Amicus Curiarum

VOLUME 30
ISSUE 12 DECEMBER 2013

A Publication of the Office of the State Reporter

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http://www.mdcourts.gov/opinions/coa/2013/2a11ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland ("the Commission"), Petitioner, charged Michelle Hamilton Davy ("Davy"), Respondent, with violating several Maryland Lawyers' Rules of Professional Conduct ("MLRPC").

A hearing judge found the following facts. In a prior attorney discipline proceeding, with her consent, the Court of Appeals indefinitely suspended Davy from the Bar of Maryland. The following year, the Court reinstated Davy to the Bar of Maryland.

Davy agreed to represent Linda Smalls ("Smalls") in an employment action in the United States District Court for the District of Columbia ("the federal court"). Smalls paid Davy, who did not deposit Smalls's payment into a client trust account or orally inform Smalls about client trust accounts. Davy did not produce a written retainer agreement until two weeks after her first meeting with Smalls. On the day on which the complaint in Smalls's action had to be filed, Davy left the complaint in the federal court's box for after-hours filings. The federal court rejected the complaint for filing and informed Davy as much. Davy represented to Smalls that the complaint had been filed on time. On at least six occasions, Davy demanded additional retainer payments. The federal court informed Smalls that there was no case pending in her name, and Smalls demanded a refund. Davy informed Smalls that the federal court had stated that Smalls's case would "be perfected as of the date filed[.]" On the same day, Davy filed a motion in which she asked the federal court to accept the complaint for filing. Smalls again demanded a refund from Davy, who promised a refund and stated that she would withdraw her appearance. However, Davy did not provide a refund or withdraw her appearance until after Smalls filed a complaint against Davy with the Commission. The federal court dismissed Smalls's action because of substantive defects in the complaint that Davy had drafted.

Davy agreed to represent Bobby McAdams ("McAdams") and his business as both filed for bankruptcy. Davy and McAdams entered into two different written retainer agreements with

inconsistent terms. McAdams paid Davy, who did not deposit McAdams's payment into a client trust account or orally inform Smalls about client trust accounts. Davy did not provide McAdams with a billing statement until nearly three months after he requested one. On behalf of McAdams's business, Davy petitioned for bankruptcy. The bankruptcy court issued three different deficiency notices regarding the bankruptcy filings, which Davy corrected. Davy informed McAdams that he was withdrawing from the representation, and promised to provide a refund and return McAdams's file. However, Davy did not provide a refund, return McAdams's file, or notify the bankruptcy court that the representation had ended until after McAdams filed a complaint against Davy with the Commission.

Based on the above facts, the hearing judge concluded that Davy had violated MLRPC: 1.1 (Competence); 1.2(a) (Allocation of Authority Between Client and Lawyer); 1.3 (Diligence); 1.4 (Communication Generally); 1.5(a) (Reasonable Fees); 1.5(b) (Communication of Fees); 1.15(c) (Client Trust Accounts); 1.16(d) (Termination of Representation); 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation); 8.4(d) (Conduct Prejudicial to the Administration of Justice).

Held:

The Court of Appeals held that Davy violated MLRPC: 1.1 by failing to provide Smalls or McAdams with competent representation; 1.2(a) by acting on Smalls's behalf after Smalls ended the representation; 1.3 by failing to act with reasonable diligence and promptness in representing Smalls and McAdams; 1.4 by failing to tell Smalls that the federal court had rejected the complaint for filing, and by failing to promptly provide McAdams with a billing statement; 1.5(a) by charging Smalls and McAdams fees that were unreasonable because Davy failed to perform services to any meaningful degree; 1.5(b) by failing to promptly establish an understanding as to fees with Smalls and McAdams; 1.15(c) by failing to obtain informed consent not to deposit Smalls's or McAdams's payments into client trust accounts; 1.16(d) by failing to take steps to the extent reasonably practicable to protect Smalls's and McAdams's interests after the representations ended; 8.4(c) by deceiving Smalls about the status of her action; and 8.4(d) by engaging in conduct prejudicial to the administration of justice in representing Smalls and McAdams.

The Court of Appeals disbarred Davy because–in addition to violating numerous other MLRPC–Davy violated MLRPC 8.4(c) by engaging in dishonest conduct, and failed to identify any compelling extenuating circumstances. Additionally, there were six aggravating factors: a prior disciplinary offense; a dishonest or selfish motive; a pattern of misconduct; multiple offenses; refusal to acknowledge wrongful nature of conduct; and indifference to making restitution. There were no mitigating factors.

