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Harrell, J., joins in judgment only.

http://www.mdcourts.gov/opinions/coa/2015/7a13ag.pdf

ATTORNEY DISCIPLINE – DISBARMENT

Facts:

The hearing judge found that Respondent, Mark T. Mixter, made copious knowing and intentional misrepresentations to courts, parties and witnesses in twenty-two separate cases that spanned a period of approximately seven years. The hearing judge found that sixty-two separate motions to compel or hold in contempt, filed by Mixter and directed at non-party witnesses, were frivolous, because the underlying subpoenas that had commanded the appearance of the non-party witness and the production of documents were unenforceable. The motions were unenforceable, because there was either no proof of service of the subpoena or the subpoena did not provide the witness thirty days to produce documents, as required by the Maryland Rules.

The hearing judge also found that Mixter would knowingly or recklessly, and in complete disregard for the Maryland Rules, issue Maryland subpoenas to out-of-state witnesses over whom the Maryland courts had no jurisdiction and then file frivolous motions to compel compliance with those subpoenas. The hearing judge further found that Mixter also had issued Maryland subpoenas, commanding the witnesses' appearance and production of documents, to thirty-five out-of-state witnesses, coupled with letters containing knowing and intentional misrepresentations to the witnesses that their appearance could be compelled in Maryland. The hearing judge also found that Mixter had a pattern and practice of knowingly and intentionally noting depositions of non-party Maryland residents in the wrong county, in violation of the Maryland Rules.

The hearing judge identified episodes in which Mixter abused his authority as an officer of the court by issuing subpoenas in order to harass and intimidate witnesses and opposing counsel. The hearing judge also found that Mixter had filed motions that were frivolous, because Mixter either failed to make any good faith efforts to resolve the discovery disputes or the filings were filed prematurely or otherwise did comply with the Maryland Rules.

The hearing judge found that in fifty-three instances Mixter falsely certified to the courts that good faith efforts to resolve discovery disputes had been made. According to the hearing judge, Mixter's certifications contained misrepresentations which were intended to mislead the courts into believing that he had engaged in good faith attempts to resolve discovery disputes when, in fact, the exhibits Mixter had attached to the certificates were the original letters accompanying the subpoenas sent before any discovery dispute could have existed. The hearing judge also observed that Mixter had intentionally omitted from twelve motions the responses from the adverse parties or the witnesses, in an attempt to advance his position.

The hearing judge also found that in thirteen cases Mixter had, in bad faith and without substantial justification, knowingly and intentionally made misrepresentations as to the contents of court orders or had disregarded court orders. In one such instance, in a case called *Smith v. Chineme*, Mixter represented the defendant landlord in a mold case and Mixter blocked the plaintiff's expert from taking samples on the premises. The plaintiffs, according to the hearing judge, then filed a motion to compel entry upon the premises, which was granted by the Circuit Court Judge. The hearing judge found, however, that, when the expert returned to the property, the items the expert had previously intended to sample had been removed, thereby thwarting any testing and Mixter had facilitated his client's alteration and destruction of evidence.

In several other cases, according to the hearing judge, Mixter had misrepresented to health care providers that no objection had been made to the disclosure of the opposing party's medical records. In fact, Mixter had made such representations even though motions for protective order were pending or the medical records were not relevant to the underlying claims.

The hearing judge also had received substantial testimony with regard to Mixter's use of a trial court's order in *Greater Washington Orthopaedic Group, PA v. Varner and Miles & Stockbridge*, in which, according to the hearing judge, "the Circuit Court had issued a 'Revised Order'" to explain "that the treating physician for a plaintiff cannot charge a fee for deposition or trial that is greater than the fee charged to the physician's usual and customary office practice." The hearing judge found that Mixter routinely mailed to the other party's expert witnesses a copy of *Varner* along with a cover letter stating that the opinion controlled the method of payment for the expert's testimony, which was intentionally misleading. The hearing judge then found that Mixter would routinely file motions to hold medical professionals, who had been noted as expert witnesses by the other side, in contempt, based upon their alleged failure to appear for their deposition; the motions, however, omitted the fact that there were disputes as to the experts' fees.

The hearing judge finally determined that additional motions filed by Mixter were all based on material representations: that the witnesses were properly served with a valid subpoena and failed to appear for deposition and were most assuredly aimed at harassing and intimidating opposing parties and expert witnesses.

Based upon these factual findings, the hearing judge concluded, by clear and convincing evidence, that Mixter had violated various Rules of Professional Conduct, to include, MRPC 3.1 (frivolous claims), 3.2 (expediting litigation), 3.3(a)(1) (false statement of fact to the tribunal) and (a)(4) (false statement of law to a tribunal), 3.4(a) (obstructing access to evidence), (c)

(disobey court rules) and (d) (make a frivolous discovery request), 4.1(a) (truthfulness in statements to others), 4.4(a) (respect for rights of third persons) and 8.4(a) (violate MRPC), (c) (dishonesty, fraud or misrepresentation) and (d) (conduct prejudicial to the administration of justice). Mixter filed numerous exceptions to the hearing judge's findings of fact and conclusions of law.

Held: Disbarment is the appropriate sanction.

The Court of Appeals determined, after considering Mixter's numerous exceptions, that his conduct violated MRPC 3.1, 3.2, 3.3(a)(1) and (a)(4), 3.4(a), (c) and (d), 4.1(a)(1) and 8.4(a), (c) and (d). According to the Court, Mixter had attempted to enforce over one-hundred and twenty unenforceable subpoenas through meritless motions to compel as well as pursue meritless litigation, in violation of MRPC 3.1. The Court also determined that Mixter had violated MRPC 3.2, because unlike what Mixter had argued, delay is not a required finding for a MRPC 3.2 violation. Mixter had, instead, violated MRPC 3.2 by filing over one hundred and twenty frivolous motions that squandered judicial resources on unnecessary motions, with the attendant waste of time and money experienced by opposing parties. The Court also determined that Mixter had violated MRPC 3.3(a)(1) and (a)(4), based upon the hearing court's finding that Mixter knew that he was making misrepresentations to numerous courts, parties and witnesses. Mixter also violated MRPC 3.4(a), according to the Court, by blocking the expert from gathering specimens required for testing in *Chineme*, thereby obstructing access to evidence.

The Court also concluded that Mixter violated MRPC 3.4(c) by knowingly disobeying court orders and the Maryland Rules, as the hearing judge had found, and 3.4(d) by making frivolous discovery requests when he had filed nearly one-hundred discovery motions to compel invalid subpoenas or that had contained false certifications to the various courts that he had attempted to confer in good faith to resolve discovery disputes.

The Court next determined that Mixter violated MRPC 4.1(a)(1) by making false statements of law to third parties regarding the enforceability of Maryland subpoenas when he had misrepresented to more than fifty out-of-state recipients that their appearance could be compelled in Maryland by subpoena and by misrepresenting to non-party witnesses, located in Maryland, that they could be compelled to attend a deposition in a county other than that in which they resided.

Mixter also violated MRPC 4.4(a) by attempting to obtain a third-party defendant's mental health records, despite knowing that a motion for a protective order as to those records was pending and filing a motion to compel production of the third-party defendant's mental health records in which he misrepresented to the health care provider that there had been no objection to the production of said records.

The Court of Appeals concluded that Mixter had violated MRPC 8.4(c), because Mixter had knowingly and intentionally made many misrepresentations to various courts, to include: falsely asserting in twenty-four motions that the oppositions were properly served with subpoenas outside of Maryland; falsely certifying in fifty-three certifications that he had engaged in good faith efforts at resolving discovery disputes; willfully omitting material information in connection with twelve motions; as well as numerous additional misrepresentation to various courts.

The Court concluded that Mixter violated MRPC 8.4(d), because his conduct was prejudicial to the administration of justice in that he impugned the efficacy of the courts and the legal profession by making over one hundred and twenty misrepresentations in twenty-two cases before numerous courts.

Finally, according to the Court, Mixter violated subsection (a) of MRPC 8.4 by repeatedly violating various of the Maryland Rules of Professional Conduct.

Disbarment was the appropriate sanction, because Mixter had made hundreds of misrepresentations to courts, parties and witnesses and was without remorse. Instead, Mixter attempted to excuse his abusive discovery practices under the guise of zealous advocacy and high-volume practice, which the Court refused to recognize as mitigation.

Attorney Grievance Commission of Maryland v. Bruce Michael Smith, Misc. Docket AG No. 3, September Term 2013, filed February 23, 2015. Opinion by McDonald, J.

Harrell, Battaglia, and Watts, JJ., concur and dissent.

http://www.mdcourts.gov/opinions/coa/2015/3a13ag.pdf

ATTORNEY DISCIPLINE – PROSECUTOR'S FAILURE TO DILIGENTLY CARRY OUT OBLIGATIONS REGARDING VICTIM IN CHILD SEXUAL ABUSE CASE – SUSPENSION

Facts:

Respondent Bruce Smith was an Assistant State's Attorney for Harford County who handled District Court cases and cases from the county's Child Advocacy Center ("Center"). The Center handles cases of sexual assault and abuse, among other crimes against children. In his work there, Mr. Smith prosecuted the case of *State v. Nathan Elwood Head*, in which the defendant was charged with several sexual offenses against a minor.

On the original trial date in September 2009, Mr. Smith requested a postponement, citing a note he had received that a necessary witness, the victim's foster mother, was out of town for a medical emergency. The defense did not object and the court found good cause to postpone the case. At the new trial date in January 2010, the defendant entered an *Alford* plea and was sentenced to one year in prison, all but 142 days suspended, with credit for time served. As a special condition of probation, the defendant was not to have contact with the child victim upon release. The defendant's grandfather testified on his behalf at sentencing; Mr. Smith did not offer a victim impact statement, and neither the victim nor her foster mother were present at the hearing.

Two years later, in March 2012, the State's Attorney's Office learned that the foster mother, who had since adopted the child, was unaware that the State had prosecuted anyone for the crime against her daughter. No one from the Center had contacted her since she and the victim had visited the Center, and she had assumed the matter was dropped. She said she had not been out of town on the original trial date, and had not contacted anyone at the State's Attorney's Office.

Under State law, Mr. Smith was responsible for ensuring that the victim and her representative were informed of their rights as a victim under State law, preparing them for trial, and making sure they knew the hearing and trial dates. Mr. Smith failed to carry out those responsibilities and also failed to tell the victim or her foster mother that the defendant was prohibited from having any contact with the victim as a term of his probation.

At the evidentiary hearing in the attorney grievance proceeding, Mr. Smith conceded that he failed in his responsibility to protect the victim's rights, and he admitted that the information he

gave the trial court in his postponement request was incorrect. However, he testified that he believed the note to be from the foster mother, and although he could have verified its contents, he did not act with intent to deceive the trial judge. He had no explanation for why he did not inform the victim or her foster mother about their rights or the details of the case and the defendant's probation. He testified that his practice was to wait until the eve of trial to interview child victims, to protect them from the court system; so it made sense that he would not have interviewed her before requesting a postponement, or before reaching a plea deal with the defendant – both times he knew she would not need to testify.

The hearing judge found Mr. Smith's testimony to be genuine and credible.

Held: The appropriate sanction is indefinite suspension with the right to reapply in 60 days

Mr. Smith violated MLRPC 1.3 when he requested a postponement based on information that he did not verify before presenting it to the court. He also failed to act with diligence when he never communicated with the victim or her representative, with the result that they were unable to exercise their right to be present, and to offer an impact statement to the court.

Mr. Smith also violated MLRPC 8.4(d) with his failure to provide the victim and her foster mother with the appropriate information and failure to verify the information he provided to the trial court. This conduct caused an unnecessary delay in the trial, denied the victim and her mother information about their rights related to the case, and denied the sentencing court the benefit of a victim impact statement. The Court clarified that, although "mere mistake" is not enough for an 8.4(d) violation, bad intent is not a prerequisite. Here, Mr. Smith acted with gross negligence that "threatened the fair and efficient administration of justice."

The Court did not find violations of MLRPC 3.1 or 8.4(c). Both provisions prohibit attorneys from acting with an intent to deceive. Because Mr. Smith admitted that he provided the trial court with false information about the absence of the foster mother, the only question was whether he knew the information was false at the time he offered it, an issue that turned on Mr. Smith's credibility. The Court reiterated that it defers to the hearing judge's credibility findings, especially in "assessing an attorney's state of mind as to an intent to deceive." The hearing judge had carefully considered the evidence and testimony at trial, and found that Mr. Smith was genuine and credible when he said he did not know the information was incorrect. The Court held that the hearing judge's findings were not clearly erroneous, and therefore Mr. Smith did not violate MLRPC 3.1 or 8.4(c).

The Court found that Mr. Smith's lack of diligence and conduct prejudicial to the administration of justice were mitigated by his decision to accept responsibility for his conduct, his cooperation with Bar Counsel, and his lack of a disciplinary record. Accordingly, the appropriate sanction, as recommended by Bar Counsel, was an indefinite suspension with the right to re-apply for admission to the bar no sooner than 60 days after the beginning of the suspension.

Attorney Grievance Commission of Maryland v. Scott Gregory Adams, Misc. Docket AG No. 72, September Term 2012, filed February 5, 2015. Opinion by Barbera, C.J.

Battaglia and Watts, JJ., concur and dissent.

http://www.mdcourts.gov/opinions/coa/2015/72a12ag.pdf

ATTORNEY MISCONDUCT — DISCIPLINE — REPRIMAND

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed with this Court a Petition for Disciplinary or Remedial Action ("Petition") against Respondent, attorney Scott Adams. The Petition was brought as a reciprocal discipline matter under Maryland Rules 16-773(b) and 16-751(a)(2). The filing of the Petition was precipitated by two disciplinary matters that the Board of Overseers of the Maine Bar, through its Grievance Commission, had brought against Respondent. Both disciplinary matters related to a course of events stemming from Respondent's representation of a decedent's estate. The first action resulted in a warning to Respondent; the second resulted in a reprimand.

After receipt of the parties' responses to the show cause order, this Court transmitted the matter to a judge of the Circuit Court for Anne Arundel County ("hearing judge") to hold an evidentiary hearing and issue findings of fact and recommended conclusions of law. Our hearing judge held the hearing on September 9, 2013, and, at the hearing, expressly incorporated in the factual findings the reports of Panels D and E of the Maine Grievance Commission and thereafter issued written findings of fact, summarized below:

In April 2003, Respondent was retained by Mrs. Helen Brownell to assist her in handling her financial matters, including the filing of personal income tax returns and estate planning. Respondent reviewed Mrs. Brownell's estate plan, which included a Last Will and Testament and a family trust. He suggested changes and drafted a revised Will, which was executed in October 2004. Mrs. Brownell died, unexpectedly, on June 12, 2005, before the revisions to her trust were completed.

