; Keene refused to choose and consent to a particular legal procedure; Respondent advised Keene of his legal options; Respondent could not take legal action in June 2013 because she needed to have her law license reinstated; Scoggins and/or Keene failed to pay fully and timely Respondent's fee; Respondent offered a partial refund of fees paid; Respondent's attempt to visit Keene in jail was denied by the jail due to racism; and; Respondent did not refuse intentionally to comply with Bar Counsel's demands for information.

Held: Disbarred.

The Court of Appeals determined that, although some of Respondent's exceptions contained valid factual allegations—namely that Keene knew about the five-year deadline, that Respondent offered Scoggins a partial refund, and that Respondent needed to have her law license reinstated in June 2013—none of Respondent's exceptions were sufficient to refute the hearing judge's legal conclusions (often framed in alternate grounds) that Respondent violated Rules 1.1, 1.2(a), 1.3, 1.4(a) and (b), 8.1(b), and 8.4(a), (c), and (d).

The Court determined that Respondent engaged in dishonest conduct by failing to follow through on her promises to visit Keene in jail and file motions on his behalf, and by misrepresenting the

operation of the five-year deadline for obtaining a disposition hearing on a Motion for Modification of Sentence. She appeared also to fail to recognize that Keene's prior counsel had filed an unacted-upon sentence modification motion because she spent considerable time promising to prepare and file such a motion. Moreover, Respondent disregarded repeatedly the legal needs of, and requests for communication by, Keene and Scoggins. In addition to these violations, Respondent's misconduct was compounded by a variety of aggravating factors, including the likelihood of repeating similar misconduct in the future. Respondent's history of violating the Court's rules of professional conduct and lack of remorse or ameliorative action suggests that her continued ability to practice law in Maryland represented a grave risk to the public and the legal profession. Accordingly, the Court issued a per curiam order disbarring Respondent on 3 April 2017, with this opinion to follow.

Hanover Investments, Inc. et al. v. Susan J. Volkman, No. 9, September Term 2016, filed July 31. 2017. Opinion by McDonald, J.

Harrell, J., dissents.

http://mdcourts.gov/opinions/coa/2017/9a16.pdf

DECLARATORY JUDGMENTS ACT – EFFECT OF PENDING LITIGATION.

Facts:

One Call Concepts, Inc. ("OCC") is a Maryland corporation that provides information on underground utility lines to excavators; it is known locally by its trade name, "Miss Utility." Susan Volkman began working for OCC in 1984, moved up the company ranks, and eventually relocated to Minnesota to serve as an OCC regional manager.

At the time of the underlying events of this case, Ms. Volkman's employment with OCC was governed by an employment agreement. Under that agreement, OCC could terminate Ms. Volkman with or without good cause. If termination were with good cause (defined to include, *e.g.*, neglect of duties), OCC could terminate Ms. Volkman immediately; otherwise, it was required to give her 15 days' notice and 15 days' pay.

In 2007, Thomas Hoff – the founder of OCC – decided to sell the company to several of its longtime employees, including Ms. Volkman. He created Hanover Investments, Inc. ("Hanover"), sold OCC to Hanover, and allowed the selected employees to purchase shares of Hanover for a nominal price. Ms. Volkman purchased 190 shares of Hanover, or 19% of the corporation's stock.

The new shareholder-employees were required to enter into a Shareholders' Agreement under which Hanover retained the right to repurchase their shares if and when they stopped working for OCC. If a shareholder-employee were terminated with good cause – and Hanover's board agreed that the termination was with good cause – the shareholder-employee's shares would be redeemed for 10% of their shares' "Fair Market Value." (Hanover's "Fair Market Value" was set each year by the company's board.) If a shareholder-employee were terminated without good cause – and Hanover's board so agreed – the shareholder-employee's shares would be redeemed for their full "Fair Market Value."

In early 2010, OCC terminated Ms. Volkman, giving several reasons why there was good cause to do so. It correspondingly redeemed her Hanover shares for 10% of their Fair Market Value.

In April 2012, Ms. Volkman sued OCC and Mr. Hoff in the Circuit Court for Montgomery County, alleging that OCC terminated her without good cause and raising a breach of contract claim and several tort claims (the "Employment Agreement Action"). In November 2012, the Circuit Court dismissed the tort claims but allowed the breach of contract claim to proceed. It

ruled, however, that Ms. Volkman would be entitled to, at most, nominal damages on that claim. (The basis for this ruling is unclear, but it could have been based on the fact that OCC continued to pay Ms. Volkman for 15 days after terminating her, even though the employment agreement allowed for immediate termination with good cause.) After this ruling, in March 2013, Ms. Volkman voluntarily dismissed the Employment Agreement Action with prejudice.

In January 2013 – after the Circuit Court ruled that she was entitled to only nominal damages in the Employment Agreement Action, but before she voluntarily dismissed that action – Ms. Volkman sued Hanover in a Minnesota state trial court, alleging that OCC lacked good cause when it terminated her and that, therefore, Hanover breached the Shareholders' Agreement by agreeing with OCC that good cause existed and redeeming her stock (the "Shareholders' Agreement Action"). Hanover moved to dismiss the complaint, claiming that the Minnesota court lacked personal jurisdiction over it. The trial court denied that motion in April 2013, and Hanover appealed.

While that appeal was pending, in June 2013, OCC, Hanover, and other Hanover shareholders filed a declaratory judgment action against Ms. Volkman in the Circuit Court for Montgomery County, seeking a declaration that Hanover complied with the Shareholders' Agreement when it redeemed Ms. Volkman's stock (the "Declaratory Judgment Action"). The case was assigned to the same judge who presided over the earlier Employment Agreement Action. Ms. Volkman asked the Circuit Court to either decline jurisdiction or stay the proceedings in light of the pending Shareholders' Agreement Action. The Circuit Court declined to do so and, after holding a trial, issued the requested declaration.

Ms. Volkman appealed to the Court of Special Appeals, where she argued that the Circuit Court should not have entertained the Declaratory Judgment Action while the Shareholders' Agreement Action was pending in Minnesota. The intermediate appellate court agreed with her. The Court of Appeals then granted Hanover's petition for a writ of *certiorari*.

Held:

The Court of Appeals held that it was an abuse of discretion for the Circuit Court to entertain the Declaratory Judgment Action while another action involving the same parties and the same issues – *i.e.*, the Shareholders' Agreement Action – was pending.

As a general rule, a trial court abuses its discretion when, absent unusual and compelling circumstances, it entertains a declaratory judgment action when there is an earlier-filed, pending action involving the same parties that will adjudicate the issues raised in the declaratory judgment action. The Court of Appeals held that the Declaratory Judgment Action involved the same parties as the earlier-filed, pending Shareholders' Agreement Action; the inclusion of OCC and other shareholders in the Declaratory Judgment Action – who were all represented by the same counsel and took the same positions – did not change this assessment. The Court also held

that both actions sought to decide the same issue – *i.e.*, whether Hanover acted properly under the Shareholders' Agreement when it redeemed Ms. Volkman's stock.

The Court also held that there were no unusual and compelling circumstances that would permit the Declaratory Judgment Action to proceed during the pendency of the Shareholders' Agreement Action. Among other things, Hanover had argued that Ms. Volkman engaged in forum shopping by dismissing the Employment Agreement Action and filing the Shareholders' Agreement Action; the Court noted that Hanover, by filing the Declaratory Judgment Action after the Minnesota trial court denied its motion to dismiss for lack of personal jurisdiction, may have engaged in forum shopping itself. Hanover had also argued that it was preferable to have a Maryland court construe a contract governed by Maryland law (as the Shareholders' Agreement was); the Court noted that Minnesota was competent to interpret Maryland law. Hanover had also argued that there was a judicial policy against a multiplicity of suits; the Court noted that allowing a third action to proceed – *i.e.*, the Declaratory Judgment Action – would hardly further that policy. Finally, Hanover had argued that, since the same judge presided over the Employment Agreement Action and the Declaratory Judgment Action, the judge was already familiar with the underlying issues; the Court, after reviewing the record from that earlier action, held that the Employment Agreement Action did not delve deeply into the underlying issue of the Declaratory Judgment Action.

Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group Limited Partnership, LLLP, No. 30, September Term 2016, filed July 18, 2017. Opinion by Raker, J.

http://mdcourts.gov/opinions/coa/2017/30a16.pdf

CONTRACT LAW – INDEMNIFICATION – FIRST-PARTY FEE SHIFTING

Facts:

Petitioner, Bainbridge St. Elmo Bethesda Apartments, LLC ("Bainbridge"), owns the property immediately adjacent to two one-story buildings owned by respondent, White Flint Express Realty Group Limited Partnership, LLLP ("White Flint"). Bainbridge managed the construction and operation of a new 17-story high rise apartment on the property, which required excavation of a 50-foot-deep hole to be held open by steel cables protruding under and onto White Flint's property. Bainbridge and White Flint entered into a "Crane Swing, Tie Back and Swing Scaffold Easement Agreement" ("the Agreement"). The Agreement recognized Bainbridge's right to access the air space above and the ground below White Flint's Property and it provided White Flint a means to seek redress for any potential damage from the construction.

Article 19 of the Agreement, the indemnification clause, provided that Bainbridge:

> "indemnifies, and agrees to defend and hold harmless White Flint . . . from any and all claims . . . costs, expenses, fees, and liabilities (including reasonable attorney's fees, disbursements, and litigation costs) arising from or in connection with Bainbridge's breach of any terms of this Agreement or injuries to persons or property resulting from the Work, or the activities of Bainbridge or its employees, agents, contractors, or affiliates conducted on or about the White Flint Property, including without limitation, for any rent loss directly attributable to any damage to the White Flint Property caused by the construction of the Project . . . ."

During construction, White Flint's experts' detected damage to White Flint's Property, leading to the eventual evacuation of White Flint's two properties. White Flint terminated the Agreement for material breach. Bainbridge claimed it had honored its obligations, argued that White Flint's termination of the contract was itself a material breach, and invited White Flint to engage in a confidential settlement agreement to make White Flint whole. White Flint declined to participate in the settlement discussion and Bainbridge subsequently disclaimed any further ongoing contractual duties to White Flint. In response, White Flint filed a complaint for declaratory judgment that Article 19 and other provisions survived its termination of the Agreement.

The Circuit Court for Montgomery County granted White Flint partial summary judgment on most claims and entered a declaratory judgment. Significantly, the circuit court found that under Article 19 of the Agreement, White Flint was entitled to attorney's fees. Following a hearing,

the circuit court awarded White Flint fees. The Court of Special Appeals, in an unreported opinion, affirmed. *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. Ltd. P'ship, LLLP*, No. 0376 SEPT. TERM 2014, 2016 WL 1321205, at *6 (Md. Ct. Spec. App. Apr. 5, 2016). We granted Bainbridge's petition for writ of certiorari, appealing solely the issue of whether the Agreement, specifically Article 19, entitled White Flint to recover first-party attorney's fees. *Bainbridge St. Elmo Bethesda, LLC v. White Flint Express Realty Grp. Ltd. P'ship, LLLP*, 449 Md. 408, 144 A.3d 704 (2016).

Held: Affirmed.

Petitioner argues that Article 19 does not authorize an award of attorney's fees in first-party actions. Relying on *Nova Research, Inc. v. Penske Truck Leasing Co*., 405 Md. 435, 952 A.2d 275 (2008), for the proposition that an indemnity provision such as Article 19 must unmistakably and specifically authorize a first-party attorney's fee award in the context of the contract as a whole, Bainbridge maintains that the language of Article 19 addresses third-party claims against which Bainbridge is to "defend" and to "hold harmless," negating any suggestion that Article 19 was intended to indemnify White Flint for fees in a first-party action for any breach of the Agreement.

Maryland follows the common law American Rule, which states that, generally, a prevailing party is not awarded attorney's fees. Maryland law draws a distinction between the recovery of attorney's fees incurred in defending against a third-party claim and those expended in prosecuting a claim against the indemnitor. There are four exceptions to the American Rule where a prevailing party may be awarded attorney's fees, including that the parties have an agreement to that effect. The scope of indemnification is a matter of contract interpretation, where a court looks to the terms of the contract to decide whether the parties agreed expressly that attorney's fees would be recoverable in a first-party action.

The contract between the parties in this case, specifically Article 19, provides expressly for the payment of "attorney's fees;" it ties payment of those fees expressly to an action for "breach" of the contract; and it confirms the intent of the parties to cover first-party counsel fees by referring to "rent loss," a first-party loss arising from a breach of the Agreement. Therefore, the Easement Agreement contains sufficient language to authorize first-party fee shifting, and subsequently White Flint is entitled to recover attorney's fees.

Richard and Daphne Ceccone v. Carroll Home Services, LLC, No. 85, September Term 2016, filed July 28, 2017. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2017/85a16.pdf

LIMITATIONS – CONTRACTS – SHORTENING STATUTE OF LIMITATIONS BY CONTRACT.

Facts:

In April 2014, Richard and Daphne Ceccone's oil-fueled furnace malfunctioned, causing damage to the interior of their Anne Arundel County home. The Ceccones suspected faulty maintenance by their oil supplier, Carroll Home Services, LLC ("CHS"), and, in December 2015, they brought a small claims action for damages against the company in the District Court. That court dismissed the action, and the Ceccones pursued a *de novo* appeal in the Circuit Court for Anne Arundel County.

In the circuit court, the CHS moved to dismiss the action as untimely. Although the Ceccones' claim would normally have been governed by the three-year statute of limitations, CHS pointed to a provision in its maintenance contract with the Ceccones that required the Ceccones to bring "all actions, whether based in contract or tort . . . within one year of the cause of action." (The contract did not limit CHS's time to bring an action; in fact, it allowed CHS to "delay enforcing any of [its] rights . . . without losing [them].") Although the Ceccones questioned whether that provision was "reasonable" – and, in the alternative, argued that it was procured through fraud – the circuit court agreed with CHS that the Ceccones were "stuck with" the 1-year time limit and dismissed the action.

The Court of Appeals then granted the Ceccones' petition for a writ of *certiorari*.

Held:

The Court of Appeals held that contractual provisions that shorten the statutorily-prescribed time for bringing an action are enforceable if (1) there is no statute to the contrary, (2) the provision is not the result of fraud, duress, misrepresentation, or the like, and (3) the provision is reasonable in light of all the pertinent circumstances.

No statute forbids contractually-shortened limitations periods in home services maintenance agreements. Before enforcing that provision, however, the circuit court should have addressed the Ceccones' argument that the provision was procured through fraud, and should also have explicitly found that the shortened period was reasonable. In this case, the circumstances pertinent to a finding of reasonableness include, for example, the length of the shortened period, its relation to the statutory period, the relative bargaining power of the parties, the subject matter

of the contract, and whether the shortened limitations period applies only to claims brought by one of the parties, or runs in both directions.

Miguel A. Fuentes v. State of Maryland, No. 64, September Term 2016, filed July 12, 2017. Opinion by Hotten, J.

Watts, J. joins in judgment only. Adkins, J. dissents.

http://mdcourts.gov/opinions/coa/2017/64a16.pdf

CRIMINAL LAW – CONDITION OR STATUS OF THE VICTIM

CRIMINAL LAW – COMMENTS ON MATTERS NOT SUSTAINED BY EVIDENCE – HARMLESS ERROR ANALYSIS

CRIMINAL LAW – EVIDENCE – RELEVANCE

Facts:

A jury in the Circuit Court for Prince George's County convicted the Petitioner, Miguel Fuentes, of second-degree rape and third-degree sexual offense. The jury acquitted Fuentes of fourth-degree sexual offense and second-degree assault. The charges stemmed from a sexual incident between Fuentes and the complaining witness at a Marriott hotel where both were employed. The State alleged that the complaining witness was mentally defective as defined under Md. Code Ann., Criminal Law (2002, 2012 Repl. Vol.) ("Crim. Law") § 3-301 and unable to consent to the sexual activity. Fuentes countered that the complaining witness initiated the sexual contact and fully understood what would transpire.