Attorney Grievance Commission of Maryland v. David Eugene Bocchino, Misc. Docket AG No. 39, September Term 2012, filed November 25, 2013. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2013/39a12ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent David Eugene Bocchino. The petition alleged that Respondent committed professional misconduct in two separate client matters: his representation of Lisa and Montgomery Embrey in an automobile warranty action, and his representation of Lily Cleaves in a credit card debt collection matter. The Court of Appeals referred the matter to a judge of the Circuit Court for Harford County ("the hearing judge") to hold a hearing and make findings of fact and conclusions of law.

With respect to Respondent's representation of the Embreys, the hearing judge found that Respondent exhibited incompetence and a lack of diligence. He failed to keep his clients adequately informed of the status of their case or adequately respond to their requests for information. The hearing judge further found that, over the course of matter, Respondent made misrepresentations to the Circuit Court for Frederick County.

With respect to Respondent's representation of Ms. Cleaves, the hearing judge found that Respondent exhibited incompetence and a lack of diligence. He also assisted a disbarred attorney, Ralph Byrd, in the unauthorized practice of law by allowing Byrd to conduct all client contact in Ms. Cleaves's case and draft, edit, and file pleadings submitted to the Circuit Court for Montgomery County under Respondent's name.

Based on her factual findings, the hearing judge concluded that Respondent violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1, 1.3, 1.4(a) and (b), and 8.4(a), (c), and (d) with respect to the Embreys, and 1.1, 1.3, 5.5(a), and 8.4(a) and (d) with respect to Ms. Cleaves. Respondent filed eight exceptions to the hearing judge's findings of fact and conclusions of law.

Held:

The Court of Appeals found the hearing judge's findings of fact to be supported by clear and convincing evidence and her conclusions of law to be supported by those facts. Accordingly, the Court overruled Respondent's exceptions.

In light of the mitigating factor of Respondent's depression, anxiety, and post-traumatic stress disorder, the Court concluded that disbarment was not the appropriate sanction. Rather, the Court concluded that the appropriate sanction for Respondent's violations of the MLRPC was indefinite suspension.

William H. Mathews v. Cassidy Turley Maryland, Inc., et al., No. 51, September Term 2012, filed November 26, 2013, Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2013/51a12.pdf

MARYLAND SECURITIES ACT – DEFINITION OF SECURITY – INVESTMENT CONTRACT

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SUMMARY JUDGMENT – APPELLATE REVIEW

EVIDENCE – HEARSAY – EXCEPTION FOR PUBLIC RECORDS AND REPORTS – CATCH-ALL EXCEPTION – BASIS OF EXPERT TESTIMONY

Facts:

In 2003, Petitioner William H. Mathews decided to sell rental properties he owned. He was referred to Respondent Stephen Weiss, then employed by the predecessor in interest to Respondent Cassidy Turley Maryland, Inc. ("Cassidy Turley"). Mr. Mathews retained Cassidy Turley to market the properties, and, in August 2004, the properties were sold for approximately $4 million.

In order to receive more favorable tax treatment of the proceeds of the sale, Mr. Mathews sought to re-invest the proceeds in other real estate shortly after the sale. With Mr. Weiss' advice, Mr. Mathews ultimately used much of the proceeds to purchase five fractional interests in various commercial office buildings located throughout the United States. These fractional interests were called "Tenants in Common Interests" ("TICs"). Each of the TICs in question was created by a company called DBSI, Inc., located near Boise, Idaho, or an affiliated company.

The structures of the TICs were set forth in various written agreements and other materials. DBSI would purchase real estate, typically an office building, and divide it into TICs that it would then sell to investors. Investors in the TICs were required, as a condition of the purchase, to agree to retain a DBSI affiliate as property manager, in return for which DBSI promised a specified annual rate of return on the investment. Under the property management agreement, replacement of DBSI as property manager required a majority vote of all TIC owners of a given

piece of property, as well as satisfaction of other conditions; there was no provision for direct control of the property by the TIC owners.

In 2008, Mr. Mathews learned that DBSI would be suspending payments for certain of the TICs. Mr. Mathews then contacted Mr. Weiss, who, according to Mr. Mathews, assured him that payments would resume and that he should not worry. In November 2008, DBSI filed a voluntary petition for bankruptcy under Chapter 11 of the bankruptcy code. All of the properties underlying Mr. Mathews' TICs became the subject of foreclosure proceedings.

The bankruptcy court appointed an attorney from a prominent Washington, D.C., law firm as an examiner to conduct an investigation into DBSI. The examiner's report described a downward spiral fueled by related party transactions, conflicts of interest, growing debt disguised as equity, limited sources of revenue, complex and sloppy accounting, and the misleading of investors.