Respondent was retained to assist in the probate of the Estate and prepare the estate tax returns. In September 2005, Respondent filed the Estate's initial Maine tax return. Respondent had good reason to believe at the time that the total value of the Estate was below the $2 million threshold necessitating the filing of a federal estate tax return. He therefore did not file one.

About ten months later, in July 2006, Respondent learned that additional property attached to the Estate caused its total value to exceed $2 million. Respondent nevertheless did not undertake

any action at that time to file a timely federal estate tax return, nor did he seek an extension of time within which to file the return or recommend to the Estate that it pay the tax due.

It was not until January 2008 that Respondent filed the federal tax return on behalf of the Estate and paid the accompanying tax owed. The delay in filing, however, caused the Estate to incur substantial penalties and interest. By May 2008, the Estate had paid $134,000 in penalties and interest. Nonetheless, significant interest and penalties were still owed, prompting Respondent to request a recalculation of the penalties and interest.

Respondent resigned as the Estate's counsel on May 11, 2008. The following day, he reported to the Maine Board of Overseers of the Bar ("the Board") that he had violated a rule of the Maine Code of Professional Responsibility by failing to file timely the federal estate tax return.

Panel D of the Board held a hearing and found that Respondent had violated the Maine Code of Professional Responsibility for failing to file timely the estate tax return once he learned of the full value of the Estate. At the hearing, Respondent agreed to reimburse the Estate for costs incurred because of his delayed action. Panel D issued a warning against Respondent, which, in Maine, is not a formal "discipline."

The Estate, represented by new counsel, sued Respondent in the Superior Court of Lincoln County, Maine. The lawsuit alleged breach of fiduciary duty in connection with Respondent's tax return error and sought punitive damages and attorney's fees. Two days later, the Estate's attorney, Mr. Eisenstein, filed a motion for prejudgment attachment of Respondent's real and personal property up to $309,172.10.

Respondent believed Mr. Eisenstein's estimates far exceeded any reasonable assessment of the actual damages Respondent's actions had caused the Estate. Respondent retained Attorney Jonathan Hull to defend the action and resist attachment of Respondent's property. In an apparent effort to demonstrate why Respondent's property need not be attached at the requested amount, Mr. Hull sought from Respondent a list of his real estate holdings. On July 7, 2009, Respondent emailed his response to Mr. Hull's request for that information. The email states in its entirety:

> Jon, as requested, my wife and I have interests in the following Maine properties:
>
> 1. 211 Ocean Point Road, East Boothbay
> Approximate FMV: $395,000
> Current Mortgages: $366,000
>
> 2. 247 Ocean Point Road, East Boothbay
> Approximate FMV: $590,000
> Current Mortgages: $520,000
>
> 3. 24 Mills Road, Newcastle
> Approximate FMV: $325,000
> Current Mortgages: $313,000

4. 7 Anchor Lane, East Boothbay [the family residence]
Approximate FMV: $1,600,000
Current Mortgages: $1,300,000

Total Minimum Equity $411,000
I trust this is what you require, however, if not, please give me a call.

The first three properties Respondent listed are commercial properties, the title to which, several days after he became aware of the Estate's efforts to have his assets attached, Respondent transferred to WEOALOT, LLC. Respondent had established WEOALOT, held by him and his wife, on June 5, 2009, at his banker's recommendation.

Mr. Hull, with a copy to Respondent, forwarded this information in a letter to Mr. Eisenstein's counsel in his role as personal representative of the Estate. Respondent was never asked who or what entity had title to the three commercial properties and Respondent did not supply that information to Mr. Hull, opposing counsel, or the Maine Court. Mr. Eisenstein later learned of the conveyance of the commercial properties when he had a title search performed on the real estate Respondent had listed in his email.

On February 3, 2010, Mr. Eisenstein, acting through his attorney, made an oral motion to join WEOALOT as a party in interest and approve a writ of attachment in the amount of $200,838.10, to include any property owned by WEOALOT. Respondent agreed that the attachment should include WEOALOT, LLC, and the court entered an order to that effect on February 3, 2010.

A settlement was reached between the Estate and Respondent, and Respondent timely reimbursed the Estate, in full.

In September 2010, the Board of Overseers of the Maine Bar filed a second disciplinary petition against Respondent, which led to the hearing before Panel E of the Maine Grievance Commission. That petition charged that Respondent had attempted to shield the three commercial properties from attachment. Following two days of evidentiary hearings, on January 6, 2012, Panel E issued its Order and Report of Findings, concluding that Respondent violated the Maine Bar Rules by being untruthful to his attorney, opposing counsel, and the Maine court about his conveyances of the title of the commercial properties to WEOALOT.

Based upon these findings, the hearing judge concluded, by clear and convincing evidence, that Respondent violated MLRPC 1.1, 1.3, 8.4(a), and 8.4(c).

Held:

Respondent filed an exception to our hearing judge's findings of fact. If exceptions to the findings of facts are filed, those exceptions will be overruled so long as the findings are not

clearly erroneous. Both Petitioner and Respondent filed exceptions to our hearing judge's conclusions of law. The Court reviews *de novo* the hearing judge's conclusions of law. Respondent excepted to our hearing judge's conclusion that he knowingly misrepresented to his attorney his interest in the WEOALOT properties and, consequently, also excepts to our hearing judge's ultimate conclusion that Respondent violated MLRPC 8.4(c). Petitioner excepted to our hearing judge's finding that he did not violated MLRPC 8.4(d).

Based on the Court's *de novo* review of the record, the Court agreed with the hearing judge that Respondent violated MLRPC 1.1; 1.3; and MLRPC 8.4(a). The Court further sustained Respondent's exceptions and found that Respondent did not violate MLRPC 8.4(c). The Court overruled Petitioner's exception.

The Court found that Respondent's initial email correspondence explaining the properties in which he had interest was not deceitful and did not mislead opposing counsel or the Maine court. Respondent was never asked which properties he had title to, and he and his wife were the sole title-holders to WEOALOT. The Court therefore sustained Respondent's exception and did not find him in violation of MLRPC 8.4(c).

Petitioner's exception requesting the Court to find a MLRPC 8.4(d) violation was based heavily on Respondent's MLRPC 8.4(c) violation. The Court overruled the exception based on the same reasoning it sustained Respondent's exception.

The Court held that Respondent, having discovered the true final value of the Estate, delayed for more than a year in filing the required federal estate tax return. The Estate incurred financial damage in the form of interest and penalties assessed against it. Notwithstanding Respondent's commitment to making the Estate whole—a commitment he honored—his delay, in and of itself, constitutes a violation of MLRPC 1.1 and 1.3. Further, the Court found that violation of the MLPRC constitutes a violation of MLRPC 8.4(a). Due to the mitigating factors of Respondent's self-reporting, remorse, making the Estate whole, and the unlikelihood of repetition, the Court held that Respondent's misconduct warrants a sanction of a reprimand.

Attorney Grievance Commission of Maryland v. Carl Stephen Basinger, Misc. Docket AG No. 30, September Term 2013, filed February 23, 2015. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2015/30a13ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – REPRIMAND

Facts:

The Attorney Grievance Commission ("the Commission"), Petitioner, charged Carl Stephen Basinger ("Basinger"), Respondent, with violating multiple Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), including MLRPC 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice).

A hearing judge found the following facts. Basinger and his sister-in-law entered into an attorney-client relationship. Later, an insurance company received from Basinger's sister-in-law, who was his client, a letter in which she denied that she had retained Basinger, and Basinger learned of his sister-in-law's letter. Basinger mailed to his sister-in-law three letters, all of which were on his firm's letterhead. In his first letter, Basinger described what he had done on his sister-in-law's behalf; called her "A TRUE C[**]T" who had "finally f[***]ed up one time too many"; accused the sister-in-law of being dishonest; and stated that, if he ever saw her again, "it [would] be too soon." In his second letter, Basinger shared what he had learned while investigating the circumstances of the sister-in-law's grandson's death; suggested that she perhaps was responsible for her grandson's death; called the sister-in-law "a reprehensible human being" with "worthless progeny"; accused her of being lazy and dishonest; and wished the sister-in-law "only the worst from here on out." In his third letter, Basinger accused the sister-in-law of "trying to weasel [her] way out of paying the full amount of [a funeral chapel]'s bill[,]" for her grandson's viewing and funeral.

The hearing judge concluded that Basinger did not violate MLRPC 8.4(d). The Commission excepted to the hearing judge's conclusion and recommended a reprimand. Basinger neither excepted to the hearing judge's conclusion nor recommended a sanction.

Held: Reprimanded.

The Court of Appeals held that, based on five circumstances, Basinger violated MLRPC 8.4(d) by mailing the three letters. First, Basinger's statements were written, and thus were neither inartful slips of the tongue nor spoken in the heat of an oral altercation. Second, Basinger's statements were made at least partially in his capacity as his sister-in-law's lawyer. Third, Basinger's statements were insults aimed at the letters' recipient (his client) rather than a third

party. Fourth, Basinger's statements were not limited to an isolated incident; Basinger engaged in a pattern of numerous insults that spanned three letters. Finally, Basinger chose the obscene, sexist word "c[**]t" to refer to his client.

The Court agreed with the Commission that the appropriate sanction for Basinger's misconduct was a reprimand, which should suffice to deter other lawyers from communicating with their clients in the egregiously unprofessional manner that Basinger employed.

William Rounds, et al. v. Maryland-National Capital Park and Planning Commission, et al., No. 19, September Term 2014, filed January 29, 2015. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2015/19a14.pdf

LOCAL GOVERNMENT TORT CLAIMS ACT – NOTICE REQUIREMENT – CJP § 5-304

JOINDER – NECESSARY PARTIES

STATUTE OF LIMITATIONS – DISCOVERY RULE – INQUIRY NOTICE

STATUTE OF LIMITATIONS – TOLLING – 28 U.S.C. § 1367

Facts:

According to the Amended Complaint, Petitioners own properties located along "Farm Road," which provides the only means of access to Petitioners' properties. Petitioners filed suit in the Circuit Court for Montgomery County against Respondents, the Maryland-National Capital Park and Planning Commission (the "Commission"), Macris, Hendricks, and Glascock, P.A. ("MHG"), Douglas Riggs ("Riggs"), Warren Brown ("Brown"), Paul and Sara Arey (the "Areys"), Charles and Marilyn Mess (the "Messes"), Audrey Hill, and Milton Johnson, in connection with the alleged deletion of Farm Road from state maps and the failure to recognize the existence of Farm Road. Petitioners contend that Respondents intentionally eliminated Farm Road's northern most access point during the development of a neighboring subdivision. Petitioners also aver that any reference to Farm Road was falsely omitted from surveying documents submitted to the Commission for approval, which ultimately resulted in the deletion of Farm Road from state property maps. Apart from the Commission's approval of the allegedly fraudulent subdivision plans, Petitioners contend that the Commission repeatedly and improperly refused to issue addresses to Petitioners after Petitioners discovered their addresses had been eliminated, despite having issued addresses for these properties previously.

Petitioners ultimately determined that the present suit was necessary and, in an effort to comply with the notice requirement of the Local Government Tort Claims Act ("LGTCA"), Cts. & Jud. Proc. ("CJP") § 5-301 *et seq.*, gave notice of their claim on June 10, 2008 and July 21, 2008 to the Montgomery County Executive as well as the Commission. Petitioners initially filed suit in the United States District Court for the District of Maryland. The suit was subsequently dismissed on July 15, 2011, however, for failure to exhaust state remedies. Petitioners filed the instant suit in the Circuit Court for Montgomery County on August 11, 2011. The Amended Complaint asserted the following claims: (1) Counts I-IV seeking compensatory, statutory, and punitive damages against the Commission for various violations of the state constitution; (2) Counts V-XI seeking a declaratory judgment that Petitioners have an easement to use Farm Road against all Respondents; and (3) Counts XII and XIII seeking compensatory, statutory, and

punitive damages against the Commission, MHG, Riggs, Brown, and the Areys for wrongful interference with easement rights and slander of title respectively. Respondents moved separately to dismiss the Amended Complaint. The Circuit Court granted Respondents' motions to dismiss as follows:

> (1) Counts I-IV (the state constitutional counts), with prejudice, against the Commission for failure to give proper notice under the LGTCA;
>
> (2) Counts V-XI (the easement claims), without prejudice, as to the Commission, the Areys, the Messes, Hill, and Johnson, for failure to join necessary parties;
>
> (3) Counts V-XI (the easement claims), with prejudice, as to MHG, Riggs, and Brown, as none owned property adjacent to Farm Road and were, therefore, not interested parties; and
>
> (4) Counts XII and XIII, with prejudice, as to the Commission, MHG, Riggs, Brown, and the Areys, as time-barred, or alternatively, with respects to MHG and Riggs, because no duty was owed to Petitioners.

On appeal, the Court of Special Appeals upheld the Circuit Court's dismissal of the action.

Held: Affirmed in part, reversed in part

Under CJP § 5-304, a plaintiff is required to give notice to a designated local government within 180 days of an injury as a condition precedent to bringing an action for unliquidated damages. The Court of Appeals noted that nothing in the statute's language or its legislative history indicates that the General Assembly intended to exclude any category of tortious conduct (i.e. those premised on violations of the state constitution) committed by a local government or its employees, from the scope of the LGTCA notice requirement. Rather, the LGTCA was intended to apply broadly to tort actions brought against local governments. The Court found its conclusion that the notice requirement ordinarily applies to state constitutional claims for damages amply supported by its caselaw. The Court declined to restrict the statute in a manner that would exclude tortious conduct premised upon violations of the state constitution. Therefore, Counts I-IV, seeking unliquidated damages for the tortious conduct of the Commission, were properly dismissed for failure to comply with the LGTCA notice requirement where Petitioners did not dispute notice was given outside the 180 day period proscribed by the Act. Moreover, the Court concluded that, although the LGTCA affords relief from the strict application of the notice requirement where a plaintiff demonstrates substantial compliance or, alternatively, good cause to excuse a failure to comply, the trial court had not abused its discretion in finding that Petitioners failed to demonstrate good cause to excuse their failure to comply with the notice requirement where Petitioners had not demonstrated that they exercised

the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.