The complaining witness' testimony was elicited through an American Sign Language interpreter, a certified deaf interpreter, and a Spanish interpreter who interpreted for the deaf interpreter. She testified that she was folding clothes on a table, putting them on shelves, when Fuentes came up to her and put his hands over her mouth. She demonstrated with two dolls indicating that Fuentes came up from the back, grabbed her, opened her zipper, pulled down her pants, and then "touched [her] behind and [she] pushed him away." Afterwards, in pain, the complaining witness went to the bathroom and was surprised to see something red coming from "the lower of [her] body[.]"

A June 2012 blood test revealed that the complaining witness was pregnant. When her mother asked who had impregnated her, she "wrote [Miguel's] name." The complaining witness' mother reported the situation to the Marriott administration and the Office of the State's Attorney. The complaining witness later gave birth to a daughter. A DNA analyst testified that the results of a paternity test indicated that there was a 99.9999996% probability that Fuentes was the child's father.

The complaining witness' mother and sister testified regarding the extent of her disabilities. A case manager from an organization that assists people with disabilities testified that "[b]ecause she has so many disabilities, she has limited language. She's not able to express herself."

Detective Collins of the Prince George's County Police Department interviewed the complaining witness, with the assistance of a sign language interpreter. He testified that she had difficulty understanding and responding to his questions. He further testified that "it took her about five minutes to explain that" the man alleged to have raped her bent her over a chair and locked the door.

In his defense, Fuentes presented testimony from three hotel co-workers. The co-workers testified regarding the complaining witness' ability to communicate and her relationship with Fuentes. Fuentes admitted to having sexual contact with the complaining witness, but claimed it was consensual and initiated by her. He further testified that she had touched him inappropriately before and that he had informed her mother of the behavior. He testified that on the date in question, he encountered her on the third floor and then accompanied her to a closet on the fourth floor. He further testified that she opened the closet and made a motion to him to go inside, and he complied. According to Fuentes, they then engaged in consensual sexual intercourse.

The Court of Special Appeals affirmed in an unreported opinion. The Court of Appeals granted Fuentes' Petition for Writ of Certiorari to consider the following questions:

1. Was the evidence legally insufficient to support Petitioner's convictions where the convictions were contingent on [the victim]'s status as a "mentally defective" individual and the State failed to present evidence that she had been diagnosed with either mental retardation or a mental disorder?

2. Where Petitioner's knowledge of [the victim]'s purported mental deficiency was a required element of both convictions, was it reversible error for the State to inform the jury at closing argument that Petitioner had admitted to taking advantage of her "mental diminished capacity" in an interview that was never admitted into evidence at trial?

3. Where [the victim]'s ability to understand the conduct of others and to communicate with others was central to the jury's determination of whether she could be considered a "mentally defective" individual, did the trial court err in refusing to allow the defense to present employment performance evaluations that assessed both of these skills during her employment which is when the sexual activity took place?

Held: Affirmed.

The Court held that evidence of a medical diagnosis was not required to establish a victim's status as a "mentally defective individual," as defined by Crim. Law (2002, 2012 Repl. Vol.) § 3-301(b). The plain language of the statute does not support a determination that a medical diagnosis is required to prove the status of the victim. Further, the statutes at hand, Crim. Law (2002, 2012 Repl. Vol.) §§ 3-301(b), 3-304(a)(2), and 3-307(a)(2), protect a class of vulnerable individuals, and the requirement of medical evidence would not comport with the protection afforded by the statutes. Thus, in cases such as this, a court must determine whether the

evidence was sufficient on the question of whether the victim was incapable of consent. The Court determined the evidence was sufficient to support Fuentes' convictions.

The Court determined that the prosecutor's closing argument, referencing Fuentes' alleged statement, which was not admitted in evidence, was improper. In the statement, Fuentes allegedly admitted to taking advantage of the complaining witness' limited mental capacity. However, the Court determined that under these circumstances, given: (1) the undisputed evidence that Fuentes and the complaining witness engaged in sexual contact and vaginal intercourse, (2) the evidence regarding the extent that the complaining witness exhibited a mental defect, (3) the duration of the working relationship between the Fuentes and the complaining witness, which supports the determination that Fuentes, at a minimum, reasonably should have been aware of the complaining witness' mental defect, (4) Fuentes' failure to deny knowledge of her diminished mental capacity on cross-examination, and (5) the trial court's instruction, the trial court's overruling of the defense objection to the improper argument constituted harmless error.

Lastly, the Court determined that the trial court properly excluded, on relevance grounds, the complaining witness' employment records. The records were not legally relevant to a determination of whether she was capable of "appraising the nature of the individual's conduct[]" of a sexual nature, or of "resisting vaginal intercourse, a sexual act, or sexual contact[,]" or of "communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact[,]" pursuant to Crim. Law (2002, 2012 Repl. Vol.) § 3-301(b).

Theodore Scott v. State of Maryland, No. 91, September Term 2016, filed July 10, 2017. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2017/91a16.pdf

PROHIBITION ON DOUBLE JEOPARDY – PLEA OF *AUTREFOIS ACQUIT* – DOCTRINE OF COLLATERAL ESTOPPEL – FIFTH AMENDMENT – COMMON LAW – ENHANCED SENTENCES – PRIOR CONVICTIONS FOR CRIME OF VIOLENCE – RESENTENCING

Facts:

The State, Respondent, charged Theodore Scott ("Scott"), Petitioner, with attempted robbery with a dangerous weapon and other crimes. A jury found Scott guilty of all charges. The State filed a notice of enhanced penalty, contending that Scott was subject to a mandatory minimum sentence of twenty-five years of imprisonment, without the possibility of parole, under Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol.) ("CR") § 14-101(d). CR § 14-101(d) provided for an enhanced sentence for a defendant who was convicted of a third crime of violence after having been convicted of two crimes of violence. According to the State, Scott had been convicted of two prior crimes of violence: first-degree assault in Maryland and aggravated assault in the District of Columbia. The District of Columbia conviction resulted from a guilty plea.

Scott filed a motion to strike the notice of enhanced penalties, contending that the conviction for aggravated assault in the District of Columbia did not constitute a conviction for a crime of violence under CR § 14-101(a). Scott argued that the elements of aggravated assault under District of Columbia law were not the same as the elements of first-degree assault under Maryland law.

At the sentencing proceeding, the State offered certified copies of Scott's prior convictions. To establish that the conviction for aggravated assault in the District of Columbia was based on conduct that would have been first-degree assault if Scott had committed the offense in Maryland, the prosecutor advised that the statement of charges from the District of Columbia indicated that Scott had stomped on a person's head until the person lost consciousness.

The Circuit Court for Prince George's County ("the circuit court") determined that the conviction for aggravated assault in the District of Columbia constituted a conviction for a crime of violence under CR § 14-101(d). Accordingly, the circuit court imposed an enhanced sentence for attempted robbery with a dangerous weapon. The circuit court imposed a sentence for use of a handgun in the commission of a crime of violence, consecutive to the sentence for attempted robbery with a dangerous weapon, and a sentence for conspiracy to commit robbery with a dangerous weapon, consecutive to the other two sentences.

Scott noted an appeal. The Court of Special Appeals held that the State had failed to prove that the conviction for aggravated assault in the District of Columbia constituted a conviction for a

crime of violence under CR § 14-101(d) because the State relied on the statement of charges for the District of Columbia offense and not the facts that were used to support the guilty plea. The Court of Special Appeals affirmed the convictions, but vacated the sentence for attempted robbery with a dangerous weapon and remanded for resentencing.

On remand, the State again sought an enhanced sentence. Scott contended that the Double Jeopardy Clause and the prohibition on double jeopardy under the common law of Maryland barred the State from seeking an enhanced sentence on remand.

At the resentencing proceeding, the circuit court admitted into evidence the transcript of Scott's guilty plea proceeding in the District of Columbia, and determined that the conviction for aggravated assault was the equivalent of a conviction for first-degree assault under CR § 14-101(a), *i.e.*, a crime of violence.

Scott's counsel requested that the circuit court make the new sentence for attempted robbery with a dangerous weapon and other crimes concurrent to the two existing sentences. Scott's counsel argued that the existing sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon were consecutive to a sentence that no longer existed. The circuit court reimposed the original enhanced sentence for attempted robbery with a dangerous weapon, and left the existing sentences ordered to be served consecutively.

Scott noted an appeal. The Court of Special Appeals affirmed the circuit court's judgment, holding that, where an enhanced sentence for a crime of violence is vacated on appeal because the evidence was legally insufficient to support a finding that one of the prior convictions was for a crime of violence, the prohibition on double jeopardy does not bar the State from introducing new evidence at resentencing to show that the prior conviction was for a crime of violence. Scott filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that, where an appellate court vacates an enhanced sentence due to insufficient evidence of a prior conviction, the plea of *autrefois acquit* and the doctrine of collateral estoppel do not bar a trial court from reimposing an enhanced sentence.

The Court of Appeals explained that the plea of *autrefois acquit* is a common-law plea in which a defendant alleges to have been previously acquitted of an offense, and, as a result, that he or she may not be tried again. The plea of autrefois acquit does not apply where an appellate court vacates an enhanced sentence and remands for resentencing because the vacation of the enhanced sentence does not constitute an acquittal. An acquittal is a resolution, correct or not, of some or all of the factual elements of the offense charged. As the Supreme Court held in *Almendarez-Torres v. United States*, 523 U.S. 224, 226, 235 (1998), and reaffirmed in *Monge v. California*, 524 U.S. 721, 728-29 (1998), for purposes of statutes that authorize enhanced sentences, a prior conviction is not an element of a crime; it is simply a sentencing factor. Where

an appellate court determines that the evidence was insufficient to establish a prior conviction, the appellate court's determination does not act as an acquittal or preclude a trial court from receiving additional evidence of a prior conviction.

The Supreme Court's holdings in *Almendarez-Torres* and *Monge*—that a prior conviction is not an element of a crime—were not undermined by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the Supreme Court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The Court of Appeals agreed with the Court of Special Appeals that it was necessary to take Supreme Court law as it is, not as it might become, and that, in *Apprendi*, the Supreme Court acknowledged the continued validity of *Monge* and *Almendarez-Torres* as applied to subsequent offender sentencing statutes. The Court of Appeals explained that, in *Apprendi*, 530 U.S. at 490, by expressly stating that its holding did not apply to the fact of a prior conviction, the Supreme Court refrained from vitiating its holding in *Almendarez-Torres*, 523 U.S. at 226, and its reaffirmance in *Monge*, 524 U.S. at 728-29, that a prior conviction is not an element of a crime. Although the Supreme Court remarked in *Apprendi* that it was arguable that *Almendarez-Torres* was incorrectly decided, the Supreme Court expressly declined to revisit *Almendarez-Torres* in *Apprendi*.

The Court of Appeals stated that the Supreme Court's holdings in *Almendarez-Torres*, *Monge*, and *Apprendi* were at odds with *Bowman v. State*, 314 Md. 725, 740, 552 A.2d 1303, 1310 (1989), in which the Court of Appeals earlier held that the prohibition on double jeopardy barred the State from seeking an enhanced sentence on remand. The Court decided *Bowman* in 1989—*i.e.*, before the Supreme Court held in *Almendarez-Torres* in 1998, and reaffirmed in *Monge* in the same year, that the existence of a prior conviction for enhanced sentencing purposes is strictly a sentencing factor, not an element of a crime. *Bowman* also predated *Apprendi*, in which the Supreme Court expressly declined to overrule its holding in *Almendarez-Torres*.

Upon determining that *Bowman* was contradicted by the subsequent Supreme Court cases of *Almendarez-Torres* and *Monge*, and that *Apprendi* did not abrogate either case, the Court of Appeals concluded that *Bowman* had been superseded by significant changes in double jeopardy law. The Court further determined that *Bowman* was based solely on an analysis of the Double Jeopardy Clause, and not the common law of Maryland. Consistent with the longstanding principle of *stare decisis* that authorizes overruling a case that has been superseded by significant changes in the law, the Court overruled *Bowman*.

The Court of Appeals concluded that the plea of *autrefois acquit* did not bar the circuit court from receiving additional evidence of Scott's prior conviction for aggravated assault in the District of Columbia. It was entirely permissible for the circuit court, on remand, to admit into evidence a transcript of the guilty plea proceeding in the District of Columbia, and to determine that Scott was subject to an enhanced sentence.

The Court of Appeals held that, like the plea of *autrefois acquit*, the doctrine of collateral estoppel does not bar a trial court from reimposing an enhanced sentence after an appellate court

vacates an enhanced sentence due to insufficient evidence of a prior conviction. The doctrine of collateral estoppel precludes relitigation of a factual issue where there has been a finding in the defendant's favor as to the factual issue. The Court explained that the doctrine of collateral estoppel did not apply in *Scott* because, at the original sentencing proceeding, the circuit court did not find in Scott's favor as to a factual issue. Stated otherwise, the Court of Special Appeals did not affirm a factual finding by the circuit court that Scott lacked the requisite prior convictions to be subject to an enhanced sentence; rather, that Court determined that the evidence was insufficient to support the circuit court's finding that Scott had the requisite prior convictions to be subject to an enhanced sentence.

The Court of Appeals concluded that Scott preserved for the Court's review his contention that the circuit court erred in not making the new sentence for attempted robbery with a dangerous weapon concurrent to the two existing sentences. The Court acknowledged that Scott's argument in the circuit court—that the new sentence for attempted robbery with a dangerous weapon should have been ordered concurrent to the two existing sentences—technically differed from his argument in the Court of Special Appeals, in which he contended that the two existing sentences should have been ordered concurrent to the new sentence for attempted robbery with a dangerous weapon. The Court of Appeals, however, found this circumstance to be a distinction without a difference. Regardless of which sentence or set of sentences that Scott argued should have been made concurrent to the other—*i.e.*, whether the new sentence for attempted robbery with a dangerous weapon allegedly should have been concurrent to the two existing sentences, or vice-versa—Scott sought to serve the sentence for attempted robbery with a dangerous weapon and the two existing sentences at the same time; *i.e.*, Scott sought concurrent sentences.

The Court concluded that, where an appellate court vacates a sentence to which another sentence is ordered to be served consecutively and remands for resentencing without vacating the consecutive sentence, the non-vacated consecutive sentence remains consecutive to the newly imposed sentence—*i.e.*, the trial court cannot make the new sentence concurrent to the non-vacated consecutive sentence. The Court observed that the Court of Special Appeals vacated only the sentence for attempted robbery with a dangerous weapon. Without the sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon having been vacated and remanded for resentencing, the circuit court could not resentence Scott as to those two sentences on remand.

The Court of Appeals determined that the circuit court did not violate case law prohibiting the imposition of a sentence consecutively to a sentence that does not exist. At the time of the original sentencing proceeding, the circuit court properly imposed sentences consecutively to an existing sentence. The sentences for use of a handgun in the commission of a crime of violence and conspiracy to commit robbery with a dangerous weapon were imposed consecutively to a sentence that existed at the time of their imposition. The Court of Appeals declined to establish a rule that would prevent an appellate court from vacating only a sentence that was not imposed properly where other sentences were imposed to be consecutive, and would necessarily require that the appellate court vacate all sentences—even the ones that have no defects—and remand for resentencing.

Oscar Cruz-Quintanilla v. State of Maryland, No. 44, September Term 2016, filed July 31, 2017. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2017/44a16.pdf

CRIMINAL LAW – SENTENCING DETERMINATION – EVIDENCE

Facts:

Petitioner Oscar Cruz-Quintanilla was convicted of reckless endangerment; wearing, carrying, or transporting a handgun; and conspiracy to commit robbery with a dangerous weapon. At sentencing, the State sought to introduce for the first time evidence that Cruz-Quintanilla was a member of the gang known as MS-13. Over defense counsel's objections, the sentencing court permitted Sergeant George Norris of the Prince George's County Police Department to testify regarding Cruz-Quintanilla's MS-13 membership.