On March 23, 2010, Mr. Mathews filed a complaint in the Circuit Court for Baltimore County against Mr. Weiss and Cassidy Turley. The complaint included common law tort claims for fraud, constructive fraud, negligent misrepresentation, and negligence, as well as a claim for breach of contract. It also included a claim under the Maryland Securities Act, Maryland Code, Corporations & Associations Article, ("CA") §11-703.

Specifically, the complaint alleged that Cassidy Turley owed Mr. Mathews legal and fiduciary duties to disclose material facts and to act with the care and skill of a "professional financial adviser." It alleged that Cassidy Turley had misled Mr. Mathews concerning the suitability of the TIC investment for his financial situation, the safety of the investment, and the soundness of DBSI. It also alleged that Cassidy Turley had failed to inform him of other material information regarding the investment. It alleged that Cassidy Turley actively concealed its alleged wrongdoing from him and lulled him into relying upon it, even after the DBSI bankruptcy, until he was contacted by the Maryland Securities Division.

At the pre-trial motions hearing, the Circuit Court, among other things, granted a motion in limine that precluded Mr. Mathews from mentioning or introducing into evidence at trial the bankruptcy examiner's report on the basis that it was inadmissible hearsay, although the court held open the possibility that it would reconsider that ruling at trial. Later in the hearing, the Circuit Court granted summary judgment in favor of Cassidy Turley as to all counts. With respect to the alleged violations of the Maryland Securities Act, the court ruled that the TICs were not securities as defined by the Maryland Securities Act. The court also held that, even if the TICs were securities, Mr. Mathews' claims under the Securities Act were barred by limitations, as were his common law claims.

Cassidy Turley had also sought summary judgment on the common law claims on the ground that Mr. Mathews did not plan to present expert opinion testimony on the scope of duty of a real estate broker and that, without such testimony, Mr. Mathews could not prove his common law tort claims as a matter of law. The court declined to grant summary judgment for that reason.

Mr. Mathews filed a timely notice of appeal, and Cassidy Turley filed a cross-appeal. Prior to briefing and argument in the Court of Special Appeals, Mr. Mathews filed a petition for a writ of certiorari, which the Court of Appeals granted.

Held:

(1) An investment that combines a tenant-in-common interest in commercial real estate with a mandatory management contract with the affiliate of the seller and only a limited ability for the buyers to effect a change of management of the property is an "investment contract" and therefore a security for purposes of the Maryland Securities Act. The Court adopts the Supreme Court's *Howey* test as a definition of investment contract.

(2) Mr. Mathews' claims under the Maryland Securities Act were barred by limitations insofar as they relate to registration under the Act; however, limitations as to claims under the Act that relate to alleged fraud and misrepresentation by the defendants may be tolled by affirmative fraudulent concealment by the defendants – a factual question for determination on remand.

(3) Limitations as to Mr. Mathews' common law tort claims may also be tolled on the basis of fraudulent concealment by the defendants – also a factual question for determination on remand.

(4) The Court declined to affirm summary judgment on the tort claims for a reason not adopted by the Circuit Court – i.e., the lack of expert testimony in the plaintiff's anticipated evidence concerning the duty of a real estate broker.

(5) The Circuit Court properly reserved judgment on the admissibility and use of a bankruptcy examiner's report until it had additional information concerning the proposed use of the report in the context of the trial. That report was not admissible as a public record or report under Maryland Rule 5-803(8), but might be admissible under the catch-all exception to the hearsay rule (Maryland Rule 5-803(24)) and might be an appropriate basis for expert opinion testimony under Maryland Rule 5-703.

Melvin D. Williams v. State of Maryland, No. 20, September Term 2013, filed November 22, 2013. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2013/20a13.pdf

CRIMINAL PROCEDURE – DISCHARGE OF COUNSEL – SUFFICIENCY OF REQUEST.

CRIMINAL LAW – RESISTING ARREST – USE OF FORCE.

Facts:

On 8 October 2008, the State's Attorney's Office for Harford County charged Melvin D. Williams in a criminal information with three controlled substances offenses and one count of resisting a lawful arrest. On 27 January 2010, five months prior to his trial, Williams sent a letter to the Circuit Court for Harford County stating "My name is Melvin Williams JR Im writting to request New representation From the Public defender's office. . . . I truly feel Im being mis-represented. May U please remove [my attorney] from my case." The clerk of the court date-stamped the letter two days later, and an entry in the docket sheet confirms that the court received the letter. Notations on the letter and in the docket entry also indicate that copies of the letter were sent contemporaneously to the State's Attorney's Office and the local Office of the Public Defender, whose appearance was entered on behalf of Williams. The court never responded to Williams's letter, although Williams attended four pre-trial hearings and a two-day trial with the same defense counsel over the course of the next sixteen months. The record of those proceedings reflects no mention of Williams's letter by any of the four judges who presided over the various proceedings, counsel for Williams or the State, or Williams himself.