With regard to the counts dismissed for failure to join necessary parties, the Court affirmed the trial court's dismissal. The Court held that, in order to excuse non-joinder of necessary parties, a plaintiff must demonstrate that (1) the non-joined party clearly had knowledge of the pending litigation, and (2) the non-joined party must have purposefully declined to join the litigation, despite the non-joined party's ability to join. In a case involving an easement dispute, adjacent landowners have a vested interest in the outcome of the litigation and are necessary parties. Without more to demonstrate the adjacent landowner's decision to decline joining the litigation, the mere allegation by Petitioners that the non-joined adjacent landowners will not dispute the outcome of the litigation is insufficient to excuse their failure to participate in the lawsuit.

The Court further held that the trial court erred in granting a motion to dismiss on limitations grounds. In applying the discovery rule, the court's inquiry must focus on when the plaintiff discovered certain *facts* which would be sufficient to provide notice of the injury. When a statute of limitations defense is raised at the motion to dismiss stage, review is limited to the facts as alleged in the complaint. Where a plaintiff specifically alleged the date on which they became aware of their injury, such date falls within the applicable statute of limitations, and allegations of the complaint do not demonstrate the plaintiff's knowledge of facts which would provide notice of the injury at any earlier date, granting the motion to dismiss on statute of limitations grounds is improper. In addition, when a case is first brought in federal court, but subsequently dismissed for lack of jurisdiction and then brought in state court, 28 U.S.C. § 1367(d) serves to toll the statute of limitations for state law claims that were initially filed in federal court. The statute tolls only those claims that were expressly asserted in the initial federal court case, however. Therefore, the statute of limitations will not be tolled for a newly asserted claim in state court.

State of Maryland v. Charles William Callahan, No. 28, September Term 2014, filed January 23, 2015. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2015/28a14.pdf

CONDITIONS OF PROBATION – CONDITIONS OF MANDATORY SUPERVISION – LAWFUL INSTRUCTIONS – SEPARATION OF POWERS DOCTRINE

Facts:

Charles William Callahan ("Callahan"), Respondent/Cross-Petitioner, pled guilty to crimes. The Circuit Court for Anne Arundel County ("the circuit court") imposed a sentence that included five years of probation. Callahan signed an order of probation, in which he agreed to, among other conditions: "1. Report to [his] Probation Agent as directed and follow his/her lawful instructions[.]"

Callahan was released from imprisonment early under mandatory supervision. Callahan signed a "Mandatory Supervision Release Certificate," in which he agreed to, among other "special conditions": "Comply as directed by [his] parole/probation agent with the Division of Parole and Probation's sexual offender management program, which may include . . . polygraph testing[.]"

A single agent of the State's Division of Parole and Probation in its Department of Public Safety and Correctional Services became both Callahan's probation agent and his mandatory supervision agent. The agent gave Callahan a letter that stated: "[Y]ou are scheduled for a polygraph examination . . . . . Please adjust your schedule to ensure your presence . . . . Failure to report may result in a Violation of Probation[.]" (Emphasis omitted). Callahan failed to report for the polygraph examination.

The circuit court determined that Callahan violated the order of probation by violating the condition of probation: "1. Report to your Probation Agent as directed and follow his/her lawful instructions." Callahan applied for leave to appeal, and the Court of Special Appeals granted the application and reversed. The State petitioned for a writ of *certiorari*, and Callahan conditionally cross-petitioned for a writ of *certiorari*. The Court of Appeals granted the petition and the conditional cross-petition.

Held: Reversed.

The Court of Appeals held that a probation agent's instruction to comply with a condition of mandatory supervision does not create a new, more onerous condition of probation that is outside the ambit of a condition of probation to obey the probation agent's lawful instructions. Such an instruction is clearly lawful, as the probation agent simply instructs the probationer to do what the probationer has already agreed, and is legally required, to do. In other words, a probation

agent's instruction to comply with a condition of mandatory supervision does not require a probationer to do anything more than what the probationer is already obligated to do. Because complying with a condition of mandatory supervision benefits the probationer by maintaining his or her early release from imprisonment on conditions with which the probationer has agreed to comply, a probation agent's instruction to comply with a condition of mandatory supervision is far from onerous.

The Court of Appeals also held that a probation agent's instruction to comply with a condition of mandatory supervision is not inconsistent with the separation of powers doctrine. A court chooses conditions of probation and determines whether a probationer has violated an order of probation. Thus, a court may choose a condition of probation that a probationer obey a probation agent's lawful instructions, and the court may determine that the probationer has violated the order of probation by disobeying the probation agent's instruction to comply with a condition of mandatory supervision.

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Dominik Oglesby v. State of Maryland, No. 23, September Term 2014, filed February 23, 2015. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2015/23a14.pdf

CRIMINAL LAW – SENTENCING – RULE OF LENITY

CRIMINAL LAW – FIREARMS OFFENSES – PROSECUTORIAL DISCRETION – SENTENCING

Facts:

Dominik Oglesby was charged with, and convicted of, violating a provision in the Maryland Code that prohibits a person who has been previously convicted of a drug-related offense (as Mr. Oglesby had) from possessing certain types of firearms. That statute, Public Safety Article ("PS"), §5-133(c), requires a sentencing court to impose a mandatory minimum sentence of five years incarceration, no part of which may be suspended and without the possibility of parole. Mr. Oglesby was sentenced to this five-year mandatory minimum.

Mr. Oglesby appealed to the Court of Special Appeals and argued that he received an illegal sentence. Mr. Oglesby argued that, on the same facts, he could have been charged and convicted under Criminal Law Article ("CR"), §5-622, which does not carry a mandatory minimum sentence and which allows for the possibility of a suspended sentence and parole. According to Mr. Oglesby, the rule of lenity required that he be sentenced under the statute that imposed the lesser sentence (that is, CR §5-622) even though he was not charged or convicted with violating this statute.

The Court of Appeals granted certiorari on its own motion before the Court of Special Appeals considered the appeal.

Held: Affirmed

The Court of Appeals held that Mr. Oglesby's five-year mandatory minimum sentence under PS §5-133(c) was not an illegal sentence. The Court observed that it is not unusual for the same set of facts to support potential convictions under a number of statutes or common law offenses, many of which may carry different penalties. The Court concluded that the State's constitution and criminal laws conferred on State prosecutors the discretion to determine which offense to charge in a particular case. So long as the prosecutor does not exercise his or her discretion in an unconstitutional or illegal manner, the appropriate sentence will be the sentence corresponding to the statute under which the defendant is convicted.

The Court rejected Mr. Oglesby's contention that the rule of lenity mandated a lesser sentence. The Court stated that the rule of lenity did not apply because there was no unresolvable ambiguity in the statute at question. The Court concluded that PS §5-133(c) unambiguously imposed a five-year mandatory minimum and that Mr. Oglesby's reading of the statute was untenable because it rendered a subparagraph of the statute superfluous. In the interest of completeness, the Court also examined the legislative history of both PS §5-133 and CR §5-622 and concluded that the General Assembly intended to provide for a mandatory minimum sentence of five years incarceration for violations of PS §5-133(c). Thus, given that Mr. Oglesby was convicted of violating PS §5-133(c), he was properly sentenced to the five year mandatory minimum specified in that statute.

Finally, the Court concluded that *Waye v. State*, 231 Md. 510, 191 A.2d 428 (1963) did not support a contrary conclusion. In *Waye*, the Court had considered whether a recent amendment of the Worthless Check Act that limited the sentence to be imposed when the value obtained by means of a worthless check was less than $100 should also be applied to a conviction under the False Pretenses Act involving the use of a worthless check to obtain less than $100. In that case, the Court concluded that the Legislature must have intended to limit the sentence as well in the latter case. In Mr. Oglesby's case, the Court noted that the governing principle of *Waye* – fidelity to legislative intent – supported the sentence imposed, given that the legislative intent of PS §5-133(c), as expressed in the statutory text and the legislative history, was to mandate a five-year minimum sentence.

Amalgamated Transit Union, Local 1300 and David A. McClure v. William T. Lovelace, Jr., No. 25, September Term 2014, filed February 4, 2014. Opinion by Adkins, J.

McDonald and Watts, JJ., concur.
Harrell, J., dissents.

http://www.mdcourts.gov/opinions/coa/2015/25a14.pdf

LABOR LAW – EXHAUSTION OF INTERNAL UNION REMEDIES – DEFAMATION – MONETARY DAMAGES

Facts:

Respondent, William T. Lovelace, Jr., worked for the Maryland Transit Administration and was a member of Petitioner, Amalgamated Transit Union, Local 1300 ("Local 1300"). Lovelace and Petitioner, David McClure (collectively with Local 1300, "the Union"), served together as officers on Local 1300's Executive Board between 2007 and 2010. During the three years they served together, Lovelace and McClure often disagreed about Local 1300's financial matters, and became "political enemies." When both men ran for reelection in 2010, McClure prevailed, and Lovelace was defeated. Lovelace blamed his defeat on the allegedly false and defamatory statements that McClure made prior to and during the campaign.

Lovelace filed a defamation action in the Circuit Court for Baltimore City against the Union, seeking $1 million in compensatory damages and $3 million in punitive damages. He alleged that between 2007 and 2010, McClure, acting within the scope of his employment, published—to numerous Local 1300 members—false and defamatory statements accusing Lovelace of stealing from Local 1300 and misappropriating funds. Lovelace further alleged that Local 1300 was vicariously liable because it ratified McClure's statements.

The Union filed Motions to Dismiss, asserting, in part, that Lovelace failed to exhaust Local 1300's internal remedies before filing suit. The Circuit Court denied the Motions, concluding that Lovelace was not required to exhaust Local 1300's remedies because without the availability of monetary damages, the remedies were inadequate.

The case was tried before a jury in April and May 2012. Several witnesses testified that McClure told them that Lovelace was stealing from Local 1300. Ultimately, the jury rendered a verdict in Lovelace's favor, finding that McClure defamed Lovelace with actual malice and that Local 1300 was vicariously liable for the defamation. The jury awarded compensatory and punitive damages in excess of $400,000.

The Union appealed. In a reported opinion, the Court of Special Appeals affirmed the Circuit Court, concluding that Local 1300's internal remedies were inadequate because they could not

provide the monetary damages Lovelace sought. The Union filed a Petition for Writ of Certiorari, which this Court granted on February 21, 2014, to answer the following question: (1) Whether an internal union remedy is "inadequate," thus excusing a plaintiff from exhausting internal union procedures for resolving a dispute before seeking relief in court, if it does not provide the monetary damages the plaintiff seeks?

Held: Affirmed.

The Court of Appeals held that when a union member claims that his union and a fellow union member are liable for defaming him and seeks monetary damages, if the union's internal remedies do not provide monetary damages, they are inadequate and the union member is not required to exhaust them.

The Court began by reviewing *Clayton v. Int'l Union*, 451 U.S. 679, 101 S. Ct. 2088, 68 L. Ed. 2d 538 (1981) and *McPhetridge v. IBEW, Local Union No. 53*, 578 F.3d 886 (8th Cir. 2009), the two principal cases upon which the Union relied. The Union argued that *Clayton* and *McPhetridge* demonstrate that an internal union procedure is not inadequate because of the unavailability of monetary damages if it offers a remedy that allows the union member to avoid or mitigate the injury for which monetary damages are sought in litigation.

The Court rejected the Union's broad reading of *Clayton*, reasoning that most of the federal cases that have cited *Clayton* have not utilized the standard of "avoiding or mitigating" an injury to measure what is an adequate remedy. Although the Court acknowledged that *McPhetridge* explicitly addressed avoiding or mitigating an injury, the Court determined that the Union's reliance on that case was misplaced for two reasons. First, the Court observed that *McPhetridge* is an outlier because it was the only federal case the Union cited (and the Court found no others), in which a federal court analyzing whether internal union remedies were inadequate under *Clayton* addressed whether the remedies could avoid or mitigate damages. The Court emphasized that in all the other federal cases it reviewed, the courts applied the *Clayton* inadequacy test to ascertain whether the unions' internal remedies could reactivate a grievance or provide complete relief. Second, the Court highlighted that the facts of *McPhetridge* are distinguishable. Local 1300's internal procedures could not have avoided all the damages Lovelace suffered because once Lovelace proved that he was defamed with actual malice, damages were presumed. Also, the Court observed it was uncertain whether Local 1300's internal procedures could have mitigated Lovelace's damages.

The Court then applied the *Clayton* inadequacy test, concluding it was appropriate to do so because Maryland shares one of the major policy objectives influencing the Supreme Court of the United States's analysis in *Clayton*—encouraging private resolution of disputes. The Court determined that the first part of the *Clayton* inadequacy test did not apply because Lovelace did not pursue a grievance. Therefore, the Court turned to the second part of the test: whether Local 1300's remedies provide complete relief. The Court emphasized that numerous federal courts applying the *Clayton* inadequacy test have concluded that internal union remedies do not offer

complete relief if they do not provide monetary damages. Accordingly, because Lovelace sought compensatory and punitive damages and Local 1300's internal procedures did not provide monetary damages, the Court concluded that Local 1300's internal remedies were inadequate and Lovelace was not required to exhaust them.

COURT OF SPECIAL APPEALS

Ross Contracting, Inc. v. Frederick County, Maryland, No. 977, September Term 2013, filed February 25, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/0977s13.pdf

RIGHT TO AN APPEAL – ADMINISTRATIVE LAW – PROCEDURE

Facts:

In October 2008, Frederick County (the "County") issued an invitation to bid for a construction contract to replace the Bidle Road Bridge over Catoctin Creek. This invitation included various specifications related to the excavation area, including the subsurface material that could be expected at the site. Based on this information and its own independent examination of the project site, Ross Contracting, Inc. ("Ross") submitted the lowest bid and entered into a construction contract with the County on February 3, 2009 (the "Contract").

The Contract contained specific provisions covering situations where the site conditions discovered during performance varied significantly from those set forth in the Contract. In summary, Ross was required to notify the County of any physical conditions that were materially different from those indicated in the Contract and, if any necessary changes resulted in an increase or decrease in the cost of performance, the Contract terms would be modified accordingly.

During the excavation process, Ross discovered hard rock material at a depth different from that which was disclosed in the Contract. Ross notified the County of this issue and the County provided a revised design for this portion of the project. Ross completed the revised construction design on June 24, 2009 and submitted a Proposed Change Order ("PCO") requesting a significant adjustment to the Contract price. The County rejected this PCO claiming that Ross was only due the cost of hiring a third party to conduct the mid-construction inspection.