Sergeant Norris testified that Cruz-Quintanilla has been a documented MS-13 member since at least 2004. Sergeant Norris further testified that "[o]ne of the common mottos" for MS-13 is "mata, m-a-t-a, vola, v-o-l-a, controla, c-o-n-t-r-o-l-a, which is kill, rape, and control." Any MS-13 member would "have to know that MS-13 engages in violence because the mere initiation of MS-13 involves violence. It involves you getting beaten by your own MS-13 member friends." Sergeant Norris stated that "there are several actions that you have to take prior to being jumped in [i.e., initiated], which is putting in work for the gang or committing crimes for the gang to show that you are loyal to the gang and show that they can trust you, that you're going to support the gang." Sergeant Norris added that one cannot be a member of MS-13 and decline to participate in violence. Any MS-13 member who declines to participate in the gang's criminal acts of violence is subject to discipline by other gang members.

The circuit court, noting that it had considered "[a]ll of the evidence" in the case, sentenced Cruz-Quintanilla to terms of three years of imprisonment on the weapon and reckless endangerment convictions, to be served concurrently. For the conspiracy to commit armed robbery conviction, the court sentenced Cruz-Quintanilla to 20 years of imprisonment, with all but nine years suspended, to run consecutive to the two other sentences.

The Court of Special Appeals affirmed the judgment of the circuit court. *Cruz-Quintanilla v. State*, 228 Md. App. 64, 71-72 (2016). Relying upon *Dawson v. Delaware*, 503 U.S. 159, 165-66 (1992), the Court of Special Appeals recognized that, although in some instances admission of evidence regarding beliefs or memberships protected by the First Amendment is prohibited during sentencing, "that evidence may be admissible in appropriate cases in which evidence of criminal or violent conduct of the gang is introduced." *Cruz-Quintanilla*, 228 Md. App. at 69.

Held: Affirmed.

The Court noted that the "sentencing judge is vested with virtually boundless discretion" in devising an appropriate sentence. *Smith v. State*, 308 Md. 162, 166 (1986) (citation omitted). The sentencing judge's discretion, although broad, is not without its limits. A given sentence is subject to review on any of three potential grounds: "(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits." *Jackson v. State*, 364 Md. 192, 200 (2001) (internal emphasis omitted) (quoting *Gary v. State*, 341 Md. 513, 516 (1996)).

The Court concluded that the admission of the evidence of Cruz-Quintanilla's gang membership did not violate the First Amendment, distinguishing the evidence in Cruz-Quintanilla's case from the stipulation that was presented in *Dawson*. Unlike in *Dawson*, the testimony went beyond any abstract beliefs and established that all MS-13 gang members engage in "unlawful or violent acts, or . . . endorse[] such acts." *See Dawson*, 503 U.S. at 166. Indeed, Sergeant Norris testified that all MS-13 members must commit a crime as part of "jumping-in"; they must engage in violent and criminal acts thereafter; and, if they do not, they are subject to punishment. The sentencing court, therefore, did not err or abuse its discretion in admitting that evidence and considering it in fashioning an appropriate sentence.

Bashawn Montgomery Ray v. State of Maryland, No. 81, September Term 2016, filed July 28, 2017. Opinion by Hotten, J.

http://mdcourts.gov/opinions/coa/2017/81a16.pdf

CRIMINAL LAW – SENTENCING AGREEMENT

Facts:

Petitioner was charged by indictment in the Circuit Court for Montgomery County with conspiracy to commit theft of property with a value over $1,000, theft scheme, identity fraud, and making a false statement to the police. After the denial of his motion to suppress evidence, Petitioner and the State entered into the following agreement: Petitioner would proceed by way of a plea of not guilty with an agreed statement of facts on the conspiracy and false statement charges, and the State would enter the remaining counts as nolle prosequi. This agreement was written, signed by the prosecutor and Petitioner's attorney, and submitted to the circuit court's Assignment Office, in the form of an agreement memorandum. The agreement provided that Petitioner would be subject to a "[c]ap of four years on any executed incarceration." Additionally, Petitioner and his counsel signed an advice of rights form. The form outlined the elements of the conspiracy and false statement counts, and stated that "[t]he maximum penalty for the offense you are offering to plead guilty is: 10 years + 6 months[.]"

Petitioner proceeded to trial on the agreed statement of facts. The circuit court found Petitioner guilty of conspiracy to commit theft and making a false statement while under arrest. Petitioner was sentenced to ten years' incarceration with six years suspended, followed by four years' supervised probation.

Petitioner filed a motion to correct illegal sentence, contending that the sentence exceeded the maximum sentence authorized by the agreement. The circuit court denied the motion without a hearing or a written opinion. Petitioner appealed the denial of his motion to correct illegal sentence to the Court of Special Appeals. In a reported opinion, the Court of Special Appeals affirmed the denial of Petitioner's motion to correct illegal sentence. *Ray v. State*, 230 Md. App. 157, 146 A.3d 1157 (2016).

The Court of Appeals granted Petitioner's petition for writ of certiorari, *Ray v. State*, 451 Md. 249, 152 A.3d 753 (2017), to consider the following questions:

> 1. Under this Court's decisions in *Cuffley v. State*, 416 Md. 568[,7 A.3d 557] (2010), and *Baines v. State*, 416 Md. 604[, 7 A.3d 578] (2010), which require that a plea agreement be construed according to what a reasonable lay person in [Petitioner's] position, unaware of the niceties of sentencing law, would understand it to mean, would a reasonable lay person understand "a cap of four

years on executed incarceration" to mean that the court could impose suspended time in addition to a four-year term of non-suspended incarceration?

2. Where the circuit court bound itself to a "cap of four years on executed incarceration," but the term "executed" was never explained to Petitioner and he was never informed that the court could impose suspended time in addition to incarceration for up to four years, and the court sentenced him to ten years' incarceration, with six years suspended, is the sentence imposed on Petitioner illegal?

Held: Affirmed.

The Court of Appeals clarified the relationship between plea agreement interpretation and contract law, and determined that the plain language of the disputed provision of the agreement was clear and unambiguous. If the plain language of the agreement is clear and unambiguous, then further interpretive tools are unnecessary, and the Court enforces the agreement accordingly. *See United States v. Jordan*, 509 F.3d 191, 195 (4th Cir. 2007); *Brendsel v. Winchester Constr. Co., Inc.*, 392 Md. 601, 624, 898 A.2d 472, 486 (2006) ("Only when the language of the contract is ambiguous will we look to extraneous sources for the contract's meaning."). Here, it was unreasonable to interpret the plain language of the agreement to prohibit the imposition of a suspended sentence.

The Court assumed, *arguendo*, that the plain language of the disputed provision was ambiguous. The Court thus looked to how a reasonable person in Petitioner's position would have understood the agreement, based on the record developed during the hearing at which Petitioner pleaded not guilty on an agreed statement of facts. *See Cuffley v. State*, 416 Md. 568, 582, 7 A.3d 557, 565–66 (2010). The record demonstrated that Petitioner had been informed that he could be subject to a maximum sentence of ten-and-a-half years. Thus, a reasonable person in Petitioner's position would have understood that there could be an additional, but unexecuted, period of incarceration imposed in his or her sentence.

Ukeenan Nautica Thomas v. State of Maryland, Misc. Docket No. 25, September Term 2016, filed July 28, 2017. Opinion by Hotten, J.

http://mdcourts.gov/opinions/coa/2017/25a16m.pdf

CERTIFIED QUESTION OF LAW – VOIR DIRE – MANDATORY QUESTION – POLICE-WITNESS QUESTION

Facts:

On September 14, 2014, the Appellant, Ukeenan Nautica Thomas ("Appellant") invited the victim, Timothy Butler, to meet him so that Mr. Thomas could purchase drugs. Following that meeting, Mr. Butler was robbed, struck in the head with a gun, and his cellphone, bus pass, and cash were stolen. Mr. Thomas was subsequently identified as one of Mr. Butler's assailants. Mr. Thomas was arrested and charged with multiple offenses in the Circuit Court for Baltimore County, including robbery with a dangerous weapon, use of a handgun in a crime of violence, and conspiracy to commit robbery. During voir dire, counsel for both parties requested that the trial judge ask the venirepersons whether they would give undue weight to a police-witness's testimony based on his or her occupation as a police officer, because three police-witness' were expected to testify in Mr. Thomas' case. Rather than propound the police-witness question as articulated by the parties, the trial judge instead posed a lengthy inquiry that was not specifically tailored to the police-witness' anticipated to testify in the case. After empaneling a jury, Mr. Thomas was subsequently convicted of robbery with a dangerous weapon, use of a handgun in a crime of violence, and conspiracy to commit robbery. Mr. Thomas was sentenced to forty years' of incarceration, with all but thirty years suspended, and to five years of supervised probation.

After appealing to the Court of Special Appeals, the Court canceled oral argument and filed a certified question of law to this Court, which we reformulated to ask whether a broader occupational bias question posed during voir dire was appropriate in determining whether potential jurors would give undue weight to a police officer's testimony, based on his or her position as a police officer, when a more specific police-witness question was requested by the parties.

Held: Reformulated Certified Question answered in the negative.

The Court of Appeals held that a trial judge is required to tailor the occupational bias question discussed in *Moore v. State*, 412 Md. 635, 989 A.2d 1150 (2010), to the specific occupation(s) of the witnesses who are anticipated to testify in the criminal case, including police officers, by first determining whether any witnesses testifying in the case – based on their occupation, status or affiliation – may be favored or disfavored on the basis of that witness' occupation, status or

affiliation, and then propounding a voir dire question that is tailored to those specific occupations, statuses, or affiliations. *See Moore*, 412 Md. at 654-55, 989 A.2d at 1161.

State of Maryland v. Robert L. Copes, Jr., No. 84, September Term 2016, filed July 28, 2017. Opinion by McDonald, J.

Greene, Adkins, and Hotten, JJ., dissent.

http://mdcourts.gov/opinions/coa/2017/84a16.pdf

SEARCH AND SEIZURE – WARRANT REQUIREMENT – EXCLUSIONARY RULE – GOOD FAITH EXCEPTION.

Facts:

In early 2014, the burned body of a young woman was found in a yard in northwestern Baltimore City. While investigating the murder, police officers learned that the victim had recently called her mother. Armed with the call-back number of the cell phone used to place that call – which had not been found with the victim's body – the officers applied to the circuit court for an order authorizing them to use a "Pen Register/Trap & Trace and Cellular Tracking Device" in order to, among other things, "determine the location of the subject's mobile device."

After the order was approved, the officers obtained information from the cell phone's service provider that indicated that the cell phone was in the neighborhood where the young woman's body had been found. The officers drove to that neighborhood and utilized a device known as a "cell site simulator" to track the cell phone to a specific house in the vicinity. The house contained several apartments; the officers knocked on the door to apartment 1-E, and Robert Copes answered.

Mr. Copes spoke with the officers at his apartment and then agreed to accompany them to the police station, where he made additional statements after receiving *Miranda* warnings. On the basis of what the officers observed at Mr. Copes' apartment – which implicated him in the crime – the officers applied for and received a warrant to search the apartment. They collected several pieces of evidence there, including swabs of blood that matched the victim through DNA testing.

Mr. Copes later moved to suppress all evidence recovered from his apartment as well as his statements to police. He argued that the officers' use of the cell site simulator was not authorized by the order they received from the circuit court and was, therefore, a warrantless, unreasonable search in violation of the Fourth Amendment – and that suppression of the evidence was the appropriate remedy. The circuit court granted Mr. Copes' motion, and the Court of Special Appeals affirmed that decision.

The Court of Appeals then granted a writ of *certiorari*.

Held:

The Court of Appeals assumed, without deciding, that the officers' use of the cell site simulator was a search for purposes of the Fourth Amendment and that the order obtained from the circuit court did not provide constitutionally-sufficient authorization for that search. The Court nevertheless held that the officers were engaged in "objectively reasonable law enforcement activity" when they used the cell site simulator pursuant to the order and, pursuant to the "good faith exception" to the exclusionary rule, held that suppression was not the appropriate remedy in this case.

In reaching this conclusion, the Court noted that, under existing case law, it was not a "foregone conclusion" that use of the cell site simulator was a Fourth Amendment search, especially in light of the known potential of cell phones to broadcast their location and the absence of any physical trespass to Mr. Copes' phone. The Court also noted "significant support in the case law" supporting an argument that the order provided constitutionally-sufficient authorization for use of the cell site simulator, especially since the order (1) explicitly stated the officer's desire to "determine the location of the subject's mobile phone," (2) identified the cell phone by number, (3) detailed the basis for the officers' belief that the location of the cell phone would lead to the apprehension of the murderer, (4) was sworn, and (5) was approved by a neutral and detached magistrate. Finally, the Court noted that similar applications – which were drafted by the State's Attorney's Office and the Police Department's legal team – had been used repeatedly by the officers and had never been declined.

State of Maryland v. Otis Rich, No. 83, September Term 2016, filed July 14, 2017. Opinion by Getty, J.

http://www.courts.state.md.us/opinions/coa/2017/83a16.pdf

PETITION FOR WRIT OF ERROR *CORAM NOBIS* – APPELLATE REVIEW – MOTION FOR RECONSIDERATION – WAIVER OF ARGUMENT

Facts:

In June 2009, the respondent, Otis Rich, filed a petition for writ of error *coram nobis* challenging the voluntariness of his 2001 guilty plea to conspiracy to distribute marijuana. In response to the petition, the State asserted that Mr. Rich's claims were without merit and should be denied without a hearing. The *coram nobis* court agreed with the State, and denied Mr. Rich's petition without a hearing.

When Mr. Rich appealed the decision to the Court of Special Appeals, the State asserted for a second time that the record of the 2001 plea hearing was sufficient to establish that the guilty plea was knowing and voluntary. The State's primary argument on appeal was that Mr. Rich waived the right to seek *coram nobis* relief by failing to file an application for leave to appeal his 2001 guilty plea. The State urged the intermediate appellate court to affirm the *coram nobis* court's denial of Mr. Rich's petition without a hearing.

Mr. Rich's appeal was delayed for five years, during which time the Court of Appeals decided *State v. Smith*, 443 Md. 572 (2015). In *Smith*, the Court of Appeals held that a defendant does not waive the right to seek *coram nobis* relief by failing to file an application for leave to appeal a guilty plea. Id. at 595. Following the Court's decision in *Smith*, the Court of Special Appeals lifted the stay on Mr. Rich's appeal, and set the case for consideration in March 2016. The State did not supplement or amend its brief to the Court of Special Appeals to account for the evolution of the law that took place in *Smith*.

The Court of Special Appeals decided Mr. Rich's appeal in August 2016. The intermediate appellate court held, pursuant to *Smith*, that Mr. Rich had not waived his *coram nobis* claim by failing to file an application for leave to appeal his 2001 guilty plea. On the merits of his claim, the Court of Special Appeals determined, based on the record of the 2001 plea hearing, that Mr. Rich's guilty plea was not knowing and voluntary, and therefore the *coram nobis* court erred by denying him relief based on this ground. The Court of Special Appeals then remanded the case for the *coram nobis* court to consider whether Mr. Rich was suffering significant collateral consequences as a result of his convictions.

The State filed a motion for reconsideration in the Court of Special Appeals. In its motion, the State argued, for the first time, that the record of the 2001 plea hearing was inadequate for the intermediate appellate court to determine whether Mr. Rich's guilty plea was knowing and

voluntary. The State requested, for the first time, that the Court of Special Appeals order a remand for the *coram nobis* court to conduct an evidentiary hearing on the merits of Mr. Rich's claim. The Court of Special Appeals denied the motion for reconsideration, and reissued its opinion.

Held: Affirmed.

The Court of Appeals held that the Court of Special Appeals did not abuse its discretion in denying the State's motion for reconsideration. By consistently asserting that the record of the 2001 plea hearing was sufficient to determine whether Mr. Rich's guilty plea was knowing and voluntary, and failing to argue that a remand was necessary prior to the Court of Special Appeals issuing its decision, the State effectively waived this argument on appeal.