At Williams's trial, two law enforcement officers testified regarding the facts of Williams's arrest. The officers testified that they were on patrol in Edgewood, Maryland, on 15 September 2008, when they attempted to arrest Williams on suspicion of controlled substances possession. Williams fled on foot from the officers, which led to a chase around the exterior of an apartment building. As Williams circled back around the building, a bystander, who was conversing with the officers moments before their encounter with Williams, chased Williams down and tackled him. Williams struggled with the bystander as the officers caught up and proceeded to place him under arrest. At the close of the State's case-in-chief, and again after resting his own case, Williams moved for judgment of acquittal on the resisting arrest count, arguing that the evidence was insufficient to sustain a conviction. The Circuit Court denied both motions.

The jury found Williams guilty of misdemeanor possession of cocaine and resisting arrest on 5 May 2011. Williams appealed to the Court of Special Appeals, arguing that the Circuit Court failed to comply with Maryland Rule 4-215(e) by not addressing his written request to discharge counsel, and that the State's evidence was insufficient to sustain his conviction on the charge of resisting arrest. The intermediate appellate court, in an unreported opinion, affirmed the judgment of the Circuit Court. Following a motion by the State, the Court of Special Appeals

filed a reported opinion. *Williams v. State*, 208 Md. App. 622, 57 A.3d 508 (2012). Williams appealed to the Court of Appeals, which granted certiorari to consider the following questions:

> Where Petitioner stated unequivocally and conspicuously his desire to discharge his attorney in a letter filed with the court, was the court required to comply with the requirements of Maryland Rule 4-215(e), without the need for Petitioner to repeat his request in open court?
>
> Did the Court of Special Appeals misinterpret Maryland Code (2002, 2011 Cum. Supp.), Criminal Law Article, § 9-408 in upholding Petitioner's conviction for resisting arrest where the force allegedly used in resisting arrest was "employed against someone other than the police officer who is attempting to effectuate the arrest"?

Held: Reversed in Part and Affirmed in Part.

The Court of Appeals held that Williams's letter was sufficient to trigger Rule 4-215(e), and that the Circuit Court committed reversible error by failing to address his request to discharge counsel according to the mandates of the Rule. The Court reasoned that Williams's letter clearly and unambiguously requested that his counsel be discharged. Reviewing the plain language of the Rule, the Court also observed that it does not require that a defendant make a request to discharge counsel orally or in open court to trigger the Rule. The Court also distinguished *State v. Northam*, 421 Md. 195, 26 A.3d 344 (2011), the case upon which the court of Special Appeals relied in affirming the Circuit Court's judgment, on the grounds that the letter at issue in *Northam* contained a vague reference to wanting a "Court appointed attorney," a request buried within a change of venue motion. Finally, the Court reasoned that the Court of Special Appeals erred by concluding that "it was reasonable for the trial court to infer that any issues between the appellant and [his counsel] had been resolved, and that [Williams] was assenting to his continued representation by [his counsel]."

The Court of Appeals held also that the Court of Special Appeals did not misinterpret the plain language of Maryland's resisting arrest statute when it concluded that the use of force necessary to sustain a conviction for resisting arrest can be force employed against someone involved in effecting a valid arrest, in addition to the arresting officers. The Court rejected the State's argument that it could uphold Williams's conviction based on language in *Nicolas v. State*, 426 Md. 385, 44 A.3d 396 (2012). The Court agreed, however, with the State's analysis of the plain language of Maryland Code (2002, 2011 Cum. Supp.), Criminal Law Article, § 9-408(b)(1), which states simply that it is a crime to "resist a lawful arrest." Noting that Williams did not challenge whether the arrest was lawful, and that the Legislature left the term "police officer" out of subsection (b)(1), despite including it in other sections of the statute, the Court reasoned that, considering the peculiar facts of Williams's case, the intermediate appellate court did not misinterpret that plain language of the statute in upholding Williams's conviction.

Jamar Holt v. State of Maryland, No. 98, September Term 2012, filed October 28, 2013. Opinion by Barbera, C.J.

Harrell and Greene, JJ., dissent

http://www.mdcourts.gov/opinions/coa/2013/98a12.pdf

CRIMINAL PROCEDURE – INVESTIGATORY STOP

Facts:

During the summer of 2011, the Baltimore City Police Department's Violent Crime Impact Section ("VCIS") was investigating Daniel Blue, who was known for distributing heroin in Baltimore City. In June 2011, VCIS conducted surveillance of a drug transaction involving Blue. Two weeks later, VCIS conducted surveillance of a meeting between Blue and Petitioner Jamar Holt at Lake Montebello in Baltimore City. After Blue arrived on the scene, VCIS observed the men shake hands and enter Petitioner's Jeep. Petitioner then drove one loop around Lake Montebello and dropped off Blue near his vehicle.