Ross invoked the Contract's Arbitration provision, which required that any dispute involving $10,000.00 or more would be subject to a factual determination by one of several County agencies listed in the Contract. Over the course of several months, an appointed Hearing Officer heard arguments from both sides, reviewed the Contract terms and visited the project site. On May 1, 2012, he concluded that the rock material encountered during excavation did not amount to a material difference, but found that Ross was entitled to $31,946.41 for the cost of delaying the project to further investigate the site conditions.

On May 16, 2012, Ross filed a petition for judicial review of the Hearing Officer's decision with the Circuit Court for Frederick County. The circuit court held that Ross did not encounter materially different site conditions and affirmed the Hearing Officer's decision. Ross subsequently filed a notice of appeal to the Court of Special Appeals of Maryland.

Held:

The Court of Special Appeals declined to address Ross's appeal on its merits and dismissed the case for lack of appellate jurisdiction. The Court emphasized that appellate jurisdiction is determined entirely by statute. Therefore, Ross's right to appeal depended on a provision under the Maryland Code. Section 12-301 of the Courts & Judicial Proceedings Article provides the general right to appeal final judgments of circuit courts that are exercising original, special, limited or statutory jurisdiction. However, § 12-302(a) limits this right by preventing an appeal when the circuit court is exercising its appellate jurisdiction in reviewing a decision of an administrative agency.

Although the circuit court was technically exercising original jurisdiction in this case, the Court declined to apply a narrow interpretation of "appellate jurisdiction." Instead, it held that proper application of § 12-302(a) required a broader interpretation to include statutory judicial review of adjudicatory decisions by administrative agencies and local legislative bodies. In the present case, the Circuit Court for Frederick County was exercising appellate jurisdiction in reviewing the Hearing Officer's decision. Therefore, § 12-302(a) prohibited an appeal of this decision to the Court of Special Appeals, unless additional statutory authority could be shown.

Ross argued that additional statutory authorization could be found under the Administrative Procedure Act ("APA"). A portion of the Contract specifically provided that it was subject to the provisions of Title 15, Subtitle 2, State Finance and Procurement Article of the Annotated Code of Maryland, which allows judicial review under Title 10 of the APA. However, the Court emphasized that the Contract's Arbitration provision states that it governed any disputes arising under the Contract *unless otherwise provided by law*. Article 15, Section 1A(g) of the Maryland Code provides the procedures that the parties were required to follow under the Arbitration provision of the Contract. This law does not provide any additional right to appeal other than that found under Section 12 of the Courts & Judicial Proceedings Article. As a result, appellate jurisdiction for this dispute was governed by § 12-302(a) and the Appellant had no right to appeal the circuit court's decision.

Wayne Garrity v. Maryland State Board of Plumbing, No. 2171, September Term 2013, filed February 26, 2015. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2015/2171s13.pdf

JUDGMENTS – COLLATERAL ESTOPPEL

Facts:

Appellant Wayne Garrity, Sr. was a licensed master plumber and managed two companies that provided plumbing, heating, and cooling services in Maryland. The Consumer Protection Division (CPD) of the Attorney General's Office charged Garrity in 2012 with unfair and deceptive trade practices in violation of the Consumer Protection Act. Specifically, the CPD alleged Garrity had employed unlicensed plumbers in over 6,000 jobs, and charged consumers for permits that he never obtained in work performed in at least 697 homes in Maryland. During a two-day hearing, the Administrative Law Judge heard testimony from over twenty witnesses, but Garrity elected not to testify. The CPD issued a final order concluding Garrity had committed over 7,000 violations of the CPA and imposed a $707,900 civil penalty plus $35,000 in costs to investigate and prosecute the violations. Garrity did not seek judicial review of this order.

Subsequently, the Maryland State Board of Plumbing also opened a complaint against Garrity and charged him with violation of the Maryland Plumbing Act (MPA) in the Business Occupations & Professions Article provision of incompetent and or negligent plumbing services for failure to obtain permits, and for unfair trade practices for permitting unlicensed plumbers to provide plumbing services. At an evidentiary hearing, Garrity, represented by counsel, called no witnesses and refused to testify. When the Board sought to introduce the CPD's Findings of Fact and Final Order as evidence of Garrity's violations, his attorney objected but was overruled. The Board issued a Final Order in which it revoked his master plumbing license and imposed as $75,000 civil penalty.

Garrity sought judicial review in the Circuit Court for Baltimore City, which affirmed the Board's order. On appeal to the Court of Special Appeals, Garrity argued that the Board could not use collateral estoppel against him to prove that he had employed unlicensed plumbers and charged for permits he never obtained. Additionally, Garrity contended that the Board's civil monetary penalty, following the CPD's monetary penalty, violated the Fifth Amendment's Double Jeopardy Clause.

Held: Affirmed.

Although a novel issue in Maryland, under the general principles of finality, see Restatement (Second) of Judgments § 83, an administrative agency's findings of fact may be determined final for purposes of collateral estoppel. Offensive use of collateral estoppel, see *Parklane Hosiery*, 439 U.S. at 329-30 (1979); *Rourke v. Amchem*, 384 Md. 329, 341 (2001), is appropriate in a case of successive administrative hearings where there is no indication of unfairness to the defendant; here, Garrity had ample opportunity to testify and present witnesses in the first hearing, and had similar procedural opportunities in the Board hearing. In the interest of judicial economy, there was no reason to force the Board to relitigate the well-documented factual question of Garrity's deceptive and unfair trade practices. Despite Garrity's contention that the central case in *Maryland, Culver v. Md. Ins. Comm'r*, 175 Md. App. 645 (2007), did not involve two administrative agencies, we see no reason why the recognized principle of offensive nonmutual collateral estoppel would not apply here.

Nor did the State's successive monetary penalties from two agencies constitute double jeopardy. It is well-established that the Double Jeopardy Clause does not apply to civil penalties. See *Hudson v. U.S.*, 522 U.S. 93 (1997). Garrity's deceptive and fraudulent practices were not classified as criminal acts under the CPA or the MPA. Moreover, both statutes are intended to protect consumers, and the monetary penalties serve not to punish wrongful conduct but to deter violations of the statutes. Further, as the Supreme Court explained in *Hudson*, "the payment of fixed or variable sums of money [is a] sanction which ha[s] been recognized as enforceable by civil proceedings since the original revenue law of 1789." *Id*. at 104. As these two penalties were not "punishments," we hold that their imposition did not constitute double jeopardy.

Giant of Maryland, LLC , et al. v. Julia M. Taylor, No. 1799, September Term 2013, filed February 2, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/1799s13.pdf

STATUTORY PREVAILING PARTY ATTORNEYS' FEES – REVERSAL OF MERITS JUDGMENT AND LOSS OF PREVAILING PARTY STATUS – REVERSAL OF MERITS JUDGMENT RENDERS JUDGMENT FOR PREVAILING PARTY FEES NULL – JUDGMENT FOR FEES IS RENDERED NULL EVEN IF THAT JUDGMENT WAS NOT TIMELY APPEALED – JUDGMENT FOR FEES CANNOT BE ENFORCED AGAINST BOND.

Facts:

In 2007, Julia Taylor, the appellee, prevailed at trial in the Circuit Court for Prince George's County on gender discrimination claim against Giant of Maryland, LLC ("Giant"), her employer and an appellant. She was awarded compensatory damages by the jury and, under the prevailing party attorneys' fee provision of then Article 49B of the Maryland Code, was awarded attorneys' fees by the court. Both awards were reduced to judgment, at different times. Giant noted a timely appeal from the merits judgment and an untimely appeal from the fee judgment. Travelers Casualty and Surety Company ("Travelers"), an appellant, was the surety on Giant's supersedeas bonds.

On appeal to the Court of Special Appeals, the merits judgment was reversed for insufficiency of evidence. The fee judgment likewise was reversed by this Court, even though the appeal was not timely filed, because the fee judgment could not stand without the merits judgment. The Court of Appeals granted certiorari in both appeals. On the merits judgment, it held that the evidence was sufficient, and remanded to the Court of Special Appeals to decide other issues that had been raised on appeal. On the fee judgment, it held that there was no appellate jurisdiction because the appeal from the fee judgment was not timely filed.

Before the Court of Special Appeals issued its opinion addressing the remaining appeal issues, Taylor moved for judgment on the supersedeas bond issued in the fee appeal. Ultimately, the Court of Special Appeals reversed the merits judgment on an evidentiary ground; but the circuit court entered judgment on the bond for the fee judgment. Giant and Travelers challenged that judgment on appeal. In the meantime, the Court of Appeals denied *certiorari* on the reversal of the merits judgment.

Held: Judgment on the bond reversed.

The ultimate reversal of Taylor's merits judgment means that she no longer is a prevailing party under the statute. If the case is retried and she again prevails, she will be a prevailing party; but she is not a prevailing party now. The fee judgment was dependent upon Taylor's status as a prevailing party. When a merits judgment that is the basis for a prevailing party fee award is reversed, the judgment for fees is nullified, regardless of whether the fee judgment was appealed. By noting an untimely appeal from the fee judgment, Giant lost its right to challenge the amount of the fee award and how it was calculated. That untimely appeal did not change the fact that a reversal of the merits award would nullify, and here did nullify, the fee award. Because the judgment for prevailing party attorneys' fees was null and not enforceable, the trial court erred in entering judgment on the bond.

Conwell Law LLC v. Mary Beth Tung, et al., No. 476, September Term 2013, filed February 25, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/0476s13.pdf

SERVICE OF PROCESS – PERSON TO BE SERVED

MOTION TO DISMISS – PROFESSIONAL NEGLIGENCE & LEGAL MALPRACTICE

APPEARANCE OF IMPROPRIETY – WAIVER

Facts:

The plaintiff law firm (the "Firm") filed suit against several defendants, including its former employee Ms. Tung, based on the Firm's representation of a third-party company in matters before the United States Patent and Trade Mark Patent Trial and Appeal Board. The Firm had two versions of the Complaint—a "Confidential" Complaint and a "Non-Confidential" Complaint—and the latter was an incomplete version of the former. The Firm served only the non-confidential (partial) version on Ms. Tung, and ultimately only served the Confidential Complaint on Ms. Tung's attorney (apparently on the theory that once counsel had entered an appearance on behalf of Ms. Tung, personal service was not necessary). Ms. Tung moved to dismiss pursuant to Maryland Rule 2-121, arguing that she never authorized her counsel to accept service for her. The specially assigned trial judge granted her motion to dismiss based both on this reasoning and because of lack of jurisdiction under Rule 2-507. It also granted the motion to dismiss for failure to state a claim of the remaining defendants, BIO Intellectual Property Services LLC and its employee (the "BIO Defendants"). The plaintiff appealed both rulings.

Held: Affirmed.

The Court of Special Appeals held *first* that service of a partial version of the complaint is not proper service of a complaint under Maryland Rule 2-121, and the plaintiff's ultimate service of the Confidential Complaint only on the defendant's counsel did not constitute effective service, because the plaintiff could not produce any evidence that the defendant had authorized service on her counsel. Moreover, the circuit court was also correct that the case was subject to dismissal for lack of jurisdiction under Maryland Rule 2-507(b).

Second, with respect to the BIO Defendants' motion to dismiss, the trial court properly determined that the complaint raised a single cause of action against them for "professional negligence and legal malpractice," but the Firm failed to allege the required attorney-client relationship with the BIO Defendants. Instead, it appeared that the BIO Defendants were retained by the Firm simply to serve as the requisite "back-up counsel" in the specialized court

before which the parties appeared, and that co-counsel relationship could not give rise to a legal malpractice action as a matter of law.

Finally, the Court of Special Appeals declined to consider the question of whether the special assignment of the case to one judge, and that judge's involvement in a bar association event that also included Ms. Tung's counsel, led to bias or the appearance of impropriety. Counsel for the Firm had a specific opportunity before the trial judge to raise any objections relating to the case's assignment, and never did so.

Stinyard A. Blue v. Antonio Arrington, No. 1036, September Term 2013, filed January 30, 2015. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2015/1036s13.pdf

CONSTITUTIONAL LAW – EQUAL PROTECTION – GUARANTEED ACCESS TO THE COURTS

Facts:

On July 5, 2011, Blue and Arrington were working for Baltimore City. On that day, Blue was performing his duties as a "Seasonal Maintenance Aide" on a garbage truck. In that capacity, he was "side mounted" on the outside of the garbage truck that Arrington was driving. "[W]hile talking on a cell phone," Arrington "attempted to make a turn," crushing Blue's "legs and abdomen between a fence and a brick wall," as he clung to the side of the truck. Following that accident, Blue filed a claim, under the Maryland Worker's Compensation Act, for which he received compensation for lost wages, medical expenses, and permanent disability.

Thereafter, Blue filed a complaint, in the Baltimore City circuit court, against Arrington, alleging that Arrington "had a duty of care to operate his vehicle in a proper fashion and [had] breached this duty of care by failing to properly turn his vehicle while keeping a proper lookout for" Blue. The City, on behalf of Arrington, filed a motion to dismiss, asserting that "[b]y statute, local government employees may not file an action against a negligent co-employee for tortious conduct in the scope of employment resulting in injuries which are compensable under the Worker's Compensation Act." Blue's "exclusive remedy" for the injuries he sustained, the motion stated, was the remedy provided by the compensation statute. The circuit court agreed and granted Arrington's motion to dismiss, whereupon Blue noted an appeal.

Held:

The Fourteenth Amendment to the Constitution and Article 24 of the Maryland Declaration of Rights guarantee equal protection of the laws. Section 5-302(c) of the Courts & Judicial Proceedings Article, which is part of the Local Government Tort Claims Act and limits the right of a local-government employee to "sue a fellow employee for tortious acts or omissions," does not violate a local-government employee's equal-protection rights because the statute's restriction is rationally related to the legitimate governmental purpose of assisting local governments in predicting future costs and expenses by providing protection against unanticipated tort judgments. It also prevents taxpayers from facing "higher taxes or reduced services."

Article 19 of the Maryland Declaration of Rights guarantees access to the courts, subject to "reasonable regulation." Section 5-302(c) of the Courts & Judicial Proceedings Article does not violate Article 19 because an injured local-government employee, although limited in his ability to sue a fellow employee, is entitled to compensation under the Maryland Worker's Compensation Act.