Damar Brown v. State of Maryland, No. 74, September Term 2016, filed July 28, 2017. Opinion by Getty, J.

http://www.courts.state.md.us/opinions/coa/2017/74a16.pdf

CRIMINAL PROCEDURE – PRELIMINARY EXAMINATION – RIGHT OF ACCUSED TO EXAMINATION

Facts:

The State initially charged the petitioner, Damar Brown, with wearing, carrying, or transporting a handgun; second-degree assault; and resisting or interfering with arrest by a statement of charges in the District Court of Maryland sitting in Baltimore City. All of the offenses constitute misdemeanors. Subsequently, the State refiled the same charges against Mr. Brown by means of criminal information in the Circuit Court for Baltimore City. Mr. Brown moved to dismiss the charges. He argued that he was charged with misdemeanors in the circuit court without a preliminary hearing finding probable cause to hold him, in violation of § 4-102(2) of the Criminal Procedure Article ("CP"). The circuit court granted Mr. Brown's motion and dismissed the charges. The State appealed the circuit court's dismissal of Mr. Brown's charges to the Court of Special Appeals. In an unreported opinion, the Court of Special Appeals reversed the judgment of the circuit court.

Held: Affirmed.

CP § 4-102 provides that a "State's attorney may charge by information: (1) in a case involving a felony that does not involve a felony within the jurisdiction of the District Court . . . or (2) in any other case, if a court in a preliminary hearing finds that there is probable cause to hold the defendant."

The Court of Appeals held that the term "any other case" of CP § 4-102(2) does not include instances in which a defendant is charged with misdemeanors by information in circuit court. The Court examined the purpose of preliminary hearings, which is to prevent defendants from being incarcerated without a determination of probable cause while grand jury action is pending. *Crawford v. State*, 282 Md. 210, 220-21 (1978). Mr. Brown was not awaiting grand jury action, so a preliminary hearing would not have served this purpose. The Court then examined the legislative history of CP § 4-102 and determined, based on the statute's predecessor, that the language "any other case" of CP § 4-102(2) refers to situations involving felonies within the jurisdiction of the district court, not misdemeanors. The Court of Appeals also determined that other statutes and Maryland Rules concerning preliminary hearings and charging documents further support this interpretation of CP § 4-102(2).

Frederick Classical Charter School, Inc. v. Frederick County Board of Education, No. 25, September Term 2016, filed July 14, 2017. Opinion by Getty, J.

Watts and Hotten, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2017/25a16.pdf

EDUCATION LAW – STANDARD OF REVIEW APPLIED BY THE STATE BOARD OF EDUCATION TO DECISIONS OF A LOCAL SCHOOL BOARD

EDUCATION LAW – STATUTORY CONSTRUCTION – MARYLAND CODE, EDUCATION ARTICLE § 9-109 – CHARTER SCHOOL FUNDING

CONTRACTS – CONTRACT INTERPRETATION

Facts:

This case involves a dispute between Frederick Classical Charter School, Inc. ("Frederick Classical"), the Petitioner, a charter school located in Frederick, Maryland and the Frederick County Board of Education ("the Local Board"), the Respondent, as to whether the Local Board's annual funding allocation to Frederick Classical for its first year of operation in the 2014-15 school year satisfied Maryland Code Education Article ("ED") 9-109. Under that statute, a local school board is required to disburse to a public charter school "an amount of county, State, and federal money for elementary, middle, and secondary students that is commensurate with the amount disbursed to other public schools in the local jurisdiction." ED § 9-109. Specifically, Frederick Classical disputed the Local Board's withholding from its annual funding allocation a proportional share of funds which the Local Board had budgeted for student transportation, amounting to $544.26 per-pupil and $135,926.22 in the first year of the school's operation, and more in subsequent years. Frederick Classical challenged that withholding in a letter to the Local Board and, when the Local Board summarily refused to amend the funding allocation, in an appeal to the State Board of Education ("State Board").

In reviewing Frederick Classical's appeal, the State Board regarded the issue as one of local policy, and thus applied a deferential standard of review, in which it assumed that the Local Board's decision to withhold transportation funds was "prima facie correct" unless proven to be "arbitrary, unreasonable, or illegal." *See* Md. Code Regs. ("COMAR") 13A.01.05.05(A)-(C). On the merits, the State Board determined that "it does not appear that [Frederick Classical] provides any transportation services" and that, under ED § 9-109 and its own precedent, "if [Frederick Classical] received funds for services it did not provide, it would be receiving more than its commensurate share of [ ] funds." Therefore, the State Board concluded that the Local Board decision was "not contrary to state law" and was "consistent with [its] past rulings." The State Board also focused on language in the charter agreement between Frederick Classical and the Local Board, which stated that transportation of students "shall be the responsibility of

[Frederick Classical] families," with certain narrowly defined exceptions. The State Board interpreted that provision to mean that Frederick Classical had "agreed it is not entitled to [transportation] funds by virtue of having parents take on the responsibility for transportation."

For those reasons, the State Board upheld the Local Board's decision to withhold transportation funding from Frederick Classical's annual funding allocation. Frederick Classical petitioned for judicial review of the State Board's decision before the Circuit Court for Frederick County, which upheld the State Board's ruling. Then, Frederick Classical appealed to the Court of Special Appeals which, in a reported opinion, likewise affirmed the State Board's decision. *Frederick Classical Charter Sch., Inc. v. Frederick Cty. Bd. of Educ.,* 227 Md. App. 439 (2016).

Held: Reversed and remanded with instructions to remand to the State Board of Education for further proceedings consistent with the opinion.

The Court of Appeals held that the State Board erred by applying the deferential standard of review for decisions of local school board on a matter involving local policy or a local dispute defined in COMAR 13A.01.05.05(A)-(C). Instead, the Court of Appeals concluded that State Board of Education was required to apply an "independent judgment" standard of review defined in COMAR 13A.01.05.05(E) because the decision of the Local Board involved only the "explanation and interpretation of the public school laws and State Board regulations" and not a local policy or a local dispute.

Turning to the merits of the parties' dispute, the Court of Appeals noted that the "commensurate funding" language in ED § 9-109 was ambiguous and that the General Assembly had intended for the State Board to interpret that language. However, the Court of Appeals determined that the State Board's ruling that Frederick Classical was not entitled to transportation funds because it was not providing transportation services was directly contrary to the State Board's own precedent interpreting the "commensurate funding" statutory language. In particular, the Court of Appeals determined that the State Board's decision conflicted with a set of three final declaratory rulings issued by the State Board in 2005 ("the *City Neighbors* declaratory rulings) that set forth the State Board's interpretation of "commensurate funding" and were intended to offer "guidance and direction" to other charter school applicants and local school systems. Those rulings were subsequently affirmed by the Court of Appeals in *Baltimore City Board of School Commissioners v. City Neighbors Charter School*, 400 Md. 324 (2007).

The Court of Appeals clarified that, under the State Board's precedent in the *City Neighbors* declaratory rulings, which the State Board also applied in *Monocacy Montessori Communities, Inc. v. Frederick County Board of Education*, MSBE Op. No. 06-17 (May 24, 2006), a charter school is entitled to a proportional, per-pupil share of all funds in a local school board's total operating budget, except funds devoted to debt servicing and adult education, or if there are express eligibility restrictions in federal or state law for certain funds that a charter school has not met. In addition, a charter school must reimburse a local school board two percent of its allocation for central administrative expenses, as well as for salary, local retirement, and other

fringe benefit costs for the public school employees working in the charter school, and regular services and supplies that the charter school **requests** the local school system provide. The Court of Appeals held that, because there are no federal or state law restrictions on transportation funding to public schools, under the *City Neighbors* declaratory rulings a local school board must therefore include the funds budgeted for transportation when calculating a charter school's per-pupil allocation, regardless of whether a charter school provides transportation services, unless the charter school expressly requests that the local school system provide transportation for its students. Consequently, the Local Board's withholding of transportation funding from Frederick Classical, which was not in exchange for services provided by the Local Board, was contrary to State Board precedent.

The Court of Appeals also determined that withholding the transportation funds was contrary to the statutory purpose and legislative history of ED § 9-109 and the Charter Schools Program statute, ED §§ 9 101 *et seq*. The statutory purpose and legislative history of the statute reflects the General Assembly's intent that charter schools would be afforded a substantial degree of independence and flexibility in how they used their funding allocations, and did not reflect an intent to tie charter school funding to a requirement that charter schools provide specific services.

The Court of Appeals therefore held that because the State Board failed to recognize that it was departing from its own precedent, and because its decision was contrary to the statutory purpose and legislative intent, its decision was arbitrary and capricious and an abuse of its discretion. The Court of Appeals noted that on remand and in future cases that the State Board may elect to depart from the formula and approach in its *City Neighbors* declaratory rulings. However the Court of Appeals held that any new interpretation of the commensurate funding requirement in ED § 9 109 by the State Board, in either an adjudication or in rulemaking: (1) must be consistent with the plain language of ED § 9-109 and the Charter School Program statute as a whole and, to the extent where the statutory language is ambiguous, must adhere to the statutory purpose and legislative history of those statutes as described by the Court; and (2) must give a rational explanation that includes how the State Board's new interpretation or approach is in keeping with the plain language of ED § 9-109 and the Charter Schools Program statute, its statutory purpose and legislative history, and account for the legitimate reliance interests of charter school operators, staff and students, prospective charter school applicants, and local school boards.

Finally, the Court of Appeals concluded that the charter agreement between Frederick Classical and the Local Board plainly did not include an agreement that Frederick Classical would forego or waive transportation funding, and accordingly hold that the State Board erred in deciding that Frederick Classical was not entitled to the inclusion of transportation funds in its per-pupil allocation based upon the charter agreement.

The Court of Appeals therefore directed a remand to the State Board for it to apply the correct standard of review, and to render a decision as to the claims raised by Frederick Classical consistent with its holdings.

Stewart Levitas v. Michael Davon Christian, No. 58, September Term 2016, filed July 11, 2017. Opinion by Adkins, J.

Getty, J., dissents.

http://mdcourts.gov/opinions/coa/2017/58a16.pdf

MARYLAND RULE 5-702 – EXPERT WITNESS TESTIMONY – SOURCE OF LEAD EXPOSURE

MARYLAND RULE 5-702 – EXPERT WITNESS TESTIMONY – MEDICAL CAUSATION

Facts:

Respondent Michael Christian was born on February 12, 1990. From his birth until October 1992, he resided with his mother, Nickolas Skinner ("Nickolas"), and grandmother, Betty Skinner ("Betty"), at 3605 Spaulding Avenue ("Spaulding") in Baltimore City. Christian and his mother then moved to 4946 Denmore Avenue ("Denmore") in October 1992, where they resided for almost a year. In September 1993, Christian and his mother moved back to Spaulding and lived there for another four years, until September 1997.

Christian's blood was tested eight times between November 1990 and October 1993. In April 1991, he exhibited an elevated free erythrocyte protoporphyrin ("FEP") level, which does not measure a child's blood lead level but is an initial screening test for lead exposure. From February 1992 to October 1993, Christian displayed elevated blood lead levels five times as follows:

Date Taken	Blood Lead Level	Christian's Address
February 20, 1992	9 µg/dL	Spaulding
February 18, 1993	10 µg/dL	Denmore
July 16, 1993	17 µg/dL	Denmore
September 2, 1993	12 µg/dL	Denmore
October 6, 1993	14 µg/dL	Spaulding

In 2011, Christian filed suit in the Circuit Court for Baltimore City against Petitioner Stewart Levitas, the owner of Spaulding when he lived there, alleging negligence and violations of the

Maryland Consumer Protection Act. In February 2012, Arc Environmental, Inc. ("Arc") tested the interior and exterior of Spaulding for lead using x-ray fluorescence testing and found that thirty-one interior surfaces and five exterior surfaces tested positive for lead ("Arc Report").

Christian designated Howard Klein, M.D., a pediatrician with experience treating lead-poisoned children, as an expert witness who would opine on the source of Christian's lead exposure—source causation—and his lead-caused injuries—medical causation. Dr. Klein testified in his deposition that he was "of the opinion that [Christian] was exposed to lead-based paint" at Spaulding. The basis for his opinion was: (1) the age of Spaulding—built in 1944; (2) the Arc Report; (3) a Maryland Department of the Environment ("MDE") certification reflecting that the property was not lead free; (4) a Department of Housing and Community Development ("DHCD") violation that detailed the poor condition of the property; (5) Christian's elevated FEP and blood lead levels while he was living at Spaulding and Denmore; (6) Betty's and Nickolas's deposition testimony that Spaulding was in disrepair while Christian lived there; (7) Nickolas's testimony that she saw Christian touch areas where paint was peeling around the windowsills at Spaulding; and (8) Nickolas's testimony that Christian stayed at Spaulding under the supervision of family members while she was at work during the day, both while they were living at Spaulding and while they were living at Denmore.

In his expert report on medical causation, Dr. Klein concluded that lead caused Christian's mental retardation, impaired cognition, learning disabilities, and a loss of 7.4 to 9.4 IQ points. Dr. Klein based his opinion on: (1) a neuropsychological evaluation of Christian by Barry Hurwitz, Ph.D.; (2) Christian's medical records; (3) Christian's Answers to Interrogatories; (4) information on Spaulding and Denmore; (5) Christian's Maryland Department of Health and Mental Hygiene ("DHMH") lead testing records; (6) MDE records; (7) DHCD records; and (8) Christian's school records. To calculate Christian's IQ loss, he relied on a study which found that children with certain average lifetime blood lead levels lost a specific number of IQ points.

Levitas filed a motion to exclude Dr. Klein from testifying about source causation on the grounds that he lacked both the necessary qualifications and a sufficient factual basis for his opinion. At the hearing on the motion, Levitas argued that Dr. Klein should be precluded from testifying about both source causation and medical causation. The court excluded Dr. Klein's testimony on both of these topics. It also precluded Dr. Klein from testifying about the cause and extent of Christian's injuries because he was not qualified and his opinion lacked a sufficient factual basis under Maryland Rule 5-702. Christian appealed.

In the first of two Court of Special Appeals opinions, the intermediate appellate court affirmed the Circuit Court's decision to exclude Dr. Klein. Christian appealed to the Court of Appeals Court, which, in a per curiam order, vacated the judgment and remanded the case for reconsideration in light of *Roy v. Dackman*, 445 Md. 23 (2015), *reconsideration granted*, (Nov. 24, 2015). *Christian v. Levitas*, 445 Md. 240 (2015). On remand, the Court of Special Appeals, in an unreported opinion, reversed the Circuit Court's decision to exclude Dr. Klein. *Christian v. Levitas*, 2016 WL 4076100, at *6 (Md. Ct. Spec. App. Aug. 1, 2016).

Held: Affirmed.

The Court of Appeals held under Maryland Rule 5-702 that Dr. Klein had: (1) a sufficient factual basis to testify as to the source of Christian's lead exposure; and (2) had the requisite qualifications and factual basis to testify to the nature and extent of Christian's injuries.

As to source causation, the Court concluded that Dr. Klein had an adequate factual basis for his opinion under Rule 5-702(3) because he reached his conclusion for several reasons, including: (1) the 2012 Arc Report, which found that 31 interior locations and five exterior locations tested positive for lead; (2) lead paint was banned federally in 1978, and therefore it was unlikely that Spaulding had been painted with lead-based paint since Christian lived there in the 1990s; (3) DHCD records described the poor condition of the property; (3) an MDE certification indicated that Spaulding was not lead free; (4) Christian's FEP and blood lead levels were first found to be elevated while he was living at Spaulding, when he had not yet lived anywhere else; (5) family members testified that Spaulding was in a deteriorated condition while Christian was living there and that Christian touched peeling paint at the property; and (6) Christian regularly stayed at Spaulding during the day while his mother was at work, both when he lived there and when he lived at Denmore.

As to medical causation, the Court concluded that Dr. Klein was qualified to testify regarding the source and extent of Christian's injuries under Rule 5-702(1) for several reasons. He was an attending physician at the University of Maryland for 25 years, during which time he treated lead-poisoned children. Additionally, he testified that he helps doctors in Israel, where he now practices, rule out lead poisoning as a cause of illness. He was also well-acquainted with Centers for Disease Control and Prevention and American Academy of Pediatrics literature on lead poisoning, and he has been testifying as an expert witness in lead paint cases since 1995. Furthermore, it was not necessary for Dr. Klein to have personal experience administering the type of IQ test Dr. Hurwitz used to calculate Christian's IQ. The fact that he was familiar with and had previously graded that type of IQ test was sufficient.

The Court further concluded that Dr. Klein had an adequate factual basis to testify regarding Christian's lead-caused injuries under Rule 5-702(3). Because an expert's factual basis may come from various sources, including information obtained from others, it was proper for Dr. Klein to rely on Dr. Hurwitz's report in developing his medical causation opinion. Additionally, criticism of the study Dr. Klein used to calculate Christian's IQ loss did not render his opinion invalid. Finally, a difference in Dr. Klein's and the defense expert's opinion regarding Christian's cognitive abilities was fodder for cross-examination and not a reason to exclude Dr. Klein's testimony.

Stanley Rochkind v. Starlena Stevenson, No. 76, September Term 2016, filed July 11, 2017. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2017/76a16.pdf

EXPERT WITNESS TESTIMONY – MARYLAND RULE 5-702 – SUFFICIENT FACTUAL BASIS

Facts:

Respondent Starlena Stevenson was born on December 22, 1990. In 1991, Stevenson and Montgomery moved to 3823 Fairview Avenue ("Fairview"), where they lived for 15 months. At the time, Fairview was owned in part by Petitioner Stanley Rochkind. While she lived at Fairview, Stevenson's blood lead level was tested twice. It was elevated on both occasions.

When Stevenson was five years old, she was evaluated by a psychologist with the Kennedy Krieger Institute, who found that Stevenson's cognitive functioning was within the "low average to borderline range." He diagnosed Stevenson with ADHD. Over the next few years, Stevenson was prescribed Adderall to treat her ADHD. In 2004, when she was thirteen years old, Stevenson attempted suicide. The following year, Stevenson complained of auditory hallucinations and depression. She was evaluated by a psychologist who diagnosed her with major depressive disorder and generalized anxiety disorder.

In December 2011, Stevenson filed suit against Rochkind in the Circuit Court for Baltimore City for negligence and violations of the Maryland Consumer Protection Act. In July 2012, lead testing at Fairview detected lead-based paint on 22 interior surfaces and nine exterior surfaces. In February 2013, Cecilia Hall-Carrington, M.D., a pediatrician, filed a report concluding to "a reasonable degree of medical probability" that Stevenson was poisoned by lead at Fairview, and that "her lead poisoning is a significant contributing factor" to her neuropsychological problems, including her ADHD.

Before trial, Rochkind filed four motions seeking to exclude Dr. Hall-Carrington's testimony regarding ADHD. Rochkind requested a *Frye-Reed* hearing on each motion. The court declined to conduct a *Frye-Reed* hearing and denied Rochkind's motions. The jury returned a verdict in favor of Stevenson. Rochkind filed a motion for a new trial, or, in the alternative, a remittitur. The court granted his motion in part and ordered a new trial on the issue of damages alone.

The partial new trial began in October 2014. Before trial, Rochkind renewed his motions *in limine* to exclude Dr. Hall-Carrington's ADHD testimony, which were again denied. The court declined to hold a *Frye-Reed* hearing, and admitted her testimony under Maryland Rule 5-702.

During trial, Dr. Hall-Carrington testified that studies show that lead exposure can cause "attention problems[ ] or ADHD" generally. She also opined "within a reasonable degree of

medical probability" that lead exposure caused Stevenson's ADHD specifically. To support her testimony, Dr. Hall-Carrington relied on a publication from the Environmental Protection Agency reviewing the most recent studies on the effects of lead exposure in children, titled "Integrated Science Assessment for Lead" ("the EPA-ISA").

The jury awarded Stevenson $753,000 in economic damages and $700,000 in noneconomic damages. Due to the statutory cap on noneconomic damages, the court reduced the total judgment to $1,103,000. Rochkind filed a motion for a new trial, which the court denied. He filed a timely appeal.

The Court of Special Appeals held that the trial court did not err in failing to hold a *Frye-Reed* hearing on Dr. Hall-Carrington's general causation testimony because the studies she relied upon did not reach novel conclusions and "used methodologies that are generally accepted" in the scientific community. The court also held that the trial court properly admitted Dr. Hall-Carrington's specific causation testimony under Rule 5-702. Rochkind appealed.

Held:

The Court of Appeals held that the trial court erred in admitting Dr. Hall-Carrington's testimony under Rule 5-702(3), which requires expert testimony to be supported by a "sufficient factual basis." The Court explained that it has interpreted this requirement to include two subfactors: an adequate supply of data and a reliable methodology. To demonstrate a sufficient factual basis, an expert must establish that her testimony is supported by both subfactors.

To support her testimony that lead exposure can cause ADHD, Dr. Hall-Carrington relied on an Environmental Protection Agency paper ("EPA-ISA") that explained that "multiple, high quality epidemiologic studies" have revealed "a causal relationship between [lead] exposure and attention decrements, impulsivity, and hyperactivity in children."

The Court held that Dr. Hall-Carrington did not provide a sufficient factual foundation for why she thought the EPA-ISA supported her conclusion that lead exposure can cause ADHD—her testimony suffered from an "analytical gap." It explained that the studies described in the EPA-ISA finding a causal relationship between lead exposure and attention deficits do not find causation as to ADHD. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("the *DSM-V*") lists several criteria for an ADHD diagnosis, including that the patient exhibit a minimum number of specific symptoms "for at least [six] months to a degree that is inconsistent with [the patient's] developmental level and that negatively impacts directly on [the patient's] social and academic/occupational activities." Dr. Hall-Carrington did not provide any information on this diagnostic criteria or otherwise differentiate between general attention deficits and a clinical ADHD diagnosis.

The Court acknowledged that research shows that lead exposure can cause general attention deficits and hyperactivity, but reasoned that these lead-caused behaviors do not necessarily indicate that an individual has ADHD because these behaviors are also symptoms of a variety of

other disorders and learning disabilities. It also acknowledged that the EPA-ISA includes discussion of studies exploring the relationship between lead exposure and ADHD specifically, but held that these cannot bolster Dr. Hall-Carrington's opinion because they only reveal **an association** between lead exposure and ADHD. The EPA-ISA explains that an association—a statistical relationship between two variables—"is insufficient proof of a causal relationship between an exposure and a health outcome." EPA-ISA at li.

Electrical General Corp., et al. v. Michael L. LaBonte, No. 69, September Term 2016, filed July 10, 2017. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2017/69a16.pdf

WORKERS' COMPENSATION ACT – MD. CODE ANN., LAB. & EMPL. (1991, 2016 REPL. VOL.) § 9-656 – ACCIDENTAL PERSONAL INJURY – SUBSEQUENT INTERVENING EVENT – WORSENING OF MEDICAL CONDITION

Facts:

Michael L. LaBonte ("LaBonte"), Respondent, was an electrician who worked for Electrical General Corporation, Petitioner, which had workers' compensation insurance through Selective Insurance Company of America, Petitioner (together, "Electrical General"). LaBonte suffered an accidental personal injury to his back at work when he caught and pushed a large ladder that had been falling down. LaBonte filed a claim for workers' compensation and multiple Issues with the Workers' Compensation Commission ("the Commission"), seeking temporary total disability benefits and temporary partial disability benefits, both of which the Commission awarded.

Later, LaBonte was injured outside of the workplace in an unrelated matter. Specifically, a law enforcement officer initiated a traffic stop of a vehicle that LaBonte had been driving outside the course of his employment. According to LaBonte, during the traffic stop, the law enforcement officer grabbed him and pushed him down onto the vehicle, causing his existing back pain to be aggravated.

LaBonte filed Issues with the Commission again, seeking additional temporary total disability benefits. The Commission issued an Order denying LaBonte's request, observing that he had been "involved in a subsequent event on" the date of the incident with the law enforcement officer. LaBonte filed Issues with the Commission again, this time seeking permanent partial disability benefits. In an Award of Compensation, the Commission awarded LaBonte permanent partial disability benefits, finding that his disability was partly due to his accidental personal injury—*i.e.*, his work-related injury—and partly due to "pre-existing and subsequent conditions[.]"

Years later, LaBonte filed a Petition to Reopen with the Commission, alleging that his back condition had worsened, and requesting additional permanent partial disability benefits. The Commission granted the Petition to Reopen, but found that there had not been a worsening of LaBonte's back condition that was causally related to his accidental personal injury. The Commission found that its previous Order and Award of Compensation established a "subsequent intervening event" that broke the "causal nexus" between LaBonte's accidental personal injury and his existing back condition.

LaBonte filed a Petition for Judicial Review. In the Circuit Court for Anne Arundel County, a jury found that LaBonte's accidental personal injury was the cause of the recent worsening of LaBonte's back condition. Electrical General noted an appeal, and the Court of Special Appeals affirmed, holding that the incident with the law enforcement officer did not preclude Electrical General's liability for the worsening of LaBonte's back condition. Electrical General filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that, where the Commission has awarded permanent partial disability benefits based on an accidental personal injury, and the Commission has also determined that the employee has incurred a subsequent intervening event—*e.g.*, an injury sustained outside the course of employment—the employer may be liable for a worsening of the employee's condition that is caused by and reasonably attributable solely to the accidental personal injury. Where it appears that an employee's permanent disability was caused in part by an accidental personal injury and in part by a preexisting disease, Md. Code Ann., Lab. & Empl. (1991, 2016 Repl. Vol.) ("LE") § 9-656(a) directs the Commission to determine the proportion of the disability that is reasonably attributable to the accidental personal injury, and the proportion of the disability that is reasonably attributable to the preexisting disease. Under LE § 9-656(b)(1), the employee is entitled to benefits for the portion of the permanent disability that is reasonably attributable solely to the accidental personal injury.

The Court of Appeals explained that it is entirely logical that an employer and its insurer are liable for the portion of a worsening of an employee's medical condition that was caused by and is reasonably attributable solely to an accidental personal injury. The issues of whether an accidental personal injury or a subsequent intervening event caused a worsening of an employee's medical condition, and whether, for purposes of permanent partial disability benefits, the worsening of the employee's medical condition was reasonably attributable solely to the accidental personal injury, are factual matters for the Commission to determine in each individual case.

The Court stated that the analysis that applies to the determination of permanent disability benefits significantly differs from the one that applies to a determination of temporary disability benefits. LE § 9-656 is inapplicable to temporary disability benefits. Instead of being apportioned among multiple injuries under LE § 9-656, liability for a temporary disability depends entirely on the injury that occurred last. In other words, it is the final accident contributing to a temporary disability which is to serve as the basis for liability. The exclusive focus on the injury that occurred last, however, has no application in a determination of liability for a permanent disability. The "final accident" rule applies only to the determination of temporary disability benefits, not to the assessment of permanent partial disability benefits.

The Court concluded that it was unwarranted for the Commission to deny authorization for medical treatment and payment of medical expenses on the ground that the Commission's prior

Order and Award of Compensation "establish[ed] a subsequent intervening event which breaks the causal nexus between the accidental injury and the current condition." The Court reiterated that a subsequent intervening event does not, *per se*, preclude an employer's liability due to the worsening of an employee's medical condition.

The Court of Appeals rejected Electrical General's contention that the Commission's prior Order and Award of Compensation became the law of the case because there was no petition for judicial review of either decision. As to the doctrine of the law of the case, once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case. The doctrine of the law of the case typically does not apply to a decision of a trial court because, as a general principle, one judge of a trial court ruling on a matter is not bound by the prior ruling in the same case by another judge of the court. Electrical General provided no authority, and the Court of Appeals knew of none, in which the doctrine of the law of the case had been applied to an award or order of the Commission.

The Court of Appeals also rejected Electrical General's argument that the doctrine of collateral estoppel applied to the issue of whether the incident with the law enforcement officer was a subsequent intervening event because neither party sought judicial review of the Commission's prior Order and Award of Compensation. The doctrine of collateral estoppel precludes a party from re-litigating a factual issue that was essential to a valid and final judgment against the same party in a prior action.

The Court of Appeals explained that the Workers' Compensation Act negated Electrical General's contentions regarding the law of the case and collateral estoppel. LE § 9-736(b)(1) provides that "[t]he Commission has continuing powers and jurisdiction" in workers' compensation cases. LE § 9-736(b)(2) allows the Commission, within a certain time period, to "modify any finding or order as the Commission considers justified." Under LE § 9-736(b), the Commission is not bound to follow its previous awards and orders; to the contrary, the Commission has the express authority to modify the same.

In its prior Order, the Commission properly denied LaBonte's request for additional temporary total disability benefits because the injury that occurred last—*i.e.*, the injury that resulted from the incident with the law enforcement officer—precluded liability for temporary disability benefits, as opposed to permanent disability benefits. In its prior Award of Compensation, because LaBonte had sought permanent disability benefits instead of temporary disability benefits, the Commission properly determined the portion of his back condition that was due to his accidental personal injury. Nothing in either of these two orders precluded the Commission from determining at a later date how much, if any, a worsening of LaBonte's back condition was due to his accidental personal injury. LE § 9-656(a) empowered the Commission to make such a determination, and LE § 9-736(b)(2) authorized the Commission to modify its previous finding of the proportion of LaBonte's back condition that was due to his accidental personal injury.

The Court of Appeals held that ample evidence supported the jury's finding that LaBonte's accidental personal injury, not the incident with the law enforcement officer, caused the worsening of LaBonte's back condition.

COURT OF SPECIAL APPEALS

Laurel Racing Association, L.P. v. Anne Arundel County, Maryland, No. 2413, September Term 2015, filed July 25, 2017. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2017/2413s15.pdf

REVIEWABILITY – REVIEWABLE AGENCY ACTION

Facts:

As Laurel Racing Association ("Laurel Racing") started planning to redevelop the Laurel Park horseracing complex, it sought to reserve the additional water and sewer capacity its new facilities would require. The Anne Arundel County (the "County") Office of Planning and Zoning ("OPZ") approved Laurel Racing's reservation in 2008, and Laurel Racing never appealed that decision. When a substantial fee related to the reservation came due in 2013, Laurel Racing decided to challenge the 2008 calculation. The parties exchanged data and studies, and the Department of Public Works ("DPW") sent Laurel Racing a letter on February 25, 2014 offering to reduce the allocation. Laurel Racing Association filed a Notice of Appeal with the Anne Arundel County Board of Appeals (the "Board") challenging DPW's calculation of the EDUs required for the project and the resulting charges and fees. The County moved to dismiss Laurel Racing's appeal on the grounds that the appeal of the February 25 letter was untimely and that the Board lacked jurisdiction, and the Board denied the motion, concluding that the February 25 letter constituted a modification of a prior approval. The County sought judicial review in the Circuit Court for Anne Arundel, which held *sua sponte* that the parties needed a final administrative order before they could resort to judicial review, and determined that the February 25 letter was not a final administrative decision. Laurel Racing appealed, arguing that the letter was an appealable agency action.

Held: Affirmed.

The Court of Special Appeals held that the February 28 letter was not a final administrative decision and, therefore, not appealable. The Court recognized that the OPZ, rather than the DPW, is the deciding agency, and thus, the ultimate appealable decision is embodied in the OPZ's approval of a project's sketch plan. Laurel Racing, however, did not appeal any element of the approved sketch plan from 2008. The Court also held that the DPW letter did not constitute a modification to the OPZ's original allocation plan, and as a result, the DPW's

calculation is not embodied in an appealable agency decision until the Officer of Planning and Zoning approves the final sketch plan. Lastly, this Court held that the February 25 letter does not fall within the exception to the finality requirement because there are no immediate legal consequences causing irreparable harm.