After the meeting, Petitioner exited Lake Montebello in his vehicle and, shortly thereafter, the detectives pulled him over. After one of the VCIS detectives observed a gun in Petitioner's hand, Petitioner drove his vehicle in the direction of the other detective and fled the scene. The police eventually arrested Petitioner and charged him with, among other things, assault and firearms violations.

Petitioner, through counsel, sought suppression of the detectives' observations immediately following the investigatory stop of him on the ground that the stop violated the Fourth Amendment. At a suppression hearing, the VCIS detectives testified they suspected at the time of the stop that Petitioner had committed a drug-related crime and noted several similarities between the meeting at Lake Montebello and the drug transaction involving Blue two weeks earlier. The suppression court ultimately ruled that the investigatory stop of Petitioner violated the Fourth Amendment, concluding that the detectives did not have reasonable suspicion that Petitioner had committed a drug-related crime. The suppression court then ruled inadmissible any testimony related to the detectives' observation of a gun.

The Court of Special Appeals reversed the suppression court's decision to suppress the observation of a gun, holding that "the stop of [Petitioner's] vehicle on July 13, 2011 was supported by articulable reasonable suspicion."

Held: Affirmed.

The Court of Appeals observed that a law enforcement officer may conduct a brief investigatory stop of an individual if the officer has a reasonable suspicion that criminal activity is afoot, and that the Court must assess the evidence through the prism of an experienced law enforcement officer. Moreover, the Court noted that a series of innocent acts may, taken together, raise reasonable suspicion in the mind of an experienced officer. The Court explained that it may consider as a factor in its analysis Blue's status as a drug dealer, but it clarified that an individual's association with a drug dealer does not, by itself, create reasonable suspicion that the individual committed a drug-related crime.

After assessing the totality of the circumstances, the Court held that the VCIS detectives possessed a reasonable and particularized basis to suspect that Petitioner had committed a drug-related crime. The Court noted several parallels between the meeting at Lake Montebello and Blue's drug transaction two weeks earlier, including the facts that: (1) Blue looked around throughout both meetings; (2) both meetings lasted approximately two minutes; and (3) both meetings started in what appears to be prearranged locations. Because the Court held that the detectives had reasonable suspicion to conduct an investigatory stop of Petitioner, he was not entitled to the suppression of any of the detectives' observations during and immediately following the investigatory stop, including the observation of a gun.

Emmanuel Ford Robinson v. State of Maryland, No. 11, September Term 2013, filed November 27, 2013. Opinion by Battaglia, J.

McDonald and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2013/11a13.pdf

CRIMINAL PROCEDURE – JURY INSTRUCTION – SCIENTIFIC OR INVESTIGATIVE TECHNIQUES

Facts:

Emmanuel Ford Robinson was convicted of conspiracy to commit first degree burglary. At trial, the State's theory of the case was that Robinson and a co-conspirator attempted to enter two apartment buildings and attempted to break into an apartment in the second building. Testimony of two police officers placed Robinson's co-conspirator at the scene of the crime and Robinson in the area. During his opening statement, Robinson's attorney argued that there was no evidence of wrongdoing by his client:

> There is no evidence that [Robinson] ever attempted to pry open or break into any door. There will be no evidence to show that he ever had a screwdriver on him or any kind of tool like that. There will not be any fingerprints from any door, any piece of paper or tape, or whatever they're saying, on any weatherstripping, on the doors, no fingerprints of his. There won't be his DNA on anything, not on any screwdriver, not on any weatherstripping, not on any piece of tape, not on anything. Quite frankly, there's just not, there's absolutely no evidence beyond a reasonable doubt that Mr. Robinson committed these crimes.

At the close of evidence but before argument, the trial judge instructed the jury:

> During this trial, you've heard testimony of witnesses and may hear argument of counsel that the State did not utilize a specific investigative technique or scientific tests. You may consider these facts in deciding whether the State has met its burden of proof. You should consider all of the evidence or lack of evidence in deciding whether the defendant is guilty. *However, I instruct you that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case.* Your responsibility as jurors is to determine whether the State has proven based upon the evidence, the defendant's guilt beyond a reasonable doubt.

(emphasis added). Defense counsel objected to the specific instruction in a bench conference following the giving of all the instructions and the trial judge overruled the objection, noting that based upon Robinson's counsel's opening statement and an off the record colloquy, "the defense

may be arguing, as good defense attorneys do, that there wasn't any scientific link of the defendant to the crime."