Reynaldo Parado Rodriquez v. State of Maryland, No. 2525, September Term 2011, filed January 28, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/2525s11.pdf

CONSTITUTIONAL LAW – MARYLAND SEX OFFENDER REGISTRY – RETROACTIVE APPLICATION OF MARYLAND SEX OFFENDER REGISTRATION ACT BY 2010 AMENDMENT NOT VIOLATIVE OF MARYLAND PROHIBITION AGAINST EX POST FACTO LAWS WHEN APPLIED TO APPELLANT

Facts:

Appellant committed a third degree sexual offense with a fifteen-year-old in 1996 when he was twenty-six years old. Appellant was convicted in 1998 and sentenced in 1999. Although the Maryland sex offender registration act ("MSORA") was in effect at the time of the commission of the crime, as well as at the time of sentencing, MSORA did not require appellant to register as a sex offender. As a result of the retroactive application of MSORA by the 2001 amendment, however, appellant was required to register for the rest of his life.

Because appellant was on the sex offender registry on September 30, 2010, the 2010 amendment to MSORA applied retroactively to him. The 2010 amendment reclassified appellant as a Tier II offender, which required him to register for twenty-five years, instead of lifetime. The 2010 amendment also placed additional registration requirements on homeless registrants, one of which required in person registration every week. Appellant failed to comply with that requirement when he became homeless in 2011.

Appellant was charged in the Circuit Court for Frederick County with failing to register as a homeless registrant. In an agreed statement of facts, appellant admitted to failing to register as required by the 2010 amendment, but then argued that he could not be convicted because he could not be required constitutionally to register in the first place. The circuit court rejected appellant's argument and convicted him of failing to register.

Held: Affirmed.

On appeal, the Court of Special Appeals affirmed. Appellant argued that under *Doe v. Department of Public Safety & Correctional Services* ("*Doe I*"), 430 Md. 535 (2013), the State cannot legally require him to register as a sex offender, and because he had no legal duty to register, there is insufficient evidence to sustain his conviction for failure to register. Appellant asked the Court not only to vacate his conviction, but to remove appellant's name from the registry and exempt him from future registration.

Initially, the Court rejected appellant's request for removal from the sex offender registry and exemption from future registration. Relying on *Sinclair v. State*, 199 Md. App. 130 (2011), the Court stated that appellant was in effect seeking a declaratory judgment, which was not cognizable in his criminal case. The Court concluded that under *Doe I*, registration remained a collateral consequence of criminal punishment, and thus appellant could seek removal from the sex offender registry only through a civil action for declaratory judgment.

Nevertheless, according to the Court, appellant could still challenge his conviction for failure to register under *Doe I*. Appellant claimed that the 2009/2010 amendments at issue in *Doe I* "apply equally" to both Doe and him. The Court disagreed.

The 2009 amendment required Doe to register, and the 2010 amendment classified Doe as a Tier III sex offender, which required him to register for life. On the other hand, appellant was required to register by the 2001 amendment, and the Court of Appeals did not decide in *Doe I* whether the 2001 amendment violated Article 17's prohibition against *ex post facto* laws. Appellant raised no argument regarding the constitutionality of the 2001 amendment in his appeal.

Appellant, however, was subject to the retroactive application of the 2010 amendment to MSORA. The 2010 amendment actually benefitted appellant by reducing the period of registration from lifetime to 25 years. On the other hand, the 2010 amendment imposed on appellant many additional requirements and conditions of registration. The Court of Appeals did not decide in *Doe I* whether those additional requirements and conditions of registration violated the prohibition against *ex post facto* laws when applied to persons, like appellant, *who were legally already on the registry*.

The Court of Special Appeals stated that it need not address such issue, because in the instant case only one additional requirement of the 2010 was retroactively applied to appellant, namely, the obligation of registering in person once a week as a homeless registrant. None of the other additional conditions and requirements of registration were the basis for the conviction that appellant sought to overturn. The Court concluded that the requirement of a homeless registrant to register once a week in person had a legitimate regulatory purpose and thus did not constitute an "additional sanction" for appellant's crime in violation of the prohibition against *ex post facto* laws under Article 17 of the Declaration of Rights. Accordingly, appellant's conviction for failing to register as a homeless registrant could stand.

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Oliver Allen Russell v. State of Maryland, Nos, 486 and 2806, September Term 2013, filed February 25, 2015. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2015/0486s13.pdf

CRIMINAL LAW – PROBATION – CONDITIONS OF PROBATION

Facts:

Appellant Oliver Allen Russell was convicted of child sexual abuse in two different cases, for which he was sentenced to a suspended prison term and a period of probation. While Russell was serving his probation, the probation authority filed a request with the circuit court to modify the terms of probation in both cases to add the condition of COMET supervision.

"COMET" is an acronym for Collaborative Offender Management Enforcement Treatment. The COMET supervision program was created in response to legislation passed by the General Assembly in 2006 which mandated the establishment of sexual offender management teams for the supervision of sexual offenders. A probationer on COMET supervision is required to comply with a sexual offender management program, which may include intensive reporting requirements, specialized sex offender treatment, electronic GPS monitoring, polygraph testing, computer monitoring, and being compelled to take medication. Following a hearing, the trial court modified Russell's probations to include COMET supervision.

This appeal followed.

Held: Affirmed.

The Court of Special Appeals held that the trial court acted within its authority when it imposed COMET supervision. With respect to the curfew component of COMET supervision, the Court noted that a probation authority is permitted to provide specific rules designed to govern the conduct of the probationer within the ambit of a general condition imposed by the court. The trial court authorized the COMET team to impose a curfew, and pursuant the trial court's order, the probationary authority would provide the probationer with clear and specific rules indicating the circumstances under which the court-authorized curfew would be imposed. For these reasons, the Court of Special Appeals held that the discretionary curfew imposed by the court and administered by the probationary authority did not constitute an illegal condition of probation.

The Court of Special Appeals also rejected Russell's claims with respect to the polygraph component of COMET supervision. The Court held that the polygraph condition had a rational basis because a polygraph can promote candor between the probationer and probation agent, reduce recidivism, and assist treatment providers in developing appropriate treatment plans. The

Court further held that the polygraph component did not, in and of itself, violate the Fifth Amendment of United States Constitution and was not impermissibly vague. The Court explained that a probationer's challenge to a polygraph requirement is premature when the probationer has not actually been subjected to incriminating questioning or compelled to answer incriminating questions after having asserted his Fifth Amendment privilege.

The Court of Special Appeals further held that the sanctions imposed for failing to participate in a polygraph examination, namely, increased reporting requirements and the imposition of a curfew, were not impermissible. Finally, the Court held that a trial court's imposition of a polygraph condition of probation was not an assumption or encroachment upon the role of the legislature. Similarly, with respect to the GPS monitoring component of COMET supervision, the Court of Special Appeals held that the trial court's imposition of GPS monitoring as a condition of probation was not an assumption or encroachment upon the role of the legislature.

Coryea Dominique Webster v. State of Maryland, No. 325, September Term 2013, filed January 28, 2015. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2015/0325s13.pdf

APPELLATE REVIEW

EVIDENCE – RELEVANT EVIDENCE

EVIDENCE – HEARSAY

INDICTMENT – AMENDMENT

SENTENCING

SENTENCING – MERGER

Facts:

On April 27, 2012, members of the Maryland State Police responded to an address in Frederick as a result of appellant, Coryea Dominique Webster's, failure to appear in court. After knocking on the apartment door and receiving no response, the police entered and discovered appellant back in the rear bedroom with his two-year-old child. At no point during the entry did appellant make his presence known to the police. After entering the apartment, police recovered a loaded rifle, ammunition, drugs, and drug paraphernalia throughout the apartment.

Appellant was charged in the Circuit Court for Frederick County with possession with intent to distribute cocaine, possession of cocaine, possession of marijuana, possession of Methylenedioxymethamphetamine (MDMA), possession of drug paraphernalia, possession of a rifle by a person with a disqualifying offense, possession of a firearm in connection with a drug trafficking offense, and allowing a minor access to a firearm.

Trooper First Class Jason Stevens, of the Maryland State Police, testified at trial that he recovered a rifle, a razor blade and a digital scale with suspected cocaine residue, hundreds of baggies that the trooper testified were consistent with packaging materials for controlled dangerous substances, and hundreds of rounds of ammunition. The police also found a Frederick County Detention Center identification card with appellant's picture and two notebooks. Trooper Stevens testified, without objection, that one of the notebooks contained a list labeled "fiens," and that, "[a] fiend is a drug addict and many times people involved in distribution of controlled dangerous substances will use a fiend to drive them around to pick up packages and normally the fiend is paid either through cash, or, um, more commonly in drugs." Trooper Stevens also testified that the notebooks had the name "Yeah-O" on them, which he stated was a nickname for appellant and also slang for cocaine.

The parties stipulated that the police recovered .2 grams of benzylpiperazine (BZP), rather than MDMA, a schedule I drug; the plant material was .5 grams of marijuana; and, the total gross weight of the 28 bags of cocaine was 9.1 grams from the apartment.

Appellant was convicted on all counts and sentenced to twenty years for possession with intent to distribute cocaine; a consecutive twenty years, with all but five years suspended, for possession of a firearm in connection with a drug trafficking offense; a consecutive fifteen years, all suspended, for illegal possession of a rifle; a consecutive four years, all suspended for possession of Benzylpiperazine (BZP); and, a consecutive one year, all suspended, for possession of marijuana.

Held:

The issue of whether the probative value of the notebook was greatly outweighed by its potential for unfair prejudice was not preserved for appellate review. Prior to trial, the court granted a motion *in limine* to preclude any testimony concerning gang-related activity after defense counsel noted that one of the two notebooks recovered mentioned rules for a gang. The State offered to admit the other notebook, which defense counsel objected on the grounds that "the books may contain information or, or the witness may speculate that and interpret some of the information *as being gang-related or something like that*." Defense counsel's addition, "or something like that," did not raise additional, unstated grounds beyond the explicit concern about gang evidence, and under Maryland Rule 8-131, "appellate court will not decide [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court." Even if the issue was preserved, the trial court properly exercised its discretion in admitting the notebook because the probative value of a notebook containing drawings of guns, calculation of grams, and a list labeled "fiends" was not substantially outweighed by the danger of unfair prejudice given the relevance of such evidence to the issues before the jury.

The trial court did not err in admitting evidence of appellant's alleged nickname. Trooper Stevens testified that the notebooks had the name "Yeah-O" which he knew to be a nickname for appellant and is also slang for cocaine. The testimony about the presence of a defendant's alleged nickname on a notebook was not hearsay, so the trial court did not err in admitting the evidence. Moreover, if there was any error, it was harmless beyond a reasonable doubt because the State was offering appellant's nickname and its alleged meaning as circumstantial evidence connecting appellant to other evidence recovered in the apartment.

The trial court erred in allowing the State to amend a charge in the indictment, prior to jury selection, from possession of a schedule I controlled dangerous substance, to wit: MDMA to possession of a Schedule I controlled dangerous substance: BZP because changing the identity of a controlled dangerous substance changes the identity of the offense.

The trial court erred in imposing a one year sentence for possession of .5 grams of marijuana. Appellant was indicted on June 1, 2012. On May 2, 2012. Governor O'Malley signed Senate Bill

214 Senate Bill 214, which repealed and reenacted with amendments the penalty provision of possession of marijuana of less than 10 grams to imprisonment not exceeding 90 days. The law took effect on October 1, 2012, which was before appellant was convicted and sentenced. Accordingly, appellant's sentence should be vacated because the penalty in effect at the time of sentencing controls.

Appellant's sentence for possession of a firearm in nexus to a drug trafficking crime, pursuant to Criminal Law §5-621 did not merge with a sentence for possession of a rifle after being convicted of a crime of violence under the Public Safety §5-206 because each offense includes different elements. Furthermore, the sentences do not merge under the rule of lenity because nothing in the legislative history suggests that the General Assembly intended for the sentences to merge under the rule of lenity. Nor do they merge under the concept of fundamental fairness because illegal possession of a rifle by a person previously convicted of a disqualifying offense is not "part and parcel" of a case of illegal possession of a firearm under sufficient circumstances to constitute a nexus to a drug trafficking crime. *See Carroll v. State*, 428 Md. 679, 694-95 (2012).

Jacob Bircher v. State of Maryland, No. 2451, September Term 2013, filed February 2, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/2451s13.pdf

SUPPLEMENTAL JURY INSTRUCTION – INJECTING NEW THEORY

FIRST-DEGREE MURDER – TRANSFERRED INTENT

VOLUNTARY SURRENDER – EVIDENCE OF INNOCENCE

Facts:

Defendant Jacob Bircher was charged with first- and second-degree murder after he shot and killed one victim, and wounded another, when he fired into a crowd outside a bar after ostensibly become afraid for his life based on a perceived threat from a bar patron. During jury deliberations after trial, the jury sent the court a note asking for clarification about whether "intent" in the context of first-degree murder meant intent "to kill a person or the *specific* person." The court responded by giving a supplemental instruction requested by the State, which explained the doctrine of transferred intent—*i.e.*, that intent was present if the defendant meant to kill one person and mistakenly killed another. Defense counsel objected but was permitted to address the jury briefly the following day about the instruction. Mr. Bircher was convicted, and appealed both the supplemental instruction and the court's refusal to give an unrelated requested instruction, that his voluntary surrender after the shooting could be considered evidence of innocence.

Held: Affirmed in part, vacated in part, and remanded.

The Court of Special Appeals held that where the State's theory throughout trial posited that Mr. Bircher fired into a crowd of people and was not targeting any one person in particular, the jury was improperly instructed about the doctrine of "transferred intent" for the first time in the supplemental jury instruction. The case was not about transferred intent at all, because there was no original intended victim, so the supplemental instruction injected a theory that had nothing to do with the case as it was presented to the jury. That is, "transferred intent" contemplates an intent to harm an *original intended victim*, but another person is mistakenly harmed due to some change in circumstances. Where defendant fired into a crowd of people, there was no original victim from whom intent could transfer.

The Court of Special Appeals also held that the trial court did not err in declining to instruct the jury that Mr. Bircher's decision to surrender voluntarily to police could constitute evidence of innocence. While cases he invoked discussed the *admissibility* of evidence of surrender, there

was nothing stopping his counsel from arguing that Mr. Bircher's flight the night of the crime was inconsistent with voluntary surrender the next morning.

Sam Yonga v. State of Maryland, No. 2441, September Term 2013, filed January 28, 2015. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2015/2441s13.pdf

CRIMINAL LAW – POST-CONVICTION – WRIT OF ACTUAL INNOCENCE – GUILTY PLEA

Facts:

On November 3, 2006, the appellant, then age 25, arranged to meet with the victim, a young girl then age 13, at an apartment where she lived with her mother. The meeting was set for a time when the mother would not be home, and the victim would stay home from school. The victim would later acknowledge to police that when the appellant first arrived, they kissed and there were times when he touched her breasts. The two moved to a bedroom where she undressed and he removed his pants and underpants. She reported to police that he touched her vaginal area with his hand before attempting penile penetration. It was at the fortuitous moment that the victim's mother arrived home unexpectedly and walked in on her daughter and the appellant in the bedroom. The appellant fled the apartment. In the course of his rapid escape, his cell phone fell from his pants pocket. The victim's mother searched the contents of the phone and found the phone number of the appellant's mother who then provided her with the appellant's name, cell phone number, and address. This information was ultimately passed on to the Baltimore County Police. The victim's mother took her to a local clinic for emergency contraception and an STD test. On June 4, 2007, the appellant entered a guilty plea to a charge of third-degree sexual offense in connection with these events. A charge of second-degree rape was nolle prossed by the State in consideration of the guilty plea. He was sentenced to six months incarceration with no term of probation following release.

On May 15, 2013, the appellant filed a Petition for Writ of Actual Innocence pursuant to Maryland Code, Criminal Procedure Article, § 8-301 and Maryland Rule 4-332. Apparently, at some point over the course of the preceding six years, the appellant resumed communications with the victim and the two purportedly became friends. The petition stated that the victim and her mother wished to "recant" or revise their prior statements to the police regarding the events of November 3, 2006, to wit, that no sexual contact had actually taken place. An evidentiary hearing was held on December 12, 2013. The hearing judge denied the petition, finding that the testimony defied comprehension and was wholly unbelievable.

Held: Affirmed.

We review a trial court's denial of a Petition for Writ of Actual Innocence for abuse of discretion. There was no abuse of discretion in this case because (1) a Writ of Actual Innocence cannot

issue where, as here, the challenged conviction is the result of a guilty plea, and (2) the appellant's petition nevertheless failed to present sufficient evidence, newly discovered or otherwise, to suggest that he is actually innocent of the challenged offense.

Joseph Simms v. Bobby Shearin, Warden, No. 1950, September Term 2012, filed February 24, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/1950s12.pdf

PETITION FOR WRIT OF HABEAS CORPUS – APPEALABILITY – CRIMINAL PROCEDURE § 7-107

Facts:

Approximately ten years after his 1998 conviction of two first-degree murders, Appellant Joseph Simms filed a *pro se* petition seeking additional DNA testing of clothing introduced at his trial pursuant to Maryland's post-conviction DNA testing statute—Maryland Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP") § 8-201—in the Circuit Court for Baltimore City. Although the court ultimately granted this petition, Appellant's claim that additional DNA testing would prove his innocence could not be substantiated because the clothing had been destroyed by the Baltimore City Police Department in October 2000 after his direct appeal was final pursuant to then-applicable protocols. Appellant then filed a petition for writ of habeas corpus, asserting that he was denied due process of law by the State's destruction of the evidence without notice. The circuit court denied the petition, and Appellant filed a timely appeal. The State filed a motion to dismiss the appeal on the ground that Appellant had no right to appeal the denial of his petition.

Held: Appeal dismissed.

The Court of Special Appeals first reviewed the rule in Maryland that an appeal may not be taken from a disposition of a petition for writ of habeas corpus unless authorized by one of four statutes. Only one of those statutes—CP § 7-107, a provision in the Uniform Post Conviction Procedure Act ("UPPA")—could have potentially permitted an appeal in the case. CP § 7-107 permits an appeal from habeas corpus disposition when the petition is sought for a purpose other than to challenge the legality of the conviction or sentence. The Court of Appeals has further established that an appeal from a habeas corpus petition lies where the UPPA does not provide a remedy. *Gluckstern v. Sutton*, 319 Md. 634, 662, *cert. denied sub nom Henneberry v. Sutton*, 498 U.S. 950 (1990).

The Court concluded that Appellant did not have a right to appeal under CP § 7-107 for two reasons. First, the Court emphasized that Appellant did not contend that his confinement or its duration was illegal for some collateral reason; rather, he asserted that the destruction of the DNA evidence [after his direct appeal was final] rendered him unable to challenge the legality of his *conviction* through post-trial collateral attack. In the Court's view, the essence of these assertions spoke to Appellant's desire—and his corresponding inability—to challenge the

legality of his convictions, not, for example, the terms of his confinement. Therefore, Appellant did not seek a writ of habeas corpus for a purpose "other than to challenge the legality of a conviction of a crime or sentence" as required for an appeal to be permitted under CP § 7-107.

Second, the Court determined that CP § 8-201—the post-conviction DNA testing statute—shared the UPPA's purpose in affording post-trial collateral challenge to convictions and, in its procedures governing DNA testing and appeals therefrom, CP § 8-201 is sufficiently linked to the UPPA. To reach this conclusion, the Court reviewed the statute and its procedures for relief, where warranted, for the State's failure to produce scientific DNA identification evidence after a court ordered testing of that evidence. Specifically, if the requested evidence was lost or destroyed after the enactment of CP § 8-201, the court "shall hold a hearing to determine whether the failure to produce evidence was the result of intentional and willful destruction." Upon an affirmative finding, the court must open a post-conviction proceeding, at which it will be inferred that the DNA testing results would have been favorable. Based on the statute, the Court found that like the remedies and processes set forth in the UPPA, CP § 8-201 provides an additional avenue to challenge a conviction collaterally in a manner beyond usual trial review, and that it links directly to the UPPA in that it directs post-conviction DNA testing cases proceed under the UPPA. Therefore, CP § 7-107 did not permit the appeal.

Michael Gerald D. v. Roseann B., No. 47, September Term 2014, filed December 17, 2014. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2014/0047s14.pdf

FAMILY LAW – CUSTODY AND VISITATION

Facts:

Roseann B. filed a complaint for absolute divorce from appellant and sought sole physical and legal custody of their daughter Emily. During the course of the divorce proceedings, Emily alleged that appellant had sexually abused her, both at the family's home and during supervised visitation sessions with appellant. The circuit court, applying a "preponderance of the evidence standard," found, under section 9-101 of the Family Law Article, that there were "reasonable grounds to believe" that appellant had sexually abused Emily. The court then stated that it could not specifically find that there was no likelihood that appellant would abuse Emily in the future. The court concluded that visitation would not be in Emily's best interests and "decline[d] to order any visitation" between Emily and appellant. Appellant subsequently noted an appeal, contending that the circuit court should not have denied him all visitation with Emily unless it first found by "clear and convincing evidence," rather than by a "preponderance of the evidence," that he sexually abused his daughter.

Held: Affirmed.

Under Section 9-101 of the Family Law Article, a circuit court that has "reasonable grounds to believe" that a party to a custody or visitation proceeding has neglected or abused a child, and that cannot specifically find that there is no likelihood of further abuse or neglect if custody or visitation rights are granted to the party, is required to "deny custody or visitation rights" to that party. The Court of Appeals, in *Volodarsky v. Tarachanskaya*, 397 Md. 291, 308 (2007), has explained that the "preponderance of the evidence" standard of proof is the correct standard for a circuit court to apply in determining whether there are reasonable grounds to believe that abuse or neglect has occurred. And there is no indication in either the language of section 9-101 or the legislative history of that statute that a burden of proof greater than "reasonable grounds to believe" is required to deny any and all visitation between the abusive parent and his or her child. In the case at bar, the circuit court properly applied section 9-101 when, after applying a "preponderance of the evidence" standard of proof, it found that there were "reasonable grounds" to believe that the appellant had sexually abused his daughter and denied appellant all visitation with the child.

DeAnn Baker v. Christopher A. Baker, No. 2494, September Term 2013, filed February 2, 2015. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2015/2494s13.pdf

FAMILY LAW – DIVISION OF MARITAL PROPERTY – CAPITAL LOSS CARRY-FORWARD

Facts:

Christopher and DeAnn Baker divorced in the Anne Arundel County Circuit Court on September 15, 2010. Their Voluntary Separation and Property Settlement Agreement (the "Agreement") addressed the issues of alimony, child support, child custody, the division of marital property, and visitation. It allocated various parcels of real estate to one spouse or the other, and, in the case of one parcel, arranged for it to be sold and for the proceeds and capital gains to be equally divided. The Agreement also set terms for the division of the parties' personal property. The Agreement required Mr. Baker to pay $1.135 million to Ms. Baker, as a monetary award, over the course of five years.

Section 19 of the Agreement set the terms for allocation of the couple's investment accounts. Section 19.02, which forms the crux of this dispute, states as follows:

> Wife hereby relinquishes to Husband any interest she might have in any jointly titled investment or bank accounts. It is agreed that Wife shall promptly sign whatever assignments, waivers, or other documents are reasonably necessary to effect a transfer of interest from both parties into the sole and exclusive ownership of Husband. Husband shall be solely responsible for any loans associated with or secured by those accounts.

At the time of the divorce, the parties had a "capital-loss carry-forward" that resulted from losses in their investment accounts. The carry-forward came about because the Internal Revenue Code limits the amount of a capital loss that taxpayers may use to reduce tax liability in any given year, but allows taxpayers to defer (carry forward) the excess loss to reduce tax liabilities in future years. Hence, a capital-loss carry-forward is, in essence, a kind of a deferred tax-benefit.

To illustrate, if an individual taxpayer generates a capital loss in a given year, the taxpayer, to reduce tax liability, may offset that loss against any capital gains from that year. If the aggregate losses exceed the capital gains in that year, (s)he may also deduct up to $3,000 of excess loss against ordinary income. *See* I.R.C. § 1211(b). The taxpayer then may "carry forward" any unused capital losses to the following year. In each future year in which that carried-forward loss remains, the taxpayer again may offset the loss against future capital gains, against up to $3,000.00 of ordinary income, until all losses are exhausted or until the taxpayer dies. For

further explanation, see 2 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates & Gifts* ¶ 46.2.6 (3d ed. 2000).

After the divorce, Ms. Baker used 50 percent of the carry-forward to offset the gains she had realized from the sale of the one of the couple's parcels of real property. Contending that he alone had the sole right to the carry-forward, Mr. Baker filed suit in Anne Arundel County on January 23, 2012. He alleged breach of contract and unjust enrichment and requested a declaratory judgment. A year later Ms. Baker moved for summary judgment, arguing that under the Agreement's unambiguous language, she had not relinquished her interest in the carry-forward because it was an interest separate and apart from the couple's jointly-titled investment accounts. Mr. Baker opposed the motion, arguing that the Agreement was ambiguous.

At the July 15, 2013, hearing, Mr. Baker shifted ground, arguing that the agreement was not ambiguous and that, under its unambiguous terms, his ex-wife had relinquished her interest in the carry-forward. The circuit court agreed with Mr. Baker, holding that the text of the Agreement unambiguously allocated the carry-forward to him. It memorialized its ruling in a written order dated August 21, 2013, which left open the determination of the award of attorney's fees to Mr. Baker as the prevailing party. Because the court had found in Mr. Baker's favor on the breach of contract claim, it dismissed his unjust enrichment claim as moot.

After the parties reached agreement on the amount of Mr. Baker's damages because of his ex-wife's use of the carry-forward ($43,370) and the amount of his attorneys' fees ($8,668), the court entered a final judgment.

Held: Reversed.

Case remanded with directions to enter summary judgment in Ms. Baker's favor not inconsistent with this opinion.

1. Court Erred in Entering Summary Judgment in Ms. Baker's Favor

Ms. Baker argues the capital-loss carry-forward is a tax asset that, by operation of law, was distributed equally to her and Mr. Baker upon their divorce and that nothing in the Agreement says otherwise. Mr. Baker argues the carry-forward is an interest in the jointly-titled investment accounts that his ex-wife unambiguously relinquished to him under the Agreement's terms. We reject Mr. Baker's interpretation, and hold that the circuit court erred in directing entry of summary judgment against his ex-wife.

Under Rule 2-501(f), the court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. A court must view the facts and all reasonable inferences to be drawn from them in the light most favorable to the non-moving party. In reviewing a grant of a summary judgment motion, appellate courts

focus on whether the circuit court's decision was *legally correct*. Thus, we review *de novo* the court's grant of summary judgment.

In the absence of any agreement, U.S. Treasury Regulations provide that if spouses file separate returns after having previously filed a joint return, any carry-forward is "allocated to the spouses on the basis of their individual net capital loss which gave rise to such capital loss carryover." Treas. Reg. § 1.1212-1(c)(1)(iii). In other words, if spouses stop filing joint returns, any capital-loss carry-forward is divided between them in proportion to the extent to which their individual losses gave rise to the carry-forward. *Id*. In the case of jointly-titled assets in which the spouses had an equal interest (such as is the case here), this would mean that the carry-forward would be divided equally between them.

Nonetheless, most courts have held that a carry-forward is a form of marital property, which the spouses can allocate between themselves at the time of a divorce. We agree that a capital-loss carry-forward, when generated by a capital loss from the sale of marital property, is itself marital property, which the spouses can agree to allocate as they wish at the time of a divorce. Thus, the question in this case becomes whether the Agreement allocates the carry-forward between Mr. and Ms. Baker. If it does, the terms of the Agreement govern; if it does not, the background principles of law in the Treasury Regulations allocate the carry-forward between the spouses in proportion to the extent to which their individual losses gave rise to the carry-forward.

The circuit court held that section 19.02 of the Agreement unambiguously allocated the carry-forward to him. We agree that section 19.02 is unambiguous, but disagree that the provision allocates the carry-forward to Mr. Baker.

The determination of ambiguity is one of law, not fact, and that determination is subject *to de novo* review. Under the objective view of contracts, a written contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning. It is not ambiguous merely because two parties in litigation offer different interpretations of its language. Section 19.02 states, "[Ms. Baker] hereby relinquishes to [Mr. Baker] *any interest she might have in any jointly titled investment or bank accounts*." (Emphasis added.) Thus, this case turns on whether the carry-forward was an interest "*in*" the parties' jointly-titled investment accounts. We hold that it was not.

Under the unambiguous language of section 19.02, an interest "in" the investment or bank accounts is an interest in the securities, cash, or other assets that reside "in" the accounts. By contrast, while the capital-loss carry-forward might be an interest that "relates to" the accounts, or "arises from" the accounts, or "results from activity in" the accounts, it is plainly not an asset "in" the accounts themselves. To illustrate, if Mr. Baker had liquidated the accounts and drained them of all of their assets immediately after his ex-wife signed the agreement and relinquished her interest in the accounts, the capital-loss carry-forward would continue to exist. In other words, while Mr. Baker could close the accounts and dispose of all of the securities and other assets in them, he could not thereby do away with the capital-loss carry-forward.

If the Agreement had been drafted more broadly to encompass interests "relating to," "arising from," or "resulting from activity in" the accounts, we might have reached a different conclusion. We are required, however, to construe the agreement that the parties made, not the agreement that one or the other thought or wished that they had made. Under the unambiguous terms of the agreement that the parties actually made, section 19.02 did not allocate the carry-forward to Mr. Baker, because the carry-forward was not an interest "in" the parties' joint investment accounts. The circuit court, therefore, erred.

As a fallback position, Mr. Baker argues that a number of miscellaneous provisions evidence the parties' intentions to allocate the carry-forward to him. We disagree with his interpretation of those provisions.

Mr. Baker cites section 25, titled "Income Taxes," under which Mr. Baker assumed the risk of any future tax liabilities "arising out of" jointly-titled assets and received the benefit of any future tax refunds "with respect to" those assets. Because the parties agreed to allocate those tax risks and benefits to him, Mr. Baker argues that section 19.01 should be read to allocate the capital-loss carry-forward to him as well. Mr. Baker's agreement to accept future tax liabilities and refunds from the jointly-titled accounts does not transform the carry-forward into an interest "in" the accounts pursuant to section 19.02. The carry-forward remains an interest *separate and apart from* the joint accounts, regardless of this section's allocation of tax risks and tax benefits. It might have made sense for the parties to allocate the carry-forward to Mr. Baker, but they did not do so, either in section 19.02 or in section 25.

Mr. Baker also cites section 31.01, under which "[e]ach party confirms that the financial information contained [in the Agreement] is true and correct and complete and that there are no other assets of any significance which have not been revealed to the other party." He points out that in Exhibit C, the joint statement concerning marital and non-marital property, the parties did not list the carry-forward as an asset separate from the investment accounts. He concludes that his wife must not have intended to retain any interest in the carry-forward. The problem with this argument is that Mr. Baker is still unable to identify any provision of the Agreement by which the parties allocated the carry-forward to him. It does not follow that by failing to schedule the carry-forward on Exhibit C, Ms. Baker conveyed her interest in it to her husband. Nor does the failure to schedule the asset transform it into an interest "in" the investment accounts, within the meaning of section 19.02. In any event, the purpose of section 31 is only to ensure the parties have not concealed assets. The carry-forward, however, was not concealed from either spouse, but had been "revealed" to both of them in their previous tax return.

Mr. Baker lastly cites the "Explanatory Statement," which states that the parties "desire to . . . settle all questions of maintenance, support, custody, alimony, counsel fees, their respective rights in the property or estate of the other, in property owned by them jointly or as tenants by the entireties, and in marital property, and all other matters of every kind and character arising from their marital relationship." This Statement is merely a recital, and is not formally incorporated into the Agreement itself. Thus, it speaks not to what the parties actually agreed to. Under the operative part of the Agreement, section 19.02, the parties clearly did *not* allocate the

carry-forward to Mr. Baker, because it was not an interest "in" the jointly-titled investment accounts.

2. The Remaining Issues

Because we hold that the Agreement unambiguously does not allocate the capital-loss carry-forward to Mr. Baker, we need not address Ms. Baker's alternative contention, that the Agreement is ambiguous. Because we hold that Ms. Baker was entitled to prevail as a matter of law under the clear terms of the Agreement, we also hold that Mr. Baker cannot resurrect the unjust enrichment claim, which the circuit court dismissed as moot.

Maria Simbaina v. Segundo Bunay, No. 1092, September Term 2014, filed February 3, 2015. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2015/1092s14.pdf

FAMILY LAW – IMMIGRATION – SPECIAL IMMIGRANT JUVENILE

Facts:

At the conclusion of a divorce/custody proceeding, the Circuit Court for Baltimore City declined the request of the mother (Maria Simbaina) that the Court make factual findings regarding her 14-year-old daughter's status as a "Special Immigrant Juvenile" (SIJ) under 8 U.S.C. § 1101(a)(27)(J). This statute generally provides that an undocumented alien child may be considered for SIJ status if he or she:

> has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law . . . .

In addition, in an administrative or judicial proceeding, a finding must be made that it would not be in the child's "best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence." Once a State court makes such a predicate order, a child may apply to the U.S. Citizenship and Immigration Service for the ultimate finding of SIJ status, which would stave off deportation proceedings and possibly lead to adjustment as a lawful permanent resident.

Here the circuit court declined to make the SIJ findings because 1) they could only be done in a separate guardianship proceeding, not in an ordinary custody case; and 2) the request for SIJ findings had not been sufficiently pled. Simbaina appealed to the Court of Special Appeals, which reversed and remanded.

Held:

The Court of Special Appeals noted that under federal regulations, a juvenile court, under 8 U.S.C. § 1101(a)(27)(J), is defined as "any State court with jurisdiction to make decisions about the custody and care of juveniles." 8 C.F.R. § 204.11(a). A circuit court hearing an ordinary custody case has such authority, the Court said. It also said that this delegation to a Maryland court to make advisory findings to a federal agency did not offend State separation of powers or federal preemption concerns. Reviewing out-of-state cases, the appellate court determined that a

state court's obligation to make SIJ findings was not limited to guardianship proceedings and that a request for these findings was not subject to a heightened pleading requirement. The Court concluded that the divorce/custody proceeding was a proper forum for the predicate determination of the child's SIJ status and that the issue had been sufficiently pled in that proceeding.

Because the child in this case was the subject of deportation proceedings, the Court went on to note that at that point, the child was still subject to the jurisdiction of the circuit court and was not "constructively" in the custody of federal officials. It is only when a final order of deportation is issued that the circuit court loses jurisdiction.

The case was remanded for the circuit court to make the appropriate SIJ findings under 8 U.S. C. § 1101(a)(27)(J).

William E. Peters, et ux. v. Emerald Hills Homeowners' Association, Inc., No. 1364, September Term 2013, filed February 2, 2015. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2015/1364s13.pdf

EASEMENTS – PLAT SIGNED BY PARTY GRANTING AN EASEMENT MAY BE EFFECTIVE TO ESTABLISH THE EASEMENT – ESTABLISHMENT OF PLAT THROUGH SUBDIVISION PROCESS

Facts:

In 1969, developer Victor Posner purchased 64-acres of land from William and Margaret Sheppard. As part of the transaction, the Sheppards retained a parcel of land—Parcel 765—within the 64 acres, as well as a 50' wide right-of-way for access to Southview Road, a public road. Posner proceeded to develop the 64 acres as "Emerald Hills," a residential community. Parcel 765 was adjacent to the community.

Posner recorded several plats that depict the Emerald Hills subdivision, one of which is the focus of this suit. The recorded plat depicts Parcel 765, the 50' right-of-way parcel, as well as a small triangular parcel of land that lying between Parcel 765, the 50' right-of-way, and a cul de sac at the terminus of a different road—Streamview Court. The recorded plat states that the Triangular Parcel is subject to an ingress/egress easement for access to Parcel 765. The plat also shows several parcels designated as "passive open space;" the Triangular Parcel and the 50' right-of-way lie on property with this "passive open space" title. Posner signed the plat. Posner did not execute a separate deed conveying the right of way across the Triangular Parcel to the Sheppards.

In 2001, Posner executed a cross easement agreement between Emerald Hills and an adjacent residential community also developed by him. The purpose and effect of this cross easement agreement was to grant to lot owners in each subdivision reciprocal, but non-exclusive, rights of access to the recreational and passive open space areas designated on the plats of the subdivisions.

In 2006, title to the passive open space parcels, including the Triangular Parcel, passed to the Emerald Hills Homeowners' Association. In 2009, the Peterses purchased Parcel 765, and subsequently applied for an access permit from the County to construct a driveway over the Triangular Parcel to connect Parcel 765 to Streamview Court. The Association filed suit against the Peterses, seeking injunctive relief and monetary damages, as well as a declaratory judgment that the Triangular Parcel is not subject to an easement for the benefit of Parcel 765. The trial court entered a declaratory judgment to that effect and the Association dismissed the remaining counts.

Held: Reversed.

The recorded plat created an express easement in the benefit of Parcel 765. Ordinarily, an express easement may only be created in the mode and manner prescribed by the recording statutes. However, the Court of Appeals recognized an exception to this rule when it concluded that an express easement could be created by a memorandum that satisfied the Statute of Frauds even if the writing was not a deed. *Dubrowin v. Schremp*, 248 Md. 166, 171 (1967). More recently, the Court suggested that a plat could constitute such a memorandum, although the Court concluded that the plat in the case before it did not. *Kobrine v. Metzger*, 380 Md. 620, 636–37 (2004).

The plat in the present case met all of these requirements. First, it clearly identified both the servient and dominant estate. Second, the nature of the interest is identified as for ingress and egress to Parcel 765. Third, Posner, signed the plat.

The cross-easement agreement executed by Posner in 2001 had no impact on the easement created by the plat. The intended purpose of the cross easement agreement was to create reciprocal rights, non-exclusive rights only between lot owners—which the Peterses are not. Since Parcel 765 is not a lot in the residential community, the easements created in this agreement did not benefit them. Since the cross-easement agreement only creates non-exclusive rights in the passive open spaces, the agreement also did not extinguish the pre-existing easement on the Triangular Parcel created by the plat.

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State of Maryland, Comptroller of Maryland v. Kenneth R. Shipe, No. 9, September 2014, filed February 3, 2015. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2015/0009s14.pdf

STATE – ACTIONS – EXECUTION AND ENFORCEMENT OF JUDGMENT

Facts:

The Comptroller of Maryland ("the State") issued a notice of lien of judgment for unpaid tax to appellee, Kenneth R. Shipe because of his failure to pay

$2, 111.70 in income taxes for the 1997 and 1998 tax years. The notice of lien was recorded and more than twelve years later, appellee filed a motion to release the tax judgment/lien. Appellee claimed that the judgment/tax lien had expired because it was no longer enforceable "by reason of lapse of time." Maryland Code (1988 Repl. Vol. 2010), § 13-806 of the Tax-General Article [hereinafter "Tax-Gen."].

The Circuit Court for Montgomery County granted the motion after a hearing in which it released the State's tax lien and concluded that its reading of the relevant statutes demonstrated that the General Assembly intended to impose time limits on the State to enforce a tax judgment/lien once filed.

Held: Reversed.

The Court of Special Appeals held that Tax-Gen. § 13-806 implemented the limitations period found in Maryland Code (1974 Repl. Vol. 2013), § 5-102 of the Courts & Judicial Proceedings [hereinafter "Cts. & Jud. Proc."]. Therefore, a tax lien having the effect of a judgment lien confirms that subsection (c) of Cts. & Jud. Proc. § 5-102 would exempt the State from the twelve-year statute of limitations. Additionally, Tax-Gen. § 13-806 did not provide a statutory period for subsection (a) or waiver of the State's sovereign immunity.

Comptroller of the Treasury v. John Zorzit, No. 883, September Term 2013, filed January 30, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/0883s13.pdf

MOOTNESS – EXCEPTIONS TO THE MOOTNESS DOCTRINE

EXHAUSTION OF ADMINISTRATIVE REMEDIES – TAX-GENERAL ARTICLE – § 13-505

EXHAUSTION OF ADMINISTRATIVE REMEDIES – EXCEPTIONS

Facts:

Appellee John Zorzit, a taxpayer, was the owner of Nick's Amusements, a company that operated illegal video-poker machines. After Zorzit accepted a guilty plea in federal court on money-laundering charges, the Maryland Comptroller of the Treasury assessed deficiency admissions and amusement taxes and fraud penalties against Zorzit for under-reported gross income. Seeking to challenge the assessment, Zorzit requested an informal hearing before the Comptroller's Hearings and Appeals Section. The presiding hearing officer issued a final determination affirming the assessments and penalties against Zorzit, but reducing their amount. Continuing his protest, Zorzit then filed an appeal with the Maryland Tax Court.

During the pendency his appeal to the Tax Court, the Comptroller filed a notice of lien in the Circuit Court for Baltimore County. This prompted Zorzit to file a petition for declaratory and injunctive relief in the circuit court, requesting the court to address whether the Comptroller's interpretation of when a tax becomes "due" under Tax-Gen. § 13-806(a) was proper, claiming that the Comptroller's reading—that it could file a notice of lien before the Tax Court's resolution of an appeal—violated his due process rights. The court issued a declaratory judgment, via granting Zorzit's motion for summary judgment, and determined that Maryland's tax scheme is unconstitutional because it fails to provide taxpayers with a sufficiently prompt post-deprivation hearing after the filing of a lien and that the Comptroller's lien constituted a violation of Zorzit's due process rights. The court vacated the lien until the Tax Court reached its decision. The Comptroller then appealed to the Court of Special Appeals. In the interim, the Tax Court rendered a decision on Zorzit's appeal, affirming the assessments and penalties with adjustments.

Held: Vacated.

The Court of Special Appeals first concluded that the appeal was moot because the circuit court only vacated the lien until the Tax Court's resolution of Zorzit's appeal, and the Tax Court had since then rendered a decision. The Court decided, however, that departure from the general rule

that it should not decide academic questions was warranted because another similar action is capable of repetition yet evading review, and because the issues addressed on appeal concern the relationship between the government and its citizens, and are of significant interest to the public.

The Court then turned to the Comptroller's argument that Zorzit failed to exhaust the administrative remedies set forth in the Tax-General Article and that the circuit court violated the anti-injunction statute, Tax-General § 13-505, by vacating the lien. The Court began by reviewing appellate case law establishing that the Tax-General Article's remedies are primary and exclusive, meaning that they must be exhausted before taxpayers can seek relief from the judiciary. The Court emphasized that the General Assembly unambiguously expressed its intent to preclude judicial intervention by enacting Tax-General § 13-505, which establishes that "[a] court may not issue an injunction . . . or other process against the State . . . to enjoin or prevent the assessment or collection of a tax[.]" In the realm of tax law, anti-injunction statutes like § 13-505 serve to ensure efficient collection of unpaid taxes owed to the government. If Maryland taxpayers were permitted to seek relief collateral to the detailed administrative procedures governing tax assessment and collection at their will, tax litigation would be rampant, thereby vitiating the intent of the legislature in crafting the Maryland tax framework as a primary, exclusive method to dispute taxes.

The Court recognized, however, that there are exceptions to the exhaustion doctrine, including "(1) when the party attacks the statutory scheme as facially unconstitutional; (2) when there is no administrative remedy; and (3) when the administrative remedy provided by the statutory scheme is inadequate." *Abington Center Associates Ltd. Partnership v. Baltimore County*, 115 Md. App. 580, 193. (1997). As to the second and third exceptions, the court concluded that the Tax-General Article provides a taxpayer challenging the propriety of a tax lien and its amount with adequate administrative remedies in the form of several alternative methods of review: (1) an informal hearing before the Comptroller's Hearings and Appeals Section; (2) an appeal to and hearing before the Tax Court; or (3) upon the Comptroller's enforcement of the lien, an adjudication on the merits of the lien before the circuit court.

The Court next concluded that the "constitutional exception" did not apply because Zorzit did not challenge the statute as a whole, as required to fall into the ambit of the exception, but only challenged how the statute was applied in his case, citing *Goldstein v. Time-Out Family Amusement Centers, Inc.*, 301 Md. 583 (1984). Specifically, Zorzit challenged the Comptroller's interpretation of when a tax becomes "due" under Tax-Gen. § 13-806(a) under the facts of his case; in other words, he did not contend that any tax lien filed under the statute would be unconstitutional in any taxpayer's case. The Court further held that even if Zorzit had articulated a challenge to the statute as a whole, his declaratory or equitable action still could not lie where the legislature has expressly intended the administrative and judicial review remedy to be exclusive, citing *Holiday Point Marina Partners v. Anne Arundel County*, 349 Md. 190 (1998). The Court explained that the Tax-General Article provides the exclusive, primary remedies for tax-related disputes, and the General Assembly enacted Tax-Gen. § 13-505 to establish an explicit prohibition against judicial interference with the tax assessment and collection process. Therefore, the Court concluded that Zorzit was required to exhaust the administrative remedies

available to him in the Tax-General Article, and the circuit court violated § 13-505 by vacating Comptroller's tax lien.

Sean Rosebrock, Individually, and as Guardian of Judith Phillips v. Eastern Shore Emergency Physicians, LLC, et al., No. 807, September Term 2011, filed January 28, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/0807s11.pdf

APPEAL – AUTHORITY OF A PARTY'S COUNSEL TO NOTE AN APPEAL AFTER THE PARTY'S DEATH BUT BEFORE COUNSEL RECEIVES NOTICE OF THE PARTY'S DEATH

RULE 5-406 – HABIT EVIDENCE – ADMISSION OF HABIT EVIDENCE IN MEDICAL MALPRACTICE ACTION UPHELD

Facts:

Appellant, as guardian of his mother ("Mother"), filed a medical malpractice action against appellee, an emergency room physician, among others, for negligence in the treatment of Mother in the emergency room after Mother had fallen at work. The jury found in favor of appellees, and appellant's counsel filed a timely notice of appeal.

Mother died at 10:28 p.m. on June 12, 2011. Prior to her passing, appellant authorized his attorney to file a notice of appeal on behalf of Mother. Appellant's counsel filed the Notice of Appeal on June 13, 2011, less than sixteen hours after Mother's passing. Counsel was unaware of Mother's death when he filed the notice of appeal.

Appellees filed a motion to dismiss the appeal in the Court of Special Appeals, claiming that, although appellant was the duly appointed guardian of Mother, appellant's authority to act on her behalf ceased upon her death on June 12, 2011. Thus, according to appellees, appellant, as guardian, had no authority to file an appeal on June 13, 2011. Further, appellees contended that the authority of appellant's counsel to file an appeal on behalf of Mother also ceased on her death.

Held: Affirmed.

The Court of Special Appeals disagreed with the position of appellees and denied the motion to dismiss the appeal. The Court acknowledged that under the law of guardianship, a guardian has the authority to prosecute an action on the ward's behalf only when the ward is alive, and upon the death of the ward, only the personal representative may prosecute on the ward's (now decedent's) behalf. The Court also acknowledged the general principle of agency law that an agent's authority terminates upon the death of the principal. According to the Court, these

principles of guardianship and agency law did not address the authority of the agent after the principal dies, but before the agent learns of the principal's death.

With no Maryland law as a guide, the Court adopted Section 3.07(2) of the Restatement (Third) of Agency (2006) which states, in part: "The death of an individual principal terminates the agent's actual authority. The termination is effective only when the agent has notice of the principal's death." Therefore, the Court held that, because appellant's counsel was given authority to note the appeal by appellant, as guardian of Mother, prior to Mother's death, and because counsel noted the appeal prior to being notified of Mother's death, appellant's counsel had valid authority to note the appeal.

On the merits of the appeal, the Court of Special Appeals affirmed. Appellant argued that the trial court erred by admitting as habit evidence under Rule 5-406 the testimony of appellee regarding her regular practice of examining the spine of every patient before removal from a backboard. Appellee testified that she had no recollection of whether she examined Mother's spine prior to her removal from a backboard when Mother was brought to the emergency room by ambulance after a fall at work. There was no notation in the Emergency Physician record that a spine examination had been performed on Mother.

The Court of Special Appeals disagreed with appellant's contention and upheld the admission of the physician's testimony as habit evidence under Rule 5-406. Noting a dearth of Maryland law on habit evidence in the context of a medical malpractice action, the Court looked to cases from the D.C. Circuit and the D.C. Court of Appeals. The Court of Special Appeals determined that habit evidence "is a person's regular practice of meeting a particular kind of situation with a specific type of conduct." Here, the particular kind of situation was a patient presented on a backboard in an emergency room, and the specific type of conduct was examining the spine prior to removal. The regularity and frequency of the responsive conduct was every patient several times per shift over a four and one-half year period.

The Court rejected appellant's further contention that examining the spine before removal could not be habit evidence, because according to appellant, it is a "variable activity which requires thought and decision making." Because appellee testified that she examined the spine the same way each and every time a patient was removed from a backboard, any aspect of the activity that was of a volitional nature went to the weight, and not the admissibility of the evidence.

Finally, the Court held that the habit evidence was admissible under Rule 5-406, notwithstanding the lack of corroboration. The Court cited to *Ware v. State*, 360 Md. 650, 676 n.8 (2008), wherein the Court of Appeals stated that one method of proving habit is "by the individual himself or herself, who has lost his or her memory as to the specific occasion."

Aleathea Brunson v. University of Maryland Medical System Corporation, No. 2277, September Term 2013, filed February 2, 2015. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2015/2277s13.pdf

WORKERS' COMPENSATION – ATTORNEY'S FEES – CHARGING LIEN – LE § 9-731 – COMAR 14.09.04.03 – PENALTIES – OFFSET

Facts:

Aleathea Brunson sustained an injury to her back while working as a patient care technician for UMMSC. Ms. Brunson filed a claim with the Commission, which ordered that UMMSC, a self-insured employer, pay Ms. Brunson temporary total disability at the rate of $432 per week. It further ordered that, from the compensation awarded, Ms. Brunson's attorney was entitled to counsel fees in the amount of $756.

Subsequently, the Commission held another hearing on Ms. Brunson's claim regarding temporary total disability, pursuant to which it ordered that UMMSC pay additional compensation for temporary total disability at the rate of $432 per week. It further ordered that, from the compensation awarded, Ms. Brunson's attorney was entitled to counsel fees in the amount of $842.40.

Pending appeal of the Commission's orders, UMMSC paid Ms. Brunson weekly temporary total disability benefits at the rate of $432 per week, for a total of $30,554.74. The payment of the attorney's fees awards was stayed during the pendency of the appeals, and the total awarded amount of $1,598.40 was held in escrow pending a final determination.

On appeal in the Circuit Court for Baltimore County, the jury partially reversed the Commission's orders finding that Ms. Brunson was not temporarily and totally disabled. Based on the jury's verdict, the Commission's prior orders were rescinded and annulled.

Subsequently, the Commission held another hearing to address Ms. Brunson's claim of permanent partial disability as a result of the accidental injury, as well as attorney's fees. Counsel for UMMSC asserted that it was seeking a $30,554.74 credit against any future benefits awarded for the temporary total disability benefits that had been paid, and then rescinded and annulled.

The Commission issued an order that Ms. Brunson was entitled to permanent partial disability in the amount of $7,100, but that UMMSC was entitled to a credit for overpayment of temporary total disability in the amount of $30,554.74, leaving a credit balance of $23,454.74. It denied Ms. Brunson's counsel's request for attorney's fees totaling $1,598 because the Commission's previous orders had been rescinded and annulled. The Commission did not award any penalties, and it stated that "[n]o attorney fees or reimbursement of expenses are allowed under this Order."

Ms. Brunson petitioned for judicial review in the circuit court, which affirmed the Commission's decision regarding attorney's fees. The court found that the initial orders of the Commission were voided, thereby extinguishing the attorney's fees lien of $1,598. It further affirmed the Commission's disapproval of attorney's fees relating to the award for permanent partial disability because that award was offset by credit for the earlier payment.

Held: Affirmed.

When the Workers' Compensation Commission approves attorney's fees, the fee is a charging lien on the compensation awarded. An attorney's fee in worker's compensation cases, however, is available only for a "final award" to the claimant. A final award is the award of compensation determined by the Commission after exhaustion of all applicable appeals. If a favorable judgment in favor of a claimant is reversed, any attorney's fee lien attached to the judgment is extinguished. In this case, because the initial award of temporary total disability was rescinded and annulled, there was no final award of compensation in that regard. Accordingly, there was no award on which the attorney's lien could attach.

Where the Commission properly determines that the lack of a final compensation award resulted in no viable claim for attorney's fees, no penalty for the failure to pay attorney's fees is warranted.

Where the Commission awarded permanent partial disability, but there was no actual amount of compensation due to the claimant, given the offset due to overpayment made pursuant to the initial award of temporary total disability, there was no fund to which attorney's fees could attach. Accordingly, the Commission properly declined to award attorney's fees for permanent partial disability.

Injured Workers' Insurance Fund v. Uninsured Employers' Fund, et al., No. 1215, September Term 2013, filed January 30, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/1215s13.pdf

WORKERS' COMPENSATION BENEFITS – UNINSURED EMPLOYERS' FUND – LABOR AND EMPLOYMENT ARTICLE SECTION 9-1002 – JOINT AND SEVERAL LIABILITY – MULTIPLE EMPLOYERS.

Facts:

Xiong Yao filed for workers' compensation benefits, alleging that he was injured on a job for which he had two employers. One employer was insured by the Injured Workers' Insurance Fund ("IWIF"), the appellant, and the other did not have insurance. The Commission determined that the claimant only was employed by the uninsured employer, and awarded benefits against that employer only. The uninsured employer defaulted on the award and the claimant filed an application for payment of benefits with the Uninsured Employers' Fund ("Fund"), the appellee. The Fund did not pay. It filed an action for judicial review on the question whether the claimant had one or two employers. That case was tried by a jury, which found that the claimant had two employers, not one. The circuit court overturned the award and remanded the matter to the Commission to enter an amended compensation award against both employers.

In its amended award, the Commission ruled that the Fund was an insurer and that the uninsured employer was jointly and severally liable for payment of the award. IWIF paid the award and an increased award. In a subsequent order, the Commission ruled that the Fund was jointly and severally liable with IWIF for the award, and ordered it to pay IWIF one-half of the sum IWIF had paid to the claimant. The Fund challenged that ruling in the Circuit Court for Baltimore County, which granted summary judgment in favor of the Fund.

Held: Affirmed.

The Fund is a statutorily created fund of last resort that pays workers' compensation benefits awarded to a claimant whose employer does not have workers' compensation insurance and does not independently pay the award. It is not an insurer. When there is more than one employer, the employers are jointly and severally liable for a workers' compensation award. That does not mean, however, that when one employer is insured and the other is not, the insurer for the co-employer and the Fund for the uninsured co-employer are jointly and severally liable for payment of the award. The Fund is obligated to pay when there is no insurance to pay the award, the uninsured employer has not paid the award, and an application has been made to the Fund for payment. When there is a jointly and severally liable co-employer that is insured, that insurer is

obligated to pay the full amount of the award. In that circumstance, the Fund has no role and cannot be ordered to pay any part of the award.

ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated January 13, 2015, the following attorney has been indefinitely suspended by consent, effective January 31, 2015:

LARRY JASON FELDMAN

*

By an Order of the Court of Appeals dated January 15, 2015, the following attorney has been indefinitely suspended by consent, effective January 31, 2015:

CHRISTOPHER DEAN OLANDER

*

By an Order of the Court of Appeals dated January 28, 2015, the following attorney has been disbarred by consent, effective January 31, 2015:

JAIME ARTHURO ALONSO

*

By an Opinion and Order of the Court of Appeals dated February 2, 2015, the following attorney has been disbarred:

MARK THOMAS MIXTER

*

By a Per Curiam Order of the Court of Appeals dated February 5, 2015, the following attorney has been disbarred:

JEFFREY S. MARCALUS

*

By an Order of the Court of Appeals dated February 13, 2015, the following attorney has been disbarred by consent:

ROBERT LEE SHIELDS

*

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By an Order of the Court of Appeals dated February 23, 2015, the following attorney has been indefinitely suspended by consent:

MICHAEL RON WORTHY

*

By an Opinion and Order of the Court of Appeals dated February 23, 2015, the following attorney has been disbarred:

DARLENE M. COCCO

*

By an Opinion and Order of the Court of Appeals dated February 23, 2015, the following attorney has been indefinitely suspended:

BRUCE MICHAEL SMITH

*

By an Order of the Court of Appeals dated February 24, 2015, the following attorney has been disbarred by consent:

DENISE NICOLE JAMES

*

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JUDICIAL APPOINTMENTS

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On December 30, 2014, the Governor announced the appointment of **CATHLEEN MARIE VITALE** to the Circuit Court for Anne Arundel County. Judge Vitale was sworn in on February 23, 2015 and fills the vacancy created by the retirement of the Hon. Nancy L. Davis-Loomis.

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