Theodore Priester, Jr. v. Board of Appeals of Baltimore County, Maryland, No. 1030, September Term 2016, filed July 27, 2017. Opinion by Arthur, J.

http://mdcourts.gov/opinions/cosa/2017/1030s16.pdf

BALTIMORE COUNTY PENSION STATUTE – THE HONORABLE AND FAITHFUL REQUIREMENT – FORFEITURE OF ENTIRE PENSION – THE BOARD'S APPLICATION – AD HOC FACTUAL DECISION

ADMINISTRATIVE LAW – SUBSTANTIAL EVIDENCE

Facts:

Appellant Theodore C. Priester, Jr., a Baltimore County fire captain, sexually harassed numerous female subordinates and created a hostile work environment in which employees were afraid to report his misconduct. After Captain Priester's conduct came to light, the fire department terminated his employment. He applied for retirement benefits. The Board of Trustees of the Employees' Retirement System denied Captain Priester's application on the ground that he had not rendered "honorable and faithful service as an employee." The Baltimore County Board of Appeals affirmed that determination, and the Circuit Court for Baltimore County affirmed the Board of Appeals.

Captain Priester appealed.

Held: Affirmed.

Under Baltimore County Code § 5-1-213, to qualify for retirement benefits, an employee must accumulate a certain period of "creditable service." The Code defines "creditable service" as "prior service," such as service in the armed forces of the United States, plus "membership service." The Code, in turn, defines "membership service" as "honorable and faithful service as an employee rendered while a member of the retirement system." According to § 5-1-217(b)(1)(i)(1) of the Code, "a member who retires on or after January 1, 1999, shall be entitled to receive a service retirement allowance . . . upon the completion of . . . [t]wenty-five (25) years of creditable service regardless of age[.]"

The Court rejected Captain Priester's contention that the "honorable and faithful" requirement was void for vagueness. "Honorable" and "faithful" are not technical terms; rather they are common words which are "understandable to a person of ordinary intelligence." *Finucan v. Md. Bd. of Physicians Quality Assurance*, 380 Md. 577, 592 (2004). Therefore, the Court reasoned that they give fair notice of the nature and quality of the service that members of the retirement system must give before they may obtain a pension.

Furthermore, in *Empls.' Ret. Sys. of Baltimore Cnty. v. Brown*, 186 Md. App. 293, 298 (2009), this Court implicitly rejected the Board of Appeals' position, that the "honorable and faithful" requirement was defective "because of the absence of established and official definitions and guidelines as to what constitutes 'honorable and faithful' service."

The Court also held that the Board of Appeals did not apply the Code provision in a manner that was inconsistent with case law. The Board of Appeals had to determine whether Captain Priester's misconduct was sufficiently grievous as to be labelled dishonorable or unfaithful. The *Brown* Court expressly recognized that the Board must resolve these questions in *ad hoc* factual decisions on a case-by-case basis. 186 Md. App. at 316. The Board is afforded an enormous range of discretion in making these decisions.

Captain Priester contended that because of its recognition of the necessity of *ad hoc* decision-making in the application of statutory terms to the facts of a given case, the *Brown* decision itself "hardly provides adequate notice" of what constitutes dishonorable or unfaithful service. To the contrary, *Brown* expresses the uncontroversial proposition that the Baltimore County Council cannot codify every possible application of the legal standard ("honorable and faithful conduct as an employee") to the disparate array of facts that may come before the Board.

The Court concluded that Captain Priester abused his status as a captain by creating a hostile and predatory environment, in which he exhibited a pattern of sexually harassing women for his amusement and the amusement of others. He presided over a workplace in which women were afraid to complain because they were concerned that no one would take their word over his (and that of his allies), that they would be shunned by their peers and subjected to retaliation, or that their co-workers might be ordered to withhold support from them when they were in danger. He was responsible, as captain, for enforcing the very rules that he flagrantly violated. No reasonable employee could believe that he or she could engage in a longstanding pattern of abusive misconduct such as Captain Priester's without putting pension rights at risk. The Board of Appeals, therefore, did not abuse its discretion and act in an arbitrary and capricious manner.

The Court held that forfeiture of Captain Priester's entire pension was consistent with the County Code. Captain Priester reasoned that "[t]he first instance of any alleged misconduct occurred in 'late 2010,'" which was after he had completed more than 25 years of service. Because the record contained no direct evidence of any dishonorable or unfaithful conduct during his first 25 years of service, Captain Priester concluded that he was entitled to his pension.

The Court explained that the County Code cannot reasonably be read to mean that, regardless of what he did after the twenty-fifth anniversary of his employment, Captain Priester had an indefeasible right to a pension merely because the County introduced no evidence of his misconduct in the first 25 years.

Had Captain Priester retired after 25 years, before any dishonorable or unfaithful conduct occurred (or before any came to light), he would have been entitled to a pension. Captain Priester, however, chose to remain in the County's employment after the twenty-fifth anniversary of his employment. By choosing to remain after 25 years he subjected himself to the statutory

condition that he would be entitled to a pension only if, at the time of his retirement, his service had been (or had continued to be) "honorable and faithful." See Baltimore County Code § 5-1-201(p). Because the Board of Appeals reasonably concluded that his service was not honorable or faithful at that time, he forfeited his right to a pension.

The Court also rejected Captain Priester's contention that the Board of Appeals committed an error of law in construing the Code to mean that he must serve honorably and faithfully throughout his entire tenure in order to receive a pension. He complained that, in the Board's view, "any incident of dishonorable or unfaithful service, no matter how fleeting or insignificant over the course of an employee's 30-year career, could result in" the loss of the entire benefit. However, under *Brown*, it is very clear that "fleeting or insignificant" misconduct cannot amount to dishonorable or unfaithful service.

Under *Brown*, employees may be divested of their pension rights only if the Board reasonably finds that they engaged in misconduct that was sufficiently serious or grievous as to taint or contaminate their entire record of service. The Court articulated that a pattern of misconduct, such as a years-long pattern of abuse of power and authority, like the pattern that was disclosed by the evidence in this case, would support the divestiture of benefits as well.

Finally, the Court concluded that the Board of Appeals had substantial evidence to determine that Captain Priester's service was not honorable and faithful. A reasoning mind could conclude that a fire officer's service was not honorable or faithful if he was found, over the course of several years, to have abused his authority by violating the rules that he was obligated to enforce and sexually harassing subordinates, who were unable to complain precisely because of his position of authority.

Jonathan D. Smith v. State of Maryland, Nos. 1069 & 1879, September Term 2016, filed July 26, 2017. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2017/1069s16.pdf

PETITION FOR WRIT OF ACTUAL INNOCENCE – NEWLY DISCOVERED EVIDENCE – DUE DILIGENCE

Facts:

On January 5, 1987, 64-year-old Adeline Wilford was stabbed to death in the kitchen of her farmhouse. The investigation stalled for years, but on March 1, 2001, a jury in the Circuit Court for Talbot County convicted Jonathan D. Smith, appellant, of felony murder and daytime housebreaking. The circuit court subsequently sentenced him to life imprisonment.

Approximately 10 years later, appellant filed a petition for writ of actual innocence and a Motion to Reopen Post-Conviction Proceedings based on three categories of alleged newly discovered evidence.

First, the Maryland State Police produced, pursuant to a Maryland Public Information Act request, copies of tapes containing several recorded conversations between the lead detective on the case and the State's key witness, appellant's aunt, Beverly Haddaway. These conversations revealed, *inter alia*, that charges against Ms. Haddaway's grandson in an unrelated case were dismissed prior to her testimony.

Second, the State's fingerprint examiner ran previously unidentified palm prints recovered from the crime scene through the Maryland Automated Fingerprint Identification System, which was not available at the time of appellant's trial. A match was found to Tyrone Anthony Brooks ("Ty Brooks"), who had a lengthy criminal record and had been identified initially as a suspect.

Third, appellant discovered several Betamax video tapes, which contained a recording of a hypnosis session with a witness, Danny Keene, who claimed to have seen a vehicle parked next to the victim's house at the time of the murder. Although the observation was referenced in a police report, that report did not indicate when Mr. Keene saw the vehicle.

The circuit court denied both the petition for writ of innocence and the motion to reopen.

Held: Reversed and remanded.

To prevail on a petition for writ of actual innocence, a petitioner must produce newly discovered evidence that: (1) "speaks to" the petitioner's actual innocence; (2) "could not have been discovered [with the exercise of due diligence] in time to move for a new trial under Md. Rule 4-

331"; and (3) creates "a substantial or significant possibility that the result may have been different."

With respect to the first requirement, that the evidence "speaks to" the petitioner's actual innocence, the petitioner need not definitively prove his or her innocence to warrant relief under the statute. Instead, we look to whether the evidence could support a claim that petitioner did not commit the crime for which he or she was convicted. The evidence here, to the extent it could support appellant's contention that someone else actually committed the crime and could significantly impair the credibility of the State's key witness regarding the core merits of the case, satisfied the first requirement.

The second requirement, that the newly discovered evidence "could not have been discovered in time to move for a new trial under Maryland Rule 4-331," requires defense counsel to exercise due diligence to discover evidence. The circuit court misconstrued the legal standard for due diligence in finding that appellant did not meet the requirement of due diligence with respect to the Bollinger-Haddaway tapes because he did not file an earlier MPIA request. The due diligence requirement in CP § 8-301 does not encompass a requirement that a defendant file a MPIA request with the police, or other agency that reports to the prosecutor, seeking information that the State is required to disclose pursuant to Brady and rule 4-263. The palm print evidence also constitutes newly discovered evidence that could not have been discovered with due diligence because the capability of the automated system to conduct palm print searches was not available before 2009, and the match was determined only after a new development in matching technology.

With respect to the third prong of the analysis, we are not persuaded that the innocence court conducted an independent analysis of whether, considering this newly discovered evidence, there was a substantial possibility of a different result.

Similarly, the record does not indicate that the circuit court properly exercised its discretion in deciding the motion to reopen post-conviction proceedings. Accordingly, we reverse the judgments and remand for further proceedings on both the petition and the motion.

J.H. et al. v. Prince George's Hospital Center, No. 1056, September Term 2016, filed July 27, 2017. Opinion by Leahy, J.

http://mdcourts.gov/opinions/cosa/2017/1056s16.pdf

HEALTH-GENERAL – INVOLUNTARY ADMISSION – PREADMISSION PROCEDURES

Facts:

Suffering from the harmful effects of mental illness, J.H., C.B., M.G., and B.N. (collectively "Appellants"), were brought to Prince George's Hospital Center ("Appellee" or the "Hospital") on separate occasions for emergency mental health evaluations to determine whether each should be admitted for involuntary psychiatric treatment. Each Appellant was afforded a hearing before an administrative law judge ("ALJ"), during which their counsel argued for their release on the ground that the Hospital failed to comply in various respects with the preadmission procedures set out in Maryland Code (1982, 2015 Repl. Vol.), Health-General Article ("Health-Gen."), § 10-601 *et seq*. Each ALJ concluded the evidence established that each Appellant qualified for involuntary admission to the Hospital's inpatient psychiatric unit in accordance with Health-Gen. § 10-632(e), and that none of the alleged preadmission procedure violations warranted Appellants' release.

Counsel filed a petition for judicial review for each Appellant and a motion to consolidate their cases in the Circuit Court for Prince George's County. The circuit court granted the motions to consolidate and, after argument, affirmed the ALJ's decisions with respect to each Appellant. Before the Court of Special Appeals, Appellants challenge the ALJs' decisions and present issues derivative of one overarching question: During involuntary admission hearings, are hospitals required to affirmatively prove compliance with preadmission procedures beyond the statutorily prescribed involuntary admission elements contained in Health-Gen. § 10-632(e)?

Held: Affirmed.

The Court of Special Appeals affirmed the decisions ordering the involuntary admission of each Appellant. The Court held that at an involuntary admission hearing, the hospital has the burden to prove the involuntary admission elements enumerated in Health-Gen. § 10-632(e) by clear and convincing evidence, and that the patient has the burden, pursuant to Code of Maryland Regulations ("COMAR") 10.21.01.09G(2), to raise with particularity any alleged violations of preadmission procedures. Once raised, the burden shifts to the hospital to demonstrate, by a preponderance of the evidence, its compliance with the particular procedural violations raised.

Additionally, the Court clarified the standard of review in administrative cases. In this case, the Department of Health and Mental Hygiene ("DHMH") delegates authority to the Office of

Administrative Hearings ("OAH") to preside over and issue final decisions in involuntary admission cases. COMAR 10.21.01.09A. The independence that ALJs have from DHMH in conducting involuntary admission hearings may, perhaps, warrant greater deference in reviewing their factual findings; however, without the subject matter expertise traditionally present when an agency is in the decision-making role, appellate courts should not afford deference to the ALJs' legal interpretations of the involuntary admission statutes and the concomitant regulations promulgated by DHMH.

White Pine Insurance Company v. Howard R. Taylor, No. 493, September Term 2016, filed July 27, 2017. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2017/0493s16.pdf

INSURANCE COVERAGE – INSURANCE POLICY CONSTRUCTION – GENERAL COMMERCIAL LIABILITY INSURANCE – BATTERY – ASSAULT AND BATTERY EXCLUSION

Facts:

This appeal arises from appellant-defendant, White Pine Insurance Company's ("White Pine"), denial of coverage to its insured, West End Pub and Restaurant, LLC ("West End" or "West End Pub"), for a shooting injury suffered by one of West End's patrons, plaintiff-appellee, Howard R. Taylor ("Taylor"). The injury occurred on March 31, 2013, as Taylor opened the door of the pub and was shot in the leg. No suspect was apprehended and Taylor testified that he did not see who fired the shot. After West End's insurer, White Pine, denied West End's request to provide a defense to Taylor's claim for negligence, West End and Taylor reached a consent judgment agreement (the "Consent Verdict"), in which West End admitted negligence and agreed to a settlement of $100,000.00. Further, West End assigned to Taylor all of its claims against White Pine relevant to coverage under its commercial general liability policy ("the Policy").

Thereafter, Taylor filed an action for breach of contract against White Pine seeking judgment in the amount of $74,999.00 in the Circuit Court for Washington County. During a bench trial, Taylor's counsel argued that Taylor's injury was covered under the insurance policy as an "occurrence," and White Pine argued that the "Assault and Battery" exclusion removed the incident from coverage. Taylor's counsel responded that White Pine failed to show that Taylor's injury was the result of a "battery." White Pine contended, as it continued to argue on appeal, that the fact that Taylor was shot by a gun is enough to show that the incident constitutes a "battery" under the Policy, because there is no intent requirement under the Policy's definition.

The court, during a bench trial, heard testimony from Taylor regarding his injuries, but neither side presented any evidence of the circumstances leading to the shooting (other than the Consent Verdict Agreement between Taylor and West End). The court provided that it could not find that Taylor's injuries were the result of a battery without any evidence showing that the intent requirement had been met. The circuit court, therefore, found in favor of Taylor and awarded damages in the amount of $100,000.00.

Held:

The circuit court did not err by finding in favor of Taylor, but erred by awarding an amount that exceeded the *ad damnum* clause of the complaint.

The critical issue in this case is whether the circuit court erred by finding that White Pine failed to establish that Taylor's injuries were excluded from coverage as a "battery" as defined in the Policy's Assault and Battery exclusion. Our focus, therefore, is on the evidence presented at trial and the interpretation and applicability of the Policy's definition of "battery."

The only evidence presented regarding Taylor's injuries at West End, however, established only that a bullet hit him in the leg as he opened the door to leave the pub and that he did not know who shot him or from where the bullet was fired. Neither side presented any evidence to the trial court tending to show that the shooting was intentional rather than "accidental." In other words, the trial court had no evidence before it regarding whether or not the shooter intended to harm another person or to set a force in motion that ultimately led to Taylor's shooting injury.

Two circumstances combined to make this case unique. The first is the Policy's definition of "battery" in the "Assault and Battery" exclusion, which, at least ostensibly, does not require any particular state of mind. Second, no evidence was presented at trial of any circumstance leading to the shooting or of the shooter's mental state or intent.

Even though Maryland does not follow the rule that an insurance policy is construed against the insurer, "any ambiguity will be 'construed liberally in favor of the insured and against the insurer as drafter of the instrument.'" *Md. Cas. Co. v. Blackstone Int'l Ltd*., 442 Md. 685, 695 (2015) (citations omitted). As the Court of Appeals noted in *Megonnell v. United Servs. Auto. Ass'n*., we interpret exclusionary provisions in insurance contracts narrowly. 368 Md. 633, 656 (2002) (citation omitted). "If the ambiguity remains after consideration of extrinsic or parol evidence . . . is introduced, it will be construed against the insurer as the drafter of the instrument." *James G. Davis Const. Corp. v. Erie Ins. Exchange*, 226 Md. App. 25, 35 (2015).

We found that the Policy's coverage was ambiguous under the Policy with respect to unintentional or "accidental" acts that fall within the "Assault and Battery" exclusion's definition of "battery." In this case, the Policy's "Assault and Battery" exclusion provides that the insurance "does not apply to" "bodily injury" "arising out of or resulting from" a "battery" that is "committed by any person." "Battery" is defined as "an act which brings about harmful or offensive contact to another or anything connected to another." Interpreting the definition of "battery" in the context of the remainder of the Assault and Battery exclusion and the purpose of the Policy as a whole provides an alternative, reasonable interpretation of the scope of the exclusion.

Alternatively, White Pine argues that, even if the Policy's definition of "battery" was ambiguous, the incident met the common law definition of battery. As we explain, the common law definition of battery requires, at a minimum, proof of intent, even if only to show that the actor intended to set a force in motion that resulted in bodily harm.

Where an insurer claims that an exclusion removes the insurer's obligation to indemnify the insured, the insurer bears the burden of showing that the exclusion applies. *Prop. & Cas. Ins. Guar. Corp. v. Beebe-Lee*, 431 Md. 474, 489 (2013). White Pine failed to put forth any evidence of the circumstances leading to the shooting. The circuit court, therefore, did not err by finding

in favor of Taylor. The circuit court did err, however, by awarding to Taylor an amount that exceeded the *ad damnum* clause of the complaint. *See* Md. Rule 2-305.

Joseph Basso v. Juan Campos, et al., No. 364, September 2016 Term, filed July 27, 2017. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2017/0364s16.pdf

CIRCUMSTANTIAL EVIDENCE – EXPERT WITNESS OPINION – SELLER'S KNOWLEDGE OF MATERIAL DEFECT IN REAL PROPERTY – RULE 5-702.

Facts:

Purchaser of real property sued sellers for negligent misrepresentation, fraud, and violations of the Consumer Protection Act, alleging that they had failed to disclose and had concealed that there had been flooding in the basement of the property during the roughly two months that the sellers owned the property, during which time they were renovating it for resale. In a jury trial, the purchaser called an expert witness on the standard of care and causation who provided information about significant storm events that took place during the sellers' period of ownership, and testified about the condition of the property when he inspected it, in his role as an expert witness, two years after the sale. The trial court sustained objections when the purchaser sought to elicit the expert's opinion that, to a reasonable degree of certainty, the property would have experienced flooding during the interval in which the sellers owned it. There was evidence that the sellers had been present on the property daily during that period. In the absence of this expert witness opinion testimony about knowledge on the part of the sellers, the court granted the sellers' motion for judgment. The court ruled that the purchaser had failed to present any admissible evidence of knowledge of basement flooding at the property on the part of the sellers at the time of the sale. Purchaser appealed.

Held: Reversed.

Trial court abused its discretion in limiting the scope of the purchaser's expert's opinion testimony. The court ruled, incorrectly, that the expert could not express any opinion about the condition of the property at the time of sale, in 2011, based on his inspection of the property two years later, in 2013, as such an opinion would be mere speculation. The expert witness had an adequate factual foundation for his opinion: that significant weather events had taken place during the sellers' period of ownership; that the sellers were present on the property on a daily basis during the period when the weather events took place; that the basement of the property flooded in a similar significant weather event not long after the sellers sold it to the purchaser; and that the sellers had made some of the renovations to the property that could be construed as an effort to address flooding and to conceal that flooding had happened. The expert's opinion was admissible circumstantial evidence to show that flooding had happened in the basement of the property while it was owned by the sellers, the mechanism of the flooding, that the sellers knew of flooding and what was causing it, and that they failed to disclose the flooding and

attempted to conceal it from the purchaser. Whether the flooding had another cause and whether the sellers did not attempt to conceal past flooding or a condition of the property that would make it likely that the basement would continue to flood were questions for the jury to decide.

Kyle Blackstone, et al. v. Dinesh Sharma, et al., No. 1524, September Term 2015 and *Terrance Shanahan, substitute trustee, et al. v. Seyed Marvastian, et al.,* No. 1525, September Term 2015, filed June 6, 2017. Opinion by Salmon J.

http://www.mdcourts.gov/opinions/cosa/2017/1524s15.pdf

FORECLOSURES – LICENSING REQUIREMENT.

Unless some exception to the Maryland Collection Agency Licensing Act (MCALA) applies, the licensing requirement of the MCALA is applicable to persons (including an individual, fiduciary, representation of any kind, partnership, firm, corporation, or other entity) who attempt to collect a consumer debt, by bringing a foreclosure action. The MCALA exempts from its coverage, *inter alia*, "a trust company." The words "trust company" means a company that acts as a trustee for people and entities and that sometimes also operates as a commercial bank." Black's Law Dictionary (10th ed. 2014). Ventures Trust (the entity that appointed the appellants) does not fit within the definition and, because it does not claim that any other exemption from the MCALA is applicable, is barred from filing a foreclosure action in Maryland without a license.

Facts:

In 2006, Dinesh Sharma, Santosh Sharma and Ruchi Sharma, in order to secure a $1,920,000.00 loan on their personal residence, executed a deed of trust that encumbered real property located in Potomac, Maryland. Washington Mutual Bank, FA was the original lender. In December 2007, the Sharmas defaulted on the loan by failing to make deed of trust payments when due.

Ventures Trust, by its Trustee MCM Partners, LLC, acquired ownership and "all beneficial interest in the aforementioned loan" in 2013, at a time when the Sharmas were in default. On November 25, 2014, the substitute trustees appointed by Ventures Trust filed an order to docket, initiating a foreclosure action against the Sharmas. At that point, the Sharmas owed $3,800,536.23 on the loan. The Sharmas responded to the foreclosure action by filing, *inter alia*, a motion to dismiss or enjoin the foreclosure sale. The substitute trustees promptly moved to strike the Sharmas' motion. Following a hearing, the Circuit Court for Montgomery County, on August 28, 2015, filed an opinion and order granting the motion to dismiss the foreclosure action without prejudice. In its written opinion, the circuit court determined that pursuant to the MCALA, Ventures Trust was a collection agency and was therefore required to be licensed before attempting to collect on the deed of trust. The court ruled that because Ventures Trust was not licensed as a collection agency, it had no right to file a foreclosure action. In reaching this conclusion, the circuit court rejected Ventures Trust's contention that it was a "trust company" and was therefore exempt from MCALA's licensure requirements. The substitute trustees noted a timely appeal in case No. 1524.

The consolidated appeal, No. 1525, had an almost identical factual background. In that case, Seyed and Sima Marvastian executed a deed of trust secured by their personal residence, which was located in Bethesda, Maryland. The deed of trust secured a loan in the amount $1,396,500.00. Premiere Mortgage Funding, Inc. was the lender. The Marvastians defaulted on the loan in December 2012.

Ventures Trust, by its Trustee MCM Capital, acquired the Marvastians' loan in February 2014, which was more than a year after the loan was in default status. On October 20, 2014, the substitute trustees appointed by Ventures Trust filed an order to docket, initiating the foreclosure process. At the time of this filing, the substitute trustees alleged that the Marvastians owed $1,632,303.26 on the loan.

The Marvastians filed a motion to dismiss or stay the foreclosure sale pursuant to Md. Rule 14-211. Ultimately, the circuit court granted the Marvastians' motion to dismiss, without prejudice. The judge's reason for dismiss the case were exactly the same as those given for dismissing the foreclosure case that is the subject of Appeal No. 1524. The substitute trustees then filed a timely appeal.

Held: Affirmed.

The Court of Special Appeals held that unless some exception to the Maryland Collection Agency Licensing Act (MCALA) applies, the licensing requirement of the MCALA is applicable to all persons who attempt to collect a consumer debt by bringing a foreclosure action. Without a license, a debtor, or its agents, cannot file a foreclosure action.

In reaching its conclusion in both of the consolidated cases, the Court rejected Ventures Trust's contention that it was a trust company that was exempt from the provisions of the MCALA. The Court interpreted the words "trust company" as meaning "[a] company that acts as a trustee for people and entities and sometime also operates as a commercial bank." The Court held that Ventures Trust does not act as a bank. Moreover, other entities act as a trustee for it and nothing in the record shows that Ventures Trust acts as a trustee for anyone.

The Court concluded as follows:

> A debt purchaser that attempts to collect a consumer debt by bringing a foreclosure action is required to have a license unless some statutory exemption applies. Contrary to appellants' contention, Ventures Trust is not a "trust company" within the meaning of the MCALA and must therefore obtain a debt collection license in accordance with the provisions of the MCALA before bringing a foreclosure action. Because Ventures Trust had no such license, it was barred from filing, through its agents, the two foreclosure actions here at issue.

Judith Woolridge v. Lauren Abrishami, et al., No. 744, September Term 2016, filed July 6, 2017. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2017/0744s16.pdf

CONTRIBUTORY NEGLIGENCE – WAIVER OF AFFIRMATIVE DEFENSES – PRETRIAL STATEMENT – DISCOVERY.

Facts:

On May 23, 2014, 18-year-old Lauren Abrishami ("Lauren"), appellee, was operating a motor vehicle when she struck pedestrian Judith Woolridge, appellant, as Ms. Woolridge attempted to cross the street. Ms. Woolridge filed a three-count Complaint alleging, among other things, that as she was "crossing the street in a crosswalk at Main Street and Market Street East . . . in Gaithersburg, Maryland," Lauren negligently made a left turn and struck her, causing injuries. Lauren answered the Complaint, asserting affirmative defenses, including that "Plaintiff was contributorily negligent."

Prior to trial, the court issued an "Order for Mandatory Settlement Conference/Pretrial Hearing." It scheduled a pretrial settlement conference and a pretrial hearing, and directed the parties to prepare a written joint pretrial statement, which "shall contain," among other things, "a concise statement of all claims and defenses which that party is submitting for trial." The order further directed the parties to identify each pattern jury instruction that the parties intended to offer at trial, with an indication of those agreed upon and those not agreed upon.

In the Joint Pretrial Statement filed with the court, Lauren's counsel indicated, under "Claims and/or Defenses," that Lauren "denies the nature and extent of Plaintiff's injuries and permanency." Counsel also asserted that "all issues of liability and damages are in dispute." Lauren did not include a proposed jury instruction on contributory negligence in the pretrial statement. She did state, however, that she would propose "[a]dditional instructions to be submitted at trial to conform to the evidence," and she reserved the right to "request additional jury instructions based upon the evidence at trial."

During discovery, Ms. Woolridge asked about Lauren's claim of contributory negligence. Lauren initially provided to opposing counsel an unsigned response, stating: "I stopped at the stop sign and began to make a left from Main Street onto Market Street. As I made the turn, I was distracted, talking to my cousin and did not see the Plaintiff right away, as soon as I did, I slammed on my brakes but it was too late and I hit the Plaintiff." On the day of trial, however, Lauren provided signed answers. In response to the question whether she was aware of anything Ms. Woolridge "could have done to avoid being hit," Lauren responded: "I wasn't aware of like where she was situated and if she looked both ways. I'm not sure." She did note, however, that as she slowed the vehicle, Ms. Woolridge "just like stood there. She didn't move."

During opening statements at trial, counsel for Lauren stated that, in order to award compensation, the jury "must find that the defendant was at fault and that the plaintiff did nothing to contribute to the accident." Counsel for Ms. Woolridge objected, arguing that Lauren had not given adequate notice of the contributory negligence defense because she did not state facts in her answers to interrogatories, or in her deposition, that supported that defense. The court denied the motion, stating that the defense was in the answer, and "it's preserved unless it's affirmatively withdrawn or abandoned or some way[] communicated that they no longer wish to proceed."

Held: Affirmed.

An affirmative defense raised in an answer is not automatically waived by the mere failure to reassert it in discovery or the pretrial statement. Here, defendant's failure to list the defense of contributory negligence in the Joint Pretrial Statement, which stated only that "liability and damages are in dispute," did not constitute a waiver of that defense. And where plaintiff made no objection to the discovery responses provided by defendant, neither moving to compel factual support for the affirmative defense of contributory negligence, nor moving for sanctions or an order to strike this defense prior to trial, the circuit court did not abuse its discretion in declining to strike the defense of contributory negligence after trial began.

In a car accident involving a young driver, who had a driver's license and had only one prior incident, which resulted in a scratch on the vehicle, there was not sufficient evidence to show that defendant's parent knew or had reason to know that defendant had "dangerous propensities" or that any harm to others was reasonably foreseeable. Under these circumstances, the circuit court properly granted defendant's motion for summary judgment on the claim of negligent entrustment.

George Lindenmuth v. Michael McCreer, No. 482, September Term 2016, filed July 26, 2017. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2017/0482s16.pdf

DEFAMATION – INVASION OF PRIVACY – UNREASONABLE PUBLICITY GIVEN TO PRIVATE LIFE – FALSE LIGHT – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Facts:

This appeal arises out of a dispute between coworkers in a mechanic shop at Coca Cola Enterprises ("CCE"), where appellant George Lindenmuth was employed as a mechanic. Michael McCreer ("McCreer"), who was employed as the lead mechanic in the same CCE mechanic shop, held supervisory responsibilities over Lindenmuth's work, such as giving work assignments and performing audits of Lindenmuth's work. In early April 2014, Lindenmuth's manager and supervisors brought several of Lindenmuth's mistakes to his attention. On April 9, 2014, Lindenmuth's manager advised Lindenmuth to take a leave of absence from CCE due to his high level of stress.

On May 2, 2014, Doug Anderson, another mechanic under McCreer's supervision, told McCreer that he had heard rumors Lindenmuth was returning to work and that he was concerned Lindenmuth would shoot someone. It was common knowledge within the shop that Lindenmuth owned a firearm and had a license to carry a concealed weapon, which was issued in another state. When McCreer asked for the basis of Anderson's concerns, Anderson described a prior experience at a previous workplace during which a truck driver, who had been fired, returned to the workplace and killed their supervisor and himself. Anderson asked McCreer to talk to management on his behalf to convey his concerns.

McCreer went to CCE Manager, Jimmy Young ("Young"), and relayed the following concerns: (1) Lindenmuth was returning to work; (2) Lindenmuth had guns; (3) that Lindenmuth had a permit to carry a concealed weapon; and (4) Lindenmuth was going to shoot someone at work. Following McCreer's conversation with Young, Young called the police and the police questioned several employees in the mechanic shop about Lindenmuth. Thereafter, Lindenmuth returned to CCE to pick up his tools and saw that his photo had been placed in the guard shack with a note indicating that Lindenmuth was not allowed into the facility.

At a hearing on McCreer's motion to dismiss the complaint for failure to state a claim, the circuit court confirmed each of Lindenmuth's allegations and what facts remained in dispute. On April 12, 2016, the circuit court granted summary judgment in favor of McCreer on all four counts of the complaint including (1) defamation; (2) invasion of privacy -- unreasonable publicity given to private life; (3) invasion of privacy -- placing a person in a false light; and (4) intentional

infliction of emotional distress. The primary issue on appeal is whether the circuit court erred in granting summary judgment in favor of McCreer on all four counts of the complaint.

Held: Affirmed.

The Circuit Court did not err in granting summary judgment on all four counts of the complaint.

The circuit court's task was to determine, based upon the undisputed material facts, and viewing all reasonable inferences from those facts in the light most favorable to Lindenmuth, whether McCreer was entitled to judgment as a matter of law for each count of the complaint. The circuit court painstakingly sorted through the material facts, as well as some immaterial facts, to determine what facts were in dispute relevant to each count.

On the count of defamation, Lindenmuth alleged that McCreer made false and defamatory statements about Lindenmuth to his managers and coworkers, that he acted with knowledge of the falsity of the statements, and that he intended to harm Lindenmuth's chances to return to work at CCE. McCreer argued that his statements to management were subject to a privilege, which is a "circumstance[] in which a person will not be held liable for a defamatory statement because the person is acting 'in furtherance of some interest of social importance, which is entitled protection.'" *Woodruff v. Trepel*, 125 Md. App. 381, 391 (1999), *cert. denied*, 354 Md. 332 (1999) (citation omitted). A qualified privilege may "defeat[] a claim of defamation, if the defendant did not abuse that privilege." *Piscatelli v. Van Smith*, 424 Md. 294, 307 (2012) (citing *Hanrahan v. Kelly*, 269 Md. 21, 29–30 (1973)). One such privilege is "the privilege to publish to someone who shares a common interest, or, relatedly, to publish in defense of oneself or in the interest of others." *Gohari v. Darvish*, 363 Md. 42, 57 (2001) (citation omitted).

Lindenmuth failed to demonstrate that McCreer's statements were false -- an essential element of a *prima facie* case of defamation. *See Gohari, supra*, 363 Md. at 54. Even assuming Lindenmuth had been able to prove all elements of a *prima facie* case of defamation, Lindenmuth could not overcome McCreer's assertion of a qualified privilege based on McCreer's interests in common with his superior. Lindenmuth, however, provided no evidence relevant to showing that McCreer acted with "actual malice," alleging only that Lindenmuth and McCreer had an "acrimonious relationship." Even concrete evidence that McCreer harbored ill will toward Lindenmuth would not have established an abuse of privilege where Lindenmuth could not proffer any evidence to impugn McCreer's good faith belief in the accuracy of his statements. *See Bagwell, supra*, 106 Md. App. at 513. Accordingly, we hold that the circuit court did not err when it granted summary judgment in favor of McCreer on the count of defamation.

Further, Lindenmuth failed to put forth any evidence that could have established the essential elements of the two remaining privacy tort claims -- "invasion of privacy -- unreasonable publicity given to private life," and false light. Indeed, Lindenmuth did not dispute inapposite facts on either claim. Finally, a defendant who is shielded from liability for defamation based on

a qualified privilege is also protected from a claim of intentional infliction of emotional distress, as the publication of information based on a common interest, without actual malice, is not "extreme and outrageous" -- a required element of a prima facie case of intentional infliction of emotional distress. *Batson v. Shiflett*, 325 Md. 684, 724-25 (1992).

Valerie Trim, et al. v. YMCA of Central Maryland, Inc., No. 494, September Term 2016, filed July 25, 2017. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2017/0494s16.pdf

NEGLIGENCE – STATUTE OR ORDINANCE RULE – MARYLAND PUBLIC ACCESS AUTOMATED EXTERNAL DEFIBRILLATOR PROGRAM

Facts:

An automated external defibrillator (AED) is a portable device that checks the heart rhythm and can send an electric shock to the heart to try to restore a normal rhythm. An AED may save a person's life if it is used within minutes after a person suffers sudden cardiac arrest.

Vincent Trim collapsed from sudden cardiac arrest while playing basketball at a YMCA in Ellicott City. A YMCA fitness instructor was near the door to the basketball court at the time. The employee had 20 years of training and experience in administering life support and resuscitation measures, including the use of an AED. The fitness instructor administered cardiopulmonary resuscitation (CPR) until paramedics arrived. Although the YMCA had an AED that was just outside the doors of the basketball court, she did not retrieve it or ask anyone to retrieve it for her.

The paramedics were made aware that there was an AED just outside of the basketball court and asked a YMCA employee to retrieve it. The paramedics used the AED, but they were unsuccessful in resuscitating Mr. Trim. He died a few days later as a result of cardiac arrest and the resulting cessation of blood flow to his brain and vital organs.

Mr. Trim's widow, Valerie Trim, commenced a wrongful death and survival action against the YMCA in the Circuit Court for Howard County. Her theory of liability rested on the premise that the YMCA had an affirmative duty to use the AED after her husband's collapse on the YMCA's premises. She purported to rely on COMAR regulations propounded to implement Md. Code (1978, 2014 Repl. Vol.), § 13-517 of the Education Article.

The YMCA moved to dismiss the complaint, or alternatively, for summary judgment on three grounds: (1) that section 13-517 of the Education Article does not impose an affirmative duty to use an AED; (2) that the statute contains an immunity provision that shielded the YMCA from liability for an act or omission in the provision of automated external defibrillation; and (3) that Mr. Trim had released the YMCA from liability by signing a YMCA membership agreement with an exculpatory clause. The circuit court granted the YMCA's motion.

Ms. Trim appealed, challenging each of the three grounds for the judgment.

Held: Affirmed.

The Court of Special Appeals held that section 13-517 of the Education Article and its related regulations do not establish a duty of care that requires the administration of the AED in the circumstances of the case. As a result, the Court found it unnecessary to address the second and third grounds for the judgment.

Section 13-517 of the Education Article establishes a public access program for automated external defibrillators (AEDs) in this State. The statute is designed to encourage the installation of AEDs in places of business and public accommodation. The statute also seeks to ensure that the devices are operable and will be used by people who are properly trained to use them.

The public access automated external defibrillator program is administered by the Emergency Medical Services (EMS) Board. The EMS Board has the power to adopt regulations to administer the program, and to issue certificates to facilities that meet certain statutory requirements. At the time of Mr. Trim's cardiac arrest, the YMCA had a valid certificate from the EMS Board, and so it was a "registered facility" under the statute.

The appellant contended that the YMCA had a statutory or regulatory duty to use the AED on its premises when Mr. Trim collapsed. She argued that section 13-517 or its implementing regulations mandate that a facility, like the YMCA, use an AED when a person suffers or appears to have suffered sudden cardiac arrest. The Court rejected that argument.

The statute is silent as to whether or not a registered facility has an affirmative duty to administer an AED in the event of a sudden cardiac arrest. That legislative silence stands in stark contrast to the language of affirmative obligation used in other statutes that have been construed to prescribe a duty of care towards members of a specific class. The statute does not include language that obligates a facility to take any specific action when a person exhibits signs of cardiac arrest. Moreover, nothing in the regulations impose an affirmative duty to use an AED whenever a person suffers or reasonably appears to have suffered sudden cardiac arrest. The regulations merely require a facility to comply with certain requirements to obtain a certificate. Therefore, neither the statute nor the regulations create the duty of care that the appellant alleged that the YMCA had violated.

Return to ToC

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated April 21, 2017, the following attorney has been indefinitely suspended by consent, effective July 3, 2017:

FRED KELLY GRANT

*

By an Order of the Court of Appeals dated June 8, 2017, the following attorney has been suspended by consent for one year, effective July 3, 2017:

STERLING GARRETT MEAD

*

By an Opinion and Order of the Court of Appeals dated July 10, 2017, the following attorney has been indefinitely suspended:

JAMES ALOYSIUS POWERS

*

By an Order of the Court of Appeals dated July 18, 2017, the following attorney has been disbarred by consent:

JAMES ROBERT JORDAN SCHELTEMA

*

By an Order of the Court of Appeals dated July 28, 2017, the following attorney has been suspended:

LAWAL MOMODU

*

*

By an Order of the Court of Appeals dated July 28, 2017, the following attorney has been placed on inactive status:

W. STEPHEN PALEOS

*

This is to certify that the name of

ROLANDO VICENTE LEE

has been replaced upon the register of attorneys in this Court as of July 28, 2017.

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Return to ToC

JUDICIAL APPOINTMENTS

*

On June 14, 2017, the Governor announced the appointment of **MAGISTRATE JAMES ALFRED BONIFANT** to the Circuit Court for Montgomery County. Judge Bonifant was sworn in on July 6, 2017 and fills the vacancy created by the retirement of the Hon. Joseph M. Quirk.

*

On June 14, 2017, the Governor announced the appointment of **KEVIN GERARD HESSLER** to the Circuit Court for Montgomery County. Judge Hessler was sworn in on July 25, 2017 and fills the vacancy created by the retirement of the Hon. Mary Beth McCormick.

*

On July 11, 2017, the Governor announced the appointment of the **HONORABLE ERIK HOWARD NYCE** to the District Court of Maryland – Prince George's County. Judge Nyce was sworn in on July 21, 2017 and fills the vacancy created by the elevation of the Hon. Tiffany Hanna Anderson to the Circuit Court for Prince George's County.

UNREPORTED OPINIONS

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

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

	Case No.	*Decided*
4 Aces Bail Bonds v. State	0930	July 25, 2017
A.		
Adams, Zachariah v. State	0781	July 31, 2017
American Express Bank v. Groman	0950	July 14, 2017
Anderson, Keith v. State	1428	July 21, 2017
Annan, Heinin v. State	0611	July 20, 2017
Armstrong, Dustin Levi v. Armstrong	2225	July 31, 2017
Avedisian, Ara v. Rapid Financial Services	1035	July 12, 2017
B.		
Banks, Isaiah v. State	0978	July 24, 2017
Bell, Edwin E. v. Dyck O'Neal, Inc.	0388 *	July 14, 2017
Bell, Edwin E. v. Dyck O'Neal, Inc.	2269 **	July 14, 2017
Beringer, Robert v. Beringer	1177	July 19, 2017
Bloom, Max Arthur v. Adler	0219	July 11, 2017
Bradford, Marcus v. State	1809	July 13, 2017
Braithwaite, Darrell v. State	0668	July 14, 2017
Brice, Charles, Jr. v. State	0985	July 5, 2017
Brown, Demar Anthony v. State	1088	July 3, 2017
Brown, Dontaze v. State	2782 *	July 11, 2017
Brown, Robert v. State	0984	July 5, 2017
C,		
Candy, Donnell v. State	1280	July 12, 2017
Carrington, Milton v. State	1281	July 12, 2017
Christian, Heather Stanley v. Maternal-Fetal Medicine	0013 *	July 3, 2017
Clar, Felicia M. Barlow v. Muehlhauser	0851	July 12, 2017
Cole, Jennifer W. v. Ward	0492	July 7, 2017

September Term 2016
* September Term 2015
** September Term 2014
*** September Term 2013

Cottmeyer, Matthew Everett v. State	0996	July 17, 2017
Crippen, Alexander v. State	1318	July 5, 2017
D.		
Darden, Garret v. Umoja	0394	July 7, 2017
Dennis, Gaven Shamar v. State	1234	July 11, 2017
Dingle, Antonio v. State	1414	July 12, 2017
Douglas, Linda Ann v. Johnson	2237 *	July 11, 2017
Doyle, Heather Glasgow v. State	0831	July 13, 2017
E.		
Estate of Castruccio v. Castruccio	0623 *	July 11, 2017
Estate of Mattison v. Veolia Transportation	0260	July 19, 2017
Evans, Ralph N., II v. Evans	1860	July 31, 2017
F.		
Faulkner, David R. v. State	1066	July 26, 2017
Faulkner, David R. v. State	1878	July 26, 2017
G.		
Gandhi Health Career Servs. v. 1515 Reisterstown Rd.	0865	July 13, 2017
Garrett, Dominic v. State	1968	July 21, 2017
Gilbert, Michael Duane v. State	1040	July 14, 2017
H.		
Hackney, Thoyt v. State	2513 *	July 18, 2017
Hall, Joseph, Sr. v. JP Morgan Chase Bank	0434	July 31, 2017
Hall, Rondell Davon v. State	1549	July 31, 2017
Hecht, Spencer M. v. Hecht	0015	July 12, 2017
Hinton, William Raymond, II v. State	0467	July 5, 2017
Holloway, Christopher Antwone v. State	0884	July 31, 2017
Hunter, David v. State	1634 *	July 19, 2017
Hunter, David v. State	2516 *	July 19, 2017
I.		
In re: Adoption/G'ship of M.M., A.M., and J.M.	1966	July 12, 2017
In re: Adoption/Guardianship of T.A., Jr.	2110	July 3, 2017
In re: C. W.	2537	July 28, 2017
In re: D. E.	2424	July 28, 2017
In re: J. M., Jr.	2180	July 25, 2017
In re: Kameren C.	1830 ***	July 18, 2017

September Term 2016
* September Term 2015
** September Term 2014
*** September Term 2013

In re: M.S., A.S., and M.S.	1853	July 31, 2017
In re: M.S., A.S., and M.S.	2298	July 31, 2017
In re: S. E.	1323	July 5, 2017
K.		
Kranz, William Louis v. State	0785 ***	July 13, 2017
Kropfelder, Christine B. v. Kropfelder	2560 *	July 20, 2017
L.		
Lescalleet, Carolyn v. Garrity	1498	July 10, 2017
Livingston, Andre L. v. Jones	2255	July 21, 2017
Lowther, Kelly M. v. St. Mary's Co. Sheriff	1774 *	July 25, 2017
Ludtke, Max v. State	2064 *	July 18, 2017
Lyles, Larnell Tyran v. State	1515	July 13, 2017
Lyon, Angela v. State	1360	July 5, 2017
M.		
Manning, Neal v. State	1768	July 13, 2017
McGinnies, Lisa M. v. Plymouth Muse	0904 *	July 12, 2017
Montgomery Co. Public Schools v. Donlon	0571	July 19, 2017
Moore, Ronnie v. Rosenburg	0708	July 5, 2017
Morrison, Abras S. Q. v. State	0546	July 5, 2017
N.		
Nelson, Cassandra G. v. Fisher	0312	July 7, 2017
Norman, Mark v. State	1793 *	July 18, 2017
O.		
Oliphant, Samuel v. State	2913 *	July 25, 2017
Otto, Albert Carl v. State	2758 *	July 3, 2017
P.		
Parandhamaia, Gokula Krishna v. Dept. of Soc. Servs.	1091	July 3, 2017
Parandhamaia, Gokula Krishna v. Dept. of Soc. Servs.	1092	July 3, 2017
Paul, Anne Marie v. Gerald	2108	July 21, 2017
Pearce, Christopher v. Pearce	0212	July 11, 2017
Pellum, Linda J. v. Fisher	2702 *	July 7, 2017
PGMC IV v. BE UTC Dewey Parcel	1192	July 12, 2017
Prince George's Co. v. Skillman	1169	July 13, 2017
Purnell, Rodriguez v. State	2720 *	July 3, 2017

September Term 2016
* September Term 2015
** September Term 2014
*** September Term 2013

R.

Randle, Jerrell v. State	0670	July 12, 2017
Richter, Charles v. State	1264 *	July 19, 2017
Robeson, Davon v. State	0664	July 11, 2017
Roland, Ronda v. Daramaja	0709	July 11, 2017

S,

Scott, Adam Burk v. State	2885 *	July 7, 2017
Shyngle, Stanley O. v. State	2340 *	July 12, 2017
Sigethy, Deborah A. v. Klepper	0016	July 20, 2017
Smoot, Larry Mitchell v. State	0737	July 5, 2017
Spencer, Harvey Cordell v. State	0041	July 3, 2017
St. Jean, M. Monica v. The TJX Companies	1074	July 14, 2017
Stamps, Rupert v. State	1164	July 5, 2017
State v. King, Teyon	2706	July 12, 2017
Sumo, Emerson v. Garda World	1010	July 12, 2017

T.

Thomas, Nicholas Ryan v. State	0980	July 19, 2017
Tinsley, Edward G. v. Law Firm of Goozman, etc.	0550	July 7, 2017
Tinsley, Edward G. v. Starr	0549	July 7, 2017
Trotter, Douglas v. Hogan	1182	July 12, 2017

U.

Ubom, Edidiong v. Ward	1306 *	July 25, 2017

W.

Walker, Donnell v. State	1661	July 18, 2017
Waller, Burley v. State	0761	July 24, 2017
Weddington, Robert Clifford v. State	0122	July 17, 2017
Wells, Donnell Antonio v. State	1336	July 5, 2017
Williams, James, Jr. v. Rice	2689 *	July 31, 2017
Williams, James, Jr. v. Rice	2690 *	July 31, 2017
Williams, Keith v. Skelton	1887	July 13, 2017
Williams, Michelle v. Lendmark Financial	0012 *	July 3, 2017
Wright, Gary Ronald v. State	0947	July 12, 2017

September Term 2016
* September Term 2015
** September Term 2014
*** September Term 2013