The Court of Special Appeals affirmed, determining that Robinson's counsel "attributed an incorrect burden to the State" and the contested instruction was a correct statement of law.

Held: Reversed and remanded.

The Court of Appeals reversed the Court of Special Appeals and remanded the case to the Circuit Court of Montgomery County for a new trial. The Court determined, in light of *Atkins v. State*, 421 Md. 434, 26 A.3d 979 (2011) and *Stabb v. State*, 423 Md. 454, 31 A.3d 922 (2011) that the "anti-CSI effect" instruction, to be given only in a curative fashion, should not be given absent legal and empirical proof that a "CSI effect" exists and is only triggered by a material misstatement of the law; the trial court erred in the instant case in giving the contested instruction, because Robinson's counsel merely pointed out what procedures might have been available to the State, but did not misstate the law or the State's burden. The giving of the instruction, thus, effectively relieved the State of its burden to prove Robinson's guilt beyond a reasonable doubt.

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Jody Lee Miles v. State of Maryland, No. 36, September Term 2012, filed November 25, 2013. Opinion by Rodowsky, J.

McDonald, J., dissents.

http://www.mdcourts.gov/opinions/coa/2013/36a12.pdf

CRIMINAL LAW – CAPITAL PUNISHMENT – MARYLAND DECLARATION OF RIGHTS ARTICLE 16 – SANGUINARY LAWS.

Facts:

Miles was convicted of murder and condemned to death in 1998. After numerous reviews, he filed a second motion to correct illegal sentence in 2011. He claimed that his death sentence was illegal because the Maryland death penalty statute violated Maryland Declaration of Rights (MDR) Article 16. He argued that when Article 16, then Article 14, was adopted in 1776, it abrogated capital punishment by directing "[t]hat sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State." He contended that, at that time, a "sanguinary" law meant the death penalty for any crime, without regard to the method of imposition. The Circuit Court for Queen Anne's County denied Miles's motion.

Held: Denial of motion to correct illegal sentence affirmed.

Repeal of the death penalty, see 2013 Md. Laws, Chapter 156, did not moot this appeal under the savings of penalties provision in Maryland Code (1957, 2011 Repl. Vol.), Article 1, § 3.

The Court of Appeals held that Miles's sentence is not illegal. 1776 MDR Article 14 was not retroactive. The sanguinary laws clause applied only prospectively, to future legislation, and did not change the fact that death by hanging was the common law penalty for the common law crime of murder. Subsequent statutory enactments classifying murder into degrees did not change the common law crime. Alternatively, the sanguinary laws clause, if retroactive, was not intended to include death by hanging for murder. This is evidenced by acknowledgments of the continued existence of capital punishment in the first draft of the 1776 MDR and in the text, as adopted. Continued existence of capital punishment was further recognized by legislation enacted relatively shortly after the Revolution, by provincial and English legislation considered to be in effect after the Revolution, and by death warrants signed by revolutionary era Governors.

Adeline Sturdivant, et al. v. Department of Health and Mental Hygiene, No. 96, September Term 2012, filed November 25, 2013. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2013/96a12.pdf

PUBLIC EMPLOYMENT – STATE PERSONNEL MANAGEMENT SYSTEM – METHODS FOR FILLING VACANCIES

Facts:

In 2009, the Maryland Department of Health and Mental Hygiene closed the Rosewood Center, a facility that provided treatment services to developmentally disabled individuals, and transferred a number of its staff members to Spring Grove Hospital ("Spring Grove"), a State psychiatric hospital. Because of the consolidation of the two facilities and the resulting redundant staffing, the agency subsequently laid off approximately 50 Direct Care Assistants ("assistants"), who were responsible for assisting patients with daily activities, such as escorting patients to and from appointments. Pursuant to § 11-205 of the State Personnel and Pensions Article ("SPP"), the agency laid off the least senior assistants, including the 17 petitioners. Spring Grove had vacant assistant positions during the lay-off, and the hospital enclosed an employment application with each layoff notice and requested the laid-off employees to submit the application.

Spring Grove organized an interview panel to evaluate the qualifications and personnel files of the applicants, all of whom were laid-off employees. The personnel file contained the amount of sick leave each applicant used and the number of disciplinary actions received by each applicant. The panel asked a list of questions and evaluated the applicants based on their answers. Seniority was not a factor in Spring Grove's hiring decisions, and Spring Grove eventually hired applicants who were junior in seniority points to petitioners.

The petitioners filed a grievance asserting that (i) they had statutory right to reinstatement according to seniority pursuant to SPP § 11-208 and (ii) the hiring process actually used by Spring Grove was a pretext to disguise the fact that it was reinstating laid-off employees without regard to their seniority. Dispute resolution efforts were unsuccessful, and the grievance was referred to the Office of Administrative Hearings for an adjudicatory hearing before an administrative law judge. The administrative law judge denied the grievance, concluding that Spring Grove had the option to hire via a recruitment process, pursuant to Title 7, rather than through a reinstatement of laid-off employees, pursuant to Title 11. The petitioners then sought judicial review in the Circuit Court for Baltimore City, which affirmed the administrative decision. The decision was appealed to the Court of Special Appeals.

The Court of Special Appeals held that the State Personnel and Pensions Article authorizes an agency to fill vacancies by recruitment or reinstatement, and that there is no statutory preference for reinstatement. However, if an agency chooses to fill a vacant position by recruitment, the agency must comply with the statutory requirements for recruitment set out in Title 7. The Court

of Special Appeals held that, if Spring Grove did not comply with the requirements pertaining to public notice and advertising, which assures an open, transparent and fair recruiting process, its efforts to fill the vacant positions cannot be deemed a recruitment.

Because the administrative law judge did not make sufficient findings of fact regarding Spring Grove's compliance with the requirements, the Court of Special Appeals remanded the case to the administrative law judge for further proceedings with instructions that the administrative law judge should grant the grievance if the administrative law judge concludes that Spring Grove failed to comply with relevant statutory requirements for recruitment. The grievants then petitioned for a writ of certiorari, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals affirmed the decision of the Court of Special Appeals and adopted the Court of Special Appeals' opinion as its own. It remanded the case to the administrative law judge for further factfinding as to Spring Grove's compliance with the requirements for recruitment in Title 7.

BJ's Wholesale Club, Inc. v. Russell Rosen, Individually, etc., et al., No. 99, September Term 2012, filed November 27, 2013. Opinion by Battaglia, J.

Adkins and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2013/99a12.pdf

TORTS – NEGLIGENCE – ENFORCEABILITY OF EXCULPATORY AGREEMENT AGAINST MINOR CHILD

Facts:

BJ's Wholesale Club, Inc., at its Owings Mills, Maryland location (BJ's), offered to its customers a free supervised play area, the "Kids' Club," for children to use while their parents shopped. In order to utilize the play area, however, BJ's required parents to sign a usage agreement containing an exculpatory clause releasing BJ's from liability for causes of action arising out of the use of the Kids' Club, which Russell Rosen signed on his and his son Ephraim's behalf. Ephraim was subsequently injured after falling off of a plastic play apparatus in the Kids' Club, and, thereafter, his parents filed suit individually and on behalf of Ephraim against BJ's for negligence. BJ's moved for summary judgment, contending that the exculpatory clause barred the Rosens' claims for negligence. The trial court granted summary judgment and the Court of Special Appeals reversed, reasoning that a parentally-executed exculpatory agreement is unenforceable against a minor child in a commercial setting because the state has a *parens patriae* interest in protecting children, and commercial enterprises are more capable of bearing the costs associated with injuries because they derive profit from their services and can, therefore, insure against the risk of loss.

Held:

The Court of Appeals reversed the judgment of the Court of Special Appeals. The Court observed that in accordance with *Wolf v. Ford*, 335 Md. 525, 644 A.2d 522 (1994), exculpatory agreements are generally enforceable except in certain circumstances, including "transactions affecting the public interest." The Court determined that "transactions affecting the public interest" encompasses three separate categories: (1) public service obligations, such as public utility providers; (2) transactions so important to the public good that the inclusion of an exculpatory clause would be patently offensive; and (3) transactions not readily susceptible to definition that should be ascertained by evaluating the "totality of the circumstances of any given case against the backdrop of current societal expectations." The Court further explained that "societal expectations" can be derived from relevant statutory and common law.

The Court of Appeals surveyed various pieces of legislation and the common law, including Section 6-405 of the Courts and Judicial Proceedings Article permitting a parent to settle litigation on behalf of her child, and concluded that parents are empowered to make significant decisions on behalf of their minor children. The Court then proceeded to evaluate the "totality of the circumstances," involving a parent making a decision to sign an exculpatory agreement on behalf of his son. Reasoning that a parent's decision-making is not limited, the Court concluded that the parentally-signed exculpatory agreement to allow Ephraim's use of the Kids' Club was not a transaction affecting the public interest within the meaning of *Wolf v. Ford*.

The Court of Appeals also decided that the State's *parens patriae* authority was not applicable to this case because it is generally only invoked in circumstances in which parental rights have been abrogated by the State. The Court concluded, finally, that the commercial nature of the services offered by BJ's was not a factor in determining the enforceability of the agreement, reasoning that the Court's prior jurisprudence made no such distinction, and that whether a commercial enterprise, rather than a non-commercial enterprise, is more capable of bearing the risk of loss is a matter for legislative fact-finding.

Brittany Ellis v. Housing Authority of Baltimore City, No. 16, September Term, 2013; *Tyairra Johnson v. Housing Authority of Baltimore City*, No. 17, September Term 2013, filed November 26, 2013. Opinion by Watts, J.

Battaglia and Adkins, JJ., concur in No. 16, Sept. Term, 2013.

http://www.mdcourts.gov/opinions/coa/2013/16a13.pdf

LOCAL GOVERNMENT TORT CLAIMS ACT ("LGTCA") – LGTCA NOTICE REQUIREMENT – SUBSTANTIAL COMPLIANCE WITH LGTCA NOTICE REQUIREMENT – GOOD CAUSE FOR FAILURE TO COMPLY WITH LGTCA NOTICE REQIREMENT – ARTICLE 19 OF MARYLAND DECLARATION OF RIGHTS

Facts:

Brittany Ellis ("Ellis") and Tyairra Johnson ("Johnson") (together, "Appellants"), separately sued the Housing Authority for Baltimore City ("HABC"), Appellee, in the Circuit Court for Baltimore City ("the circuit court") for causes of action arising out of Appellants' alleged exposure to lead paint in properties that HABC owned and operated. Discovery revealed the following facts.

From birth until she was at least four-years-old, Ellis lived in properties that HABC owned and operated. When Ellis was three-years-old, a pediatric center tested Ellis's blood-lead level and reported 14 micrograms per deciliter (µg/dL). An HABC document stated only that HABC had received the results of Ellis's blood-lead level test. Nothing in Ellis's mother's "tenant folder" indicated that Ellis's mother complained of or expressed concern about the presence of lead paint in any of the premises occupied by Ellis.

From birth until she was at least six-years-old, Johnson spent several hours each day in properties that HABC owned and operated. When Johnson was approximately three-years-old, Johnson's mother saw Johnson putting paint chips in her mouth. Johnson's mother complained to an HABC housing manager and threatened to sue HABC if it did not fix the chipping paint. Until Johnson was ten-years-old, no one from any health clinic informed Johnson's mother that Johnson had any lead in her blood.

In both Ellis and Johnson, HABC moved for summary judgment, which the circuit court granted, concluding that: (1) Appellants did not substantially comply with the notice requirement of the Local Government Tort Claims Act ("the LGTCA"), Md. Code Ann., Cts. & Jud. Proc. Art. (1987, 2013 Repl. Vol.) § 5-301 et seq.; and (2) Appellants did not show good cause for their failure to comply with the LGTCA notice requirement. Appellants noted appeals. While the appeals were pending in the Court of Special Appeals, the Court of Appeals granted certiorari on its own initiative.

Held: Affirmed.

The Court of Appeals held that the circuit court properly concluded that Appellants did not substantially comply with the LGTCA notice requirement. Neither Ellis nor Johnson apprised HABC of its possible liability. The record did not indicate that, before Ellis sued HABC, she or her mother ever contacted HABC about deteriorated paint conditions in any property, or that Ellis or her mother ever alleged that property owned or operated by HABC was the cause or source of Ellis's injury (i.e., Ellis's elevated blood-lead level). It is true that, before Johnson sued HABC, Johnson's mother allegedly orally complained to an HABC housing manager about chipping paint and threatened to sue HABC if it did not fix the chipping paint. However: (1) Johnson's mother essentially advised that the threatened action against HABC would be a landlord-tenant action (in which Johnson's mother sought that HABC fix the chipping paint), not a lead paint action (in which Johnson sought damages for her alleged injury resulting from exposure to lead paint); and (2) Johnson's mother did not learn of Johnson's injury (i.e., Johnson's elevated blood-lead level) until approximately six or seven years after her oral complaint; thus, at the time of Johnson's mother's alleged oral complaint, it was not possible for Johnson's mother to give notice of an injury allegedly caused by HABC.

Additionally, the Court of Appeals held that the circuit court did not abuse its discretion in concluding that Appellants failed to show good cause for their failure to comply with the LGTCA notice requirement. Neither Ellis nor Johnson prosecuted her claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances, as no one in Ellis's family or Johnson's family took any action regarding the potential claims until at least eleven years after Appellants' mothers learned that Appellants had elevated blood-lead levels.

Furthermore, the Court of Appeals held that, as applied to a minor plaintiff in a lead paint action against HABC, the LGTCA notice requirement does not violate Article 19 of the Maryland Declaration of Rights, as the lead paint action arises out of a governmental–as opposed to proprietary–activity (i.e., HABC's operