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SUPREME COURT OF MARYLAND

Attorney Grievance Commission of Maryland v. Asher Newton Weinberg, AG No. 1, September Term1 2022, filed August 31, 2023. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2023/1a22ag.pdf

ATTORNEY DISCIPLINE – SANCTION – INDEFINITE SUSPENSION

Facts:

On March 14, 2022, the Attorney Grievance Commission of Maryland ("ACG"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Asher N. Weinberg, member of the Maryland Bar, regarding his representation of Megan Lemons. The ACG alleged eight violations of the Maryland Attorneys' Rules of Professional Conduct ("MARPC"). Under Maryland Rule 19-722(a), the matter was referred to the Circuit Court for Montgomery County. After a two-day hearing, the hearing judge found clear and convincing evidence that Respondent violated rules 1.1 (Competence); 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Attorney); 3.3(a)(1) (Candor Toward the Tribunal); 8.2(a) (Judicial and Legal Officials); and 8.4(a), (c), and (d) (Misconduct).

Ms. Lemons was arrested and charged with armed robbery and other related offenses in 2019. The District Court initially ordered that Ms. Lemons be held without bond and have no contact with the victim, Ms. Hirsch. Ms. Lemons' case eventually was transferred to the circuit court where Respondent entered his appearance in February 2020. The circuit court subsequently ordered Ms. Lemons to be released on home detention with the condition that she travel only for specific purposes, including legal appointments; there was no mention of the no-contact order. Throughout 2020, while representing Ms. Lemons, Respondent communicated with Ms. Hirsch several times, eventually facilitating a meeting between Ms. Lemons and Ms. Hirsch for the purpose of providing Ms. Hirsch the opportunity to observe Ms. Lemons and hopefully rule out Ms. Lemons as the robber. Ms. Hirsch never definitively ruled out Ms. Lemons. The hearing judge found that Respondent violated Rule 1.1 and 1.2(d) because he knew or should have known about the no-contact order, and he assisted Ms. Lemons in violating it when he arranged the meeting with Ms. Hirsch.

Respondent filed a motion regarding Ms. Lemons' bond and, in support of that motion, represented that Ms. Hirsch "will testify that after seeing Ms. Lemons in person, she is 100% positive that Ms. Lemons was NOT the robber." Respondent also stated that Ms. Hirsch "had

stated with absolute certainty" that Ms. Lemons was not the robber. However, at the disciplinary hearing, Respondent admitted that Ms. Hirsch never made that statement and never stated that she would testify that Ms. Lemons was not the robber. The hearing judge found that Respondent violated Rule 3.3(a)(1) by making these misrepresentations to the court.

Following the conclusion of Ms. Lemons' case, Respondent made several statements in unrelated matters that the hearing judge determined violated rule 8.2(a). First, at an August 6, 2021, hearing, Respondent stated that the Honorable Pamela K. Alban was "a liar," "biased," "corrupt," "complicit in kidnapping," and improperly stepped "into the shoes of the State's Attorneys."

Second, on August 8, 2021, Respondent emailed the Honorable Glenn L. Klavans, detailing what Respondent believed was "corruption" that had spread through the Circuit Court for Anne Arundel County. Respondent also accused Judge Alban of lying on the bench, being complicit in kidnapping, and acting as a State's Attorney. Respondent also asserted that the Honorable J. Michael Wachs "demonstrated bias" against the Bar, that he is hypocritical, and refused to apply the law, thus causing harm to clients. Respondent finally alleged to Judge Klavans that the Honorable William C. Mulford II was biased towards Respondent and that allowing Judge Mulford and Judge Alban to "lie" and "commit fraud" to the court removes their ability to be fair and impartial.

Third, Respondent disseminated a flyer to Judge Klavans and several attorneys and posted it to a listserv for the Maryland Criminal Defense Attorney's Association. The flyer contained photographs of Judges Wachs and Alban with an "X" superimposed over each of their images. Beneath each photograph were the words "Bias, Lawless, Criminality," and the flyer included a link to "AnneArundelCorruptCourts.com." The flyer contained the tagline, "Anne Arundel Circuit Court – Where Our Constitution Comes to Die," and a QR code directing to a Change.org petition calling on former Governor Hogan to recall Judges Wachs and Alban for "violat[ing] their oath of office."

The hearing judge concluded that Respondent violated Rule 8.4(a) by violating multiple rules under the MARPC. The hearing judge also determined that Respondent knowingly made false statements for the same reasons that constituted his Rule 3.3 violation. Lastly, the hearing judge noted that Respondent's statements made (1) directly to Judge Alban, (2) to Judge Klavans in the email, and (3) in the flyer brought the legal profession into disrepute.

The hearing judge found four aggravating factors and four mitigating factors. Respondent filed several exceptions to the hearing judge's findings and conclusions.

Held: Overruled in part, sustained in part

After overruling Respondent's general exceptions, the Supreme Court of Maryland turned to Respondent's exceptions that were specific to the hearing judge's conclusions of law. The Court sustained Respondent's exceptions as to the Rule 1.1 and 1.2(a) violations. The Court reasoned

that it was not unreasonable for Respondent to conclude that the no-contact order was no longer in effect after the circuit court's order, as the circuit court order did not expressly incorporate, by reference, any prior orders or terms from the District Court. The circuit court order purported to stand on its own, and it did not include the no-contract prohibition; further, the two orders conflicted. Thus, the Court did not believe that clear and convincing evidence existed to support a violation of Rule 1.1 or 1.2(d).

The Court overruled Respondent's exception as to the Rule 3.3(a)(1) violation. In her testimony, Ms. Hirsch made five statements contradicting Respondent's assertion that Ms. Hirsch "will testify that Ms. Lemons was not the robber." The Court held that Respondent violated Rule 3.3(a)(1) when he wrote that Ms. Hirsch "will testify that after seeing Ms. Lemons in person, she is 100% positive that Ms. Lemons was [not] the robber[;]" "After meeting with Ms. Lemons, Ms. Hirsch spoke to Counsel by phone and stated with absolute certainty, Ms. Lemons was not the robber[;]" and "The victim of the robbery, Ms. Hirsch will testify that Ms. Lemons was not the robber." The Court relied on the hearing judge's assessment of Ms. Hirsch's credibility and fully accepted her testimony, which was not clearly erroneous. Therefore, clear and convincing evidence existed to support Respondent's Rule 3.3(a)(1) violation.

The Court overruled in part and sustained in part Respondent's exception for his Rule 8.2(a) violation. The Court noted that statements made in open court or in court filings should form the basis for a Rule 8.2(a) violation only when they could not be viewed as part of legitimate advocacy. The August 6, 2021, statements about Judge Alban were made in connection with a motion for Judge Alban to recuse herself, but Respondent made those statements twice, and the Court determined that they were neither mistaken nor the product of a surge of unfortunate or regrettable emotion; instead, they were considered and intentional. Accusing Judge Alban of being "complicit in kidnapping" and being "corrupt for a judge," are statements of fact, not opinion, and the statements were false and, absent any reasonable articulable basis for Respondent to believe they were true, were made with at least a reckless disregard for their truth or falsity. As such, the Court overruled Respondent's exception and held that these statements violated Rule 8.2(a) by clear and convincing evidence.

The Court likewise overruled Respondent's exception that he violated Rule 8.2(a) when he distributed the August 2021 flyer. Of importance to the Court was the fact that attorneys and other judges outside the listserv had seen the flyer. Because of the broad circulation, the Court reasoned that it was foreseeable that the flyer could have been distributed to the public. Additionally, while some statements on the flyer alone may not have constituted an 8.2(a) violation, the Court "must view the statements on the flyer in their totality," including the accusations of the judges' "lawless and criminal behavior." These accusations "fall squarely" within the kind of "false, scandalous, or other improper attacks" the Court has previously subjected to discipline under 8.2(a).

The Court disagreed, however, with the hearing judge that the August 8, 2021, email to Judge Klavans could serve as a basis for a Rule 8.2(a) violation, and the Court sustained Respondent's exception to the hearing judge's conclusion. While the statements in the email were "unseemly

and intemperate," and many of them false, Rule 8.2(a) acts to protect the public's confidence in the judicial system's integrity, not to protect judges from unkind or undeserved criticism. The Court reasoned that the criticisms contained in the email were sent to one administrative judge, and, as such, it was unlikely they would harm the integrity of the judicial system or the public's confidence therein.

Lastly, the Court overruled Respondent's exception that he violated Rules 8.4 (a), (c), and (d). The Court reasoned that because Respondent violated Rules 3.3(a)(1) and 8.2(a), he also violated Rule 8.4(a). Further, as to Rule 8.4(c), Respondent made knowing and intentional misrepresentations to the court in violation of Rule 3.3(a)(1). Finally, while Respondent's email to Judge Klavans did not violate 8.4(d), Respondent's conduct at the August 6 court hearing and statements in the flyer did violate 8.4(d), as they reflect negatively on the legal profession and impair public confidence in the legal system.

The Court agreed with the hearing judge's findings and conclusions regarding aggravation and mitigation. The Court held that the Commission proved by clear and convincing evidence the aggravating factors of violations of the MARPC, a pattern of misconduct, and Respondent's substantial experience in the practice of law. The Court also believed that Respondent proved by a preponderance of the evidence his lack of a prior record of attorney discipline, absence of dishonest or selfish motive, and remorse. The Court also sustained Respondent's exceptions that the additional mitigating factors of an unlikelihood of repeating misconduct, remedial actions, and full and free disclosure to Bar Counsel during the disciplinary process were applicable. As Respondent failed to present a character witness or evidence of his good character, and similarly failed to present testimony regarding personal and emotional problems, the Court overruled Respondent's exceptions that those mitigating factors also should apply

The Court imposed an indefinite suspension with the right to apply for reinstatement six months after the beginning of the suspension.

Kevron D. Walker v. State of Maryland, No. 19, September Term 2022, filed July 28, 2023. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2023/19a22.pdf

CRIMINAL PROCEDURE – MOTION TO SUPRESS – MARYLAND DNA COLLECTION ACT – REMAND

Facts:

An attempted homicide involving Petitioner, Kevron Walker, occurred on July 10, 2019, in Eldersburg, Carroll County, Maryland. Prior to this case, however, in July 2018, incident to an arrest concerning a homicide in Baltimore, Maryland, Baltimore police officers collected Petitioner's DNA ("Arrest DNA"). And pursuant to a search warrant, Baltimore police also obtained "swabs of suspected DNA" from a motorcycle ("Motorcycle Warrant DNA") believed to have been ridden by Petitioner and another suspect involved in the July 2018 homicide. Based on this information, Baltimore police obtained and executed, in January 2019, a search warrant for Petitioner's DNA ("Search Warrant DNA"). On January 23, 2019, the state *nol prossed* the case against Petitioner for the 2018 homicide. On October 24, 2019, the Arrest DNA was destroyed, and all related records were expunged. There were no records indicating whether the Search Warrant DNA was destroyed or if the records of the related sample results obtained via the search warrants were expunged.

In the instant case of July 10, 2019, Gilbert Dodd suffered six, non-fatal gun-shot wounds. Deputies from the Carroll County Sheriff's Office recovered swab samples of DNA at the crime scene ("Dodd Crime Scene DNA"), which were entered into the statewide DNA database, including the Combined DNA Index System ("CODIS"), to identify the assailant. A "high stringency match between two forensic specimens" resulted from a "routine search of the State DNA database." In other words, the Dodd Crime Scene DNA sample matched a forensic evidence sample ("Forensic Evidence DNA") "previously linked" to Petitioner's DNA. The Forensic Evidence DNA purportedly came from a gun used in a homicide that occurred on February 25, 2018. This match prompted the Sheriff's Office to obtain and execute search warrants for Petitioner's residence and a DNA sample in October 2019. Petitioner was subsequently charged in the July 2019 attempted homicide of Mr. Dodd.

In the Circuit Court for Carroll County, Petitioner moved to suppress "all evidence obtained pursuant to the search warrant from the DNA CODIS match," alleging that the DNA was used in violation of the Maryland DNA Collection Act ("Act"), Md. Code, Public Safety Article ("PS") § 2-511 and the Fourth Amendment of the United States Constitution. The parties believed that the Search Warrant DNA obtained in January 2019 was the sample that matched the Dodd Crime Scene DNA. The circuit court denied the motion, stating that CODIS "maintained a record" of Petitioner's DNA, "which had been obtained pursuant to a search warrant," and that DNA samples obtained via search warrants are not subject to expungement because such samples lie

outside the scope of the Act. The court determined that the plain language of PS §2-511 clarified that the Legislature intended that "the expungement provision only apply to arrestee and convicted-offender DNA samples." However, the court did not explicitly state which DNA sample, the Arrest DNA or the Search Warrant DNA, was the sample that generated the match to the Dodd Crime Scene DNA.

Petitioner moved to reconsider the motion to suppress, which the circuit court denied on May 15, 2020. Petitioner then entered a conditional guilty plea and was sentenced to life imprisonment, with all but 30 years suspended and five years of probation. Petitioner appealed the denial of the motion to suppress to the Appellate Court of Maryland, which affirmed the circuit court's judgment, stating that the Search Warrant DNA was not subject to expungement under the Act and, as such, was properly retained in CODIS in 2019 at which time it matched the Dodd Crime Scene DNA. Neither the circuit court judge nor the parties considered whether the Forensic Evidence DNA from the gun in the February 2018 case was the match to the Dodd Crime Scene DNA.

Petitioner sought a writ of certiorari, which the Supreme Court of Maryland granted on August 25, 2022. *Walker v. State*, 481 Md. 2 (2022).

Held: Remanded to the Circuit Court for Carroll County without affirmance or reversal.

The Supreme Court of Maryland declined to decide the merits of the questions presented on appeal due to unclear factual findings in the record. The Court was unable to determine whether the DNA sample at issue that Petitioner sought to have expunged originated pursuant to Petitioner's arrest, pursuant to a search warrant, or pursuant to a forensic specimen collected during the investigation of another crime. Thus, the Court was unable to reach the substantial merits of the case.

In accordance with Maryland Rule 8-604(d), the Court concluded that a limited remand for additional fact finding was appropriate, and that the circuit court should resolve the factual uncertainty around the origin of the DNA that generated the match in CODIS.

Michele Williams v. Morgan State University, et al., Misc. No. 9, September Term 2022, filed August 14, 2023. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2023/9a22m.pdf

SOVEREIGN IMMUNITY – WAIVER – MARYLAND TORT CLAIMS ACT – STATUTORY INTERPRETATION

Facts:

Appellant, Michele Williams, worked for Appellee Morgan State University ("MSU") from 2014 to 2017. Appellant organized a debate among the 2016 Baltimore City mayoral candidates. However, because the incumbent and Democrat candidate, Catherine Pugh, could not attend, Appellant canceled the debate per Appellee Dean Dewayne Wickham's instructions. Adhering to prior procedures, Appellant granted Republican and Green Party candidates' requests for on-air interviews. Dean Whickham disapproved of Appellant's actions, stating that things would "not end well" for her. Appellant then alleged to MSU that Dean Wickham's actions violated federal and state laws and regulations. Appellant also notified Dean Wickham and other MSU leaders that she believed MSU was deliberately inflating expenses in reports submitted to state and federal agencies to obtain larger grants. Appellant believes these complaints resulted in her improper termination in 2017.

Appellant originally filed suit in the Circuit Court for Baltimore City claiming, among other things, that her termination violated the National Defense Authorization Act and the American Recovery and Reinvestment Act ("the federal claims"). Appellees thus removed the suit to the United States District Court for the District of Maryland. The district court dismissed Appellant's entire complaint, but the United States Court of Appeals for the Fourth Circuit reversed the dismissal of the federal claims, instructing the district court to answer whether Maryland waived state sovereign immunity by enacting the Maryland Tort Claims Act ("MCTA"). The district court answered that question in the negative and again dismissed the federal claims. Appellant appealed to the Fourth Circuit, which issued the following certified question of law to the Supreme Court of Maryland: Does Maryland's waiver of sovereign immunity for "a tort action" under the MTCA extend to federal statutory claims?

Held: Certified question answered in the negative

The Supreme Court of Maryland held that the MTCA does not waive Maryland's sovereign immunity for federal statutory claims. First, the Court noted that the MTCA does not define "a tort action," but that the plain language of the waiver did not explicitly state that the waiver applied to federal claims. Because waivers in derogation of sovereign immunity must be construed in the State's favor, this was strong evidence that waiver did not extend to federal

claims. Second, the Court noted that the legislature created a "comprehensive statutory scheme, where the waiver of the State's sovereign immunity for tort actions corresponds precisely with immunity from suit and liability for State personnel," and that "liability of the State and liability of individual State personnel are mutually exclusive. If the State is liable, the individual is immune; if the individual is liable, the State is immune." Because the General Assembly cannot immunize State employees from federal causes of action, it would be illogical to include federal claims within the MTCA's waiver where a core tradeoff and purpose would go unrecognized.

Third, when the General Assembly intends to waive the State's sovereign immunity under state statutory claims, it generally does so directly within the specific statutory scheme at issue. To include federal claims under the MTCA's waiver would render many of the provisions for other statutory schemes, which usually detail specific procedural and/or administrative requirements, superfluous. Fourth, pointing one of those other statutory schemes and a prior opinion interpreting it, the Court noted that the General Assembly knows precisely how to broadly waive the State's immunity if that is the General Assembly's desired goal.

The Court further acknowledged the historical context of the MTCA, indicating that it initially waived immunity to six specified causes of action. However, the MTCA was later revised to eliminate those categories and extend the waiver to "a tort action." That, and subsequent amendments to the MTCA have not contained any express indication that "a tort action" includes federal statutory claims.

After assessing the MTCA's plain language, the Court concluded that there is no evidence that the General Assembly intended to include federal statutory claims within the scope of the MTCA. Thus, Maryland's waiver of sovereign immunity under the MTCA for "a tort action" does not extend to federal statutory claims.

APPELLATE COURT OF MARYLAND

HBC US Propco Holdings, LLC v. Federal Realty Investment Trust, No. 558, September Term 2022, filed September 1, 2023. Opinion by Arthur, J.

https://www.mdcourts.gov/data/opinions/cosa/2023/0558s22.pdf

CIVIL PROCEDURE – FIRST-TO-FILE RULE – ANTICIPATORY FILING

Facts:

This appeal concerns a commercial lease for a department store located in Montgomery County, Pennsylvania. HBC Propco US Holdings LLC ("HBC"), a company with its principal place of business in New York, is the guarantor of the lease obligations. Federal Realty Investment Trust ("FRIT"), a Maryland investment trust with its principal place of business in Montgomery Count, Maryland, is the landlord.

The tenant ceased operating the retail store at the leased premises in March 2020, after the Governor of Pennsylvania ordered the closure of non-essential businesses and issued stay-at-home orders in response to the COVID-19 pandemic. FRIT sent the tenant a notice of default because of its failure to pay amounts due under the lease. The tenant petitioned for protection from its creditors in bankruptcy court. FRIT filed claims in the bankruptcy case to recover the amounts due under the lease.

On May 13, 2021, FRIT sent a notice of demand for payment to HBC, demanding that HBC pay amounts due under the guaranty for the lease. The notice alerted HBC that FRIT intended to file suit should HBC fail to pay.

On the morning of Friday, June 4, 2021, HBC filed a complaint in the Circuit Court for Montgomery County, Maryland, for declaratory and injunctive relief.

On that same morning, 21 minutes after HBC filed its complaint in Maryland, FRIT filed suit against HBC in the Court of Common Pleas in Montgomery County, Pennsylvania, for claims based on breach of the guaranty, estoppel, and unjust enrichment.

FRIT moved to dismiss the Maryland action on grounds of forum non conveniens. HBC opposed FRIT's motion and stressed that it had filed first.

The circuit court issued an oral ruling granting FRIT's motion to dismiss. The court relied on section 6-104(a) of the Courts and Judicial Proceedings Article of the Maryland Code, which permits a circuit court to dismiss an action if "in the interest of substantial justice" the matter "should be heard in another forum," outside Maryland. After weighing the public interest factors and the private concerns at stake, the court concluded that Pennsylvania was the more appropriate forum for the litigation.

The court stayed the case for six months to ensure that Pennsylvania would continue to serve as a viable alternative forum. The court dismissed the action after determining that the litigation had proceeded in Pennsylvania. HBC appealed.

Held: Affirmed.

The Appellate Court of Maryland held that the circuit court did not abuse its discretion in dismissing the action filed in Maryland.

Section 6-104(a) of the Courts and Judicial Proceedings Article of the Maryland Code (1974, 2020 Repl. Vol.) permits a circuit court to dismiss an action if, "in the interests of substantial justice," the action "should be heard in another forum." To decide whether an action should be dismissed under this statute, the court must weigh the "public factors of systemic integrity" in addition to "private concerns." The public factors include the fairness of imposing jury duty on a community with little or no relationship to the controversy, the interest in having local controversies decided locally, and the appropriateness of having a trial in the forum that is familiar with the governing law. The private concerns involve the convenience of the parties and witnesses.

The Appellate Court held that the circuit court did not abuse its discretion when it determined that the dispute should go forward in only one jurisdiction: Pennsylvania. The litigation concerned a guaranty on the lease of a retail property located in Pennsylvania; the lease was governed by Pennsylvania law; it was apparent from the appellant's complaint that many of the witnesses probably would be residents of Pennsylvania; and the appellant sought an injunction to prohibit the redevelopment of the property in Pennsylvania. The public and private costs of duplicative litigation, as well as the possibility of conflicting rulings and conflicting judgments if the cases proceeded on two separate tracks in two different states, required the court to make a determination about which jurisdiction was the more appropriate forum. The circuit court reasonably concluded that the case should proceed in Pennsylvania even though the party seeking dismissal was a Maryland real estate investment trust, which would not be inconvenienced if it were required to defend itself in Maryland.

The Court recognized that, where identical actions are pending concurrently in two courts, the suit that was filed first ordinarily should have priority. Exceptions to the first-to-file rule include bad faith filing, anticipatory filing, and forum shopping. An anticipatory filing is improper when it attempts to exploit the first-to-file rule by securing a venue that differs from the one that the

filer's adversary would be expected to choose. An improper anticipatory filing is one made under the apparent threat of a presumed adversary filing the mirror image of that suit in a different court.

In this case, the appellant had actual knowledge of the appellee's intention to file suit and had reason to suspect that the appellee probably would file suit in Pennsylvania. In response, the appellant filed a preemptive declaratory judgment action in Maryland, a forum that it thought might look more skeptically at the appellee's damages claims than a Pennsylvania court would. The Court held that, because of the anticipatory nature of the appellant's filing, it was appropriate for the court to refrain from a rigid and inflexible application of the first-to-file rule.

State of Maryland v. Kory J. Fabien, No. 1061, September Term 2021, filed September 5, 2023. Opinion by Woodward, J.

https://mdcourts.gov/data/opinions/cosa/2023/1061s21.pdf

CRIMINAL LAW – MANSLAUGHTER OF A VIABLE FETUS – MANSLAUGHTER BY VEHICLE OR VESSEL – REQUIREMENT OF KNOWLEDGE FOR CONVICTION

CRIMINAL LAW – MOTION TO DISMISS – DISMISSAL OF SOME, BUT NOT ALL, CHARGES – STATE NOT REQUIRED TO ENTER NOLLE PROSEQUI OF REMAINING CHARGES WITHIN THIRTY DAYS OF ORDER GRANTING MOTION

Facts:

On January 12, 2019, appellee, Kory J. Fabien, drove a motor vehicle while under the influence of alcohol, crossed the double-yellow center lines, and caused a head-on collision with another vehicle. Haruko Berry, who was then thirty-three weeks pregnant, was the front seat passenger of the other vehicle. Although Ms. Berry survived the crash, she sustained serious injuries and her viable fetus was delivered stillborn during an emergency cesarean section at the hospital.

On December 19, 2019, appellee was indicted on four counts: (1) manslaughter by vehicle or vessel in violation of CR § 2-209(b); (2) homicide by motor vehicle or vessel while under the influence of alcohol per se in violation of CR § 2-503(a)(2); (3) criminally negligent manslaughter by vehicle or vessel in violation of CR § 2-210(b); and (4) life-threatening injury by motor vehicle or vessel while under the influence of alcohol per se in violation of CR § 3-211(c)(ii). In counts one, two, and three, the State charged appellee with the death of a viable fetus.

On February 9, 2021, appellee filed a motion to dismiss counts one, two, and three, to which the State filed an opposition. The trial court granted appellee's motion to dismiss in an Order dated May 28, 2021, and entered on June 1, 2021. On September 3, 2021, the State entered a *nolle prosequi* to the remaining count of the indictment and then filed a Notice of Appeal on September 9, 2021.

Held: Affirmed.

On appeal, appellee moved to dismiss the State's appeal on the grounds that, if the State intended to enter a *nolle prosequi* to the remaining count of the indictment, it had to do so within thirty days of the entering of the Order granting the motion to dismiss. According to appellee, because the State entered the *nolle prosequi* and noted an appeal more than thirty days after the entry of the Order granting the motion, the State's appeal was untimely. The Appellate Court of Maryland denied appellee's motion to dismiss, holding that there is no thirty-day time limit on

the prosecutor's power to enter a *nolle prosequi* when the trial court dismisses some, but not all, of the counts of an indictment. The Court pointed out that, under well-established case law, an appeal cannot be taken by the State from an order dismissing less than all counts of an indictment and that a final judgment occurs only when the remaining charges are resolved – here by entry of a *nolle prosequi*.

Next, as a preliminary matter, the Appellate Court noted that in order to convict a person of manslaughter of a viable fetus, CR § 2-103(c)(3) requires the State to prove that the defendant "wantonly or recklessly disregarded the likelihood that the person's actions would cause the death of or serious physical injury to the viable fetus." The State conceded, and the Court agreed, that CR § 2-103(c)(3) establishes a *mens rea* standard higher than the *mens rea* required for convictions under CR §§ 2-210 and 2-503. Consequently, the Court held that CR § 2-103 does not apply to a prosecution for a violation of CR §§ 2-210 and 2-503, and thus the trial court's dismissal of counts two and three must be affirmed. Accordingly, the only charge subject to the instant appeal was manslaughter by vehicle or vessel in violation of CR § 2-209.

The Appellate Court identified the issue raised in the appeal as whether CR § 2-103 applies to CR § 2-209, both generally and under the circumstances of this case. Because the issue is entirely of statutory construction, the Court engaged in an extensive analysis of both CR § 2-103 and CR § 2-209 under the established principles of statutory construction. As a result of that analysis, the Court held that CR § 2-103 applies to CR § 2-209 generally.

The Appellate Court then addressed whether CR § 2-103 applied to CR § 2-209 under the circumstances of the instant case. Specifically, the Court focused on appellee's argument that by choosing the phrase "to *the* viable fetus" instead of "to *a* viable fetus" in describing the object of the defendant's "wanton or reckless disregard" in CR § 2-103(c)(3), the General Assembly "intended the perpetrator to know of the potential harm to the viable fetus." The Court noted that the indefinite article "a, an" denotes a single but unspecified person or thing and is analogous to "human life" in the gross negligence standard of "wanton or reckless disregard for human life." By contrast, according to the Court, the definite article "the" denotes particular, specified persons or things. The Court held that by using the phrase "*the* viable fetus" in CR § 2-103(c)(3), the General Assembly intended to add the element of knowledge to the gross negligence *mens rea* in a prosecution for manslaughter of a viable fetus.

Because it was undisputed that appellee did not know or have reason to know that a pregnant woman was in the vehicle involved in the head-on collision caused by his grossly negligent operation of a vehicle, the Court concluded that the State could not prove an essential element of the charge under CR § 2-209. Accordingly, the Court affirmed the trial court's dismissal of the charge of manslaughter by vehicle or vessel in violation of CR § 2-209(b).

Ebony Janae Parks v. State of Maryland, No. 1096, September Term 2022, filed September 5, 2023. Opinion by Ripken, J.

https://mdcourts.gov/data/opinions/cosa/2023/1096s22.pdf

CRIMINAL LAW – IDENTITY FRAUD – VALUE IS AN ELEMENT

CRIMINAL LAW – IDENTITY FRAUD – SUFFICIENCY OF CHARGING DOCUMENT

Facts:

A Statement of Charges, filed in the District Court of Maryland for Wicomico County, charged Ebony Janae Parks with fraudulently obtaining identification information of another where the value of the benefit sought is at least $1,500 but less than $25,000 and fraudulently assuming the identity of another where the value of the benefit sought is at least $1,500 but less than $25,000. Upon Parks' prayer for a jury trial, the matter was transferred to the Circuit Court for Wicomico County. Prior to trial, Parks raised a motion, arguing that the State could not proceed on the felony form of identity fraud because the body of the charging document only charged the elements of a misdemeanor. The State asserted that the crimes were properly charged. The court denied Parks' motion and the case proceeded to a jury trial.

At trial, when addressing jury instructions, Parks proposed supplementing the pattern jury instructions for the offenses by including value as an element. The State maintained that value is not an element of the offenses charged. The trial court gave the pattern jury instruction and supplemented it by including value as an element of the offense.

The jury convicted Parks of fraudulently obtaining identification information of another where the value of the benefit sought is at least $1,500 but less than $25,000 but acquitted her of fraudulently assuming the identity of another where the value of the benefit sought is at least $1,500 but less than $25,000.

Held: Affirmed.

Value is an element of the identity fraud offenses proscribed by Maryland Code, Criminal Law Article ("CR"), section 8 301. The maximum penalty to which a defendant is exposed for a violation of CR section 8 301(b) depends, according to CR section 8 301(g), upon proof of the value of the "benefit, credit, good, service, or other thing . . . that is the subject of subsection (b)[.]" I this context, CR section 8 301 is not meaningfully distinguishable from the consolidated theft statute, CR section 7 104. The Supreme Court of Maryland has held that value is an element of the offenses proscribed by the latter statute. Accordingly, the value of the "benefit, credit, good, service, or other thing . . . that is the subject of subsection (b)" is an element of the offenses proscribed by CR section 8 301.

The caption, which alleged the value at issue, became a necessary part of the charging document because it served to clarify an otherwise insufficiently described charge.

Jamie Bennett v. Ashcraft & Gerel, LLP, No. 31, September Term 2022, filed September 1, 2023. Opinion by Arthur, J.

https://www.mdcourts.gov/data/opinions/cosa/2023/0031s22.pdf

MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT—
ENFORCEABILITY OF FEE-SHARING AGREEMENT

Facts:

In 2011 Jamie Bennett joined the law firm Ashcraft & Gerel, LLP ("Ashcraft"). The two parties signed a "Prenuptial Agreement" that governs the division of fees between Ashcraft and an attorney if the attorney leaves the firm, is retained by any of the firm's former clients, and settles the clients' cases after leaving the firm. To apportion the fees, the Prenuptial Agreement uses a sliding-scale formula that considers (1) the amount of time between when the client retained the firm and when the attorney departed, and (2) the amount of time between when the attorney departed and when a fee was generated.

When Bennett left Ashcraft in 2015, some clients terminated their relationships with Ashcraft and retained Bennett. One of these clients was Mr. Barker. After Bennett's departure, the parties to Mr. Barker's cases finalized a settlement agreement that resulted in a contingent fee of more than $2,000,000.00 and $675,000.00 in statutory attorneys' fees. These sums were to be paid on a quarterly basis over five years.

Bennett and Ashcraft disagreed about the enforceability of the Prenuptial Agreement and the fees to which Ashcraft was entitled from Mr. Barker's cases. Through counsel, they negotiated an agreement to divide those fees in accordance with the percentages set out in the Prenuptial Agreement. Bennett paid Ashcraft its share of the settlement payments until October 2018, when she began depositing Ashcraft's share into her own operating account.

In October 2018, Bennett filed a complaint against Ashcraft in the Circuit Court for Prince George's County. Among other requests for relief, Bennett sought a declaration that the Prenuptial Agreement was unenforceable under the Maryland Attorneys' Rules of Professional Conduct. Ashcraft filed counterclaims, including a claim for breach of the Prenuptial Agreement.

After both parties requested that the circuit court determine the enforceability of the agreement, the circuit court ruled that the Prenuptial Agreement did not violate the Maryland Attorneys' Rules of Professional Conduct and that it was enforceable under Maryland common law. The court granted Ashcraft's cross-motion for summary judgment on its counterclaim for breach of contract. The court ordered Bennett to provide a complete accounting of all funds received from August 2018 forward. After Bennett provided this information, Ashcraft calculated that its damages totaled $706,164.83, not including pre-judgment interest.

The circuit court issued a declaratory judgment stating that the Prenuptial Agreement is enforceable. The court entered judgment against Bennett in the amount of $706,164.83 but awarded no pre-judgment interest. Bennett noted an appeal. Ashcraft noted a cross-appeal, seeking to challenge the denial of the claim for pre-judgment interest.

Held: Affirmed in part. Vacated in part.

The Appellate Court of Maryland upheld the circuit court's conclusions that the Prenuptial Agreement did not violate the Maryland Attorneys' Rules of Professional Conduct and that it was enforceable.

The Appellate Court considered Maryland Rule 19-305.6(a), which prohibits an attorney from entering an employment agreement that restricts the right of the attorney to practice after termination of the employment relationship. The Court distinguished agreements designed to prevent lawyers from competing with their former firms from agreements that allocate the division of contingent fees in advance of the event that the lawyer leaves a firm and is engaged by one of the firm's clients before a contingent fee is earned.

The Appellate Court held that an agreement between a law firm and one of its attorneys concerning the division of a contingent fee that is earned after the attorney leaves the firm does not violate Maryland Rule 19-305.6(a), provided that the agreement endeavors to make a reasonable forecast of what a likely quantum meruit division of fees would have been. Without such an agreement, the parties' respective shares would be determined by principles of quantum meruit. But to determine its quantum meruit share, the firm would have to sue the client and the departing lawyer to establish the reasonable value of the services provided to the client. Lawyers should be encouraged to enter into agreements to resolve these kinds of potential disputes in advance, to avoid unseemly bickering over fees, and to prevent clients from being put in the middle of disputes between lawyers.

The Appellate Court held that the Prenuptial Agreement did not restrict Bennett's right to practice law, did not limit clients' freedom to choose to use Bennett's services, and contained no restrictive covenants or prohibitions. The Prenuptial Agreement simply provided for a division of fees in advance of termination. The Court held that the Prenuptial Agreement was not unreasonable on its face because the parties used a sliding scale to forecast a likely quantum meruit division by using time as a surrogate for the value contributed by each of the respective parties. The Court also held that the Prenuptial Agreement was not unreasonable as applied to the *Barker* fees, because Bennett earned a substantial sum for taking over a case that had already been settled in principle, and she probably would have received less had she remained with the firm. Thus, the Prenuptial Agreement did not create an incentive for Bennett to decline to represent Mr. Barker.

The Appellate Court affirmed the circuit court's grant of summary judgment in favor of Ashcraft on its breach of contract claim. The Court further affirmed the circuit court's dismissal of

Bennett's claims, imposition of a constructive trust, refusal to strike Ashcraft's counterclaims, and denial of Bennett's motions for sanctions.

Finally, the Appellate Court held that the circuit court erred in denying Ashcraft's request for pre-judgment interest on the amounts due under the Prenuptial Agreement. Pre-judgment interest is available as a matter of right when the obligation to pay and the amount due is certain, definite, and liquidated by a specific date prior to judgment such that the effect of the debtor's withholding payment was to deprive the creditor the use of a fixed amount as of a known date. The Court determined that, in this case, Bennett received certain, definite, and liquidated settlement payments on discrete dates, from which she was contractually obligated to remit a certain, definite, and liquidated percentage to Ashcraft, but failed to do so. Therefore, Ashcraft was entitled to pre-judgment interest, as a matter of right, on each payment that Bennett failed to make. The pre-judgment interest ran from the date on which each payment became due until the date of the judgment.

Al Czervik, LLC, et al. v. Mayor & City Council of Baltimore, et al., Nos. 893, 894 & 895, September Term 2022, filed September 5, 2023. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2023/0893s22.pdf

TAXATION – TAX DEEDS – CONDITIONS AND PREREQUISITES

Facts:

After obtaining a judgment foreclosing the right of redemption but before receiving the deed to a given property, tax sale purchasers must pay any taxes, along with interest and penalties, that accrue after the date of sale. Md. Code (1985, 2019 Repl. Vol.), § 14 831 of the Tax-Property Article ("TP"). Any balance over the amount owed is considered surplus and is paid "to the person entitled to the balance," TP § 14-818(a)(4)(i), typically the former property owner. In three consolidated tax sale cases, the purchaser contended that it that it paid post-sale environmental citation and water charges and was a "person entitled" to recover those amounts out of the surplus proceeds. The circuit court rejected all three petitions, finding that the tax sale statute precludes the purchaser from recouping payments from the surplus proceeds of the tax sale as an entitled party under TP § 14 818(a)(4).

Held: Affirmed.

The Appellate Court of Maryland affirmed, holding that the tax sale statute does not give the circuit court discretion to award surplus proceeds to certificate holders as "person[s] entitled" to recoup amounts paid for water charges and environmental citations—considered taxes under the statute—incurred after the date of sale. TP §§ 14-831, 14 818(a)(4)(i), 14-801(d).

Pennsylvania Manufacturers Association v. William Cree, et al., No. 730, September Term 2022, filed September 6, 2023. Opinion by McDonald, J.,

https://mdcourts.gov/data/opinions/cosa/2023/0730s22.pdf

WORKERS' COMPENSATION ACT – OCCUPATIONAL DISEASE – LAST INJURIOUS EXPOSURE RULE

WORKERS' COMPENSATION ACT – OCCUPATIONAL DISEASE – OCCUPATIONAL HEARING LOSS – APPLICABILITY OF LAST INJURIOUS EXPOSURE RULE

Facts:

William Cree worked as a police officer for almost 25 years in police departments in three different Maryland jurisdictions, including the City of Laurel ("the City") during the 1970s. On August 31, 2018, an audiologist evaluated Mr. Cree's hearing and determined that his hearing had deteriorated to the extent that it met the criteria for compensation under State workers' compensation law. Mr. Cree filed a claim with the Workers' Compensation Commission, which resulted in a proceeding that included all three of his police employers and their known insurers from the period of his employment. Pennsylvania Manufacturers Association ("PMA") had insured the City during roughly half of the period during the 1970s that Mr. Cree had worked in the City's police department, although it was not the City's insurer at the end of his time with the City (the City was unable to determine the identity of its insurer at that time).

The Commission determined that liability should be allocated among the three police employers. PMA argued that it should not be considered the City's insurer with respect to the liability allocated to the City based on an application of the "last injurious exposure rule." That rule appears in a part of the Workers' Compensation Act applicable to most claims based on an occupational disease. If the worker contracted the occupational disease as a result of hazardous exposures while employed at more than one employer, the statute provides a bright-line rule that assigns that liability exclusively to the last employer chronologically – and, if that employer was insured by more than one insurer during that time, to the last insurer chronologically of that employer – during the period of hazardous exposure. PMA argued that it would not be considered the last insurer chronologically of the City and should therefore be relieved of any liability under the last injurious exposure rule.

The Commission held that the last injurious exposure rule does not apply to claims of occupational hearing loss. It therefore rejected PMA's argument and held that PMA was liable for Mr. Cree's claim. PMA sought judicial review in the Circuit Court for Prince George's County, which affirmed the Commission. PMA timely appealed that decision.

Held: Affirmed.

The Appellate Court noted that the text of the Workers' Compensation Act, with respect to occupational hearing loss cases, explicitly provided for the allocation of liability to a claimant's employers, not just the last employer chronologically. Thus, the last injurious exposure rule clearly does not apply in such a case with respect to employers. While the text of the statute is silent as to whether the last injurious exposure rule would still pertain to insurer liability in such a case, examination of the context of the language used in the Act did not support PMA's argument that the rule necessarily still applied to insurers in such cases. Moreover, the legislative history of both the last injurious exposure rule and the special occupational hearing loss provisions of the Act supported the opposite conclusion – that the rule does not apply to insurers in occupational hearing loss cases.

ATTORNEY DISCIPLINE

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By an Order of the Supreme Court of Maryland dated September 25, 2023, the following attorney has been suspended for 30 days by consent:

DANA ANDREW PAUL

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RULES ORDERS

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A Rules Order pertaining to the 217th Report of the Standing Committee on Rules of Practice and Procedure was filed on September 22, 2023.

http://mdcourts.gov/sites/default/files/rules/order/ro217.pdf

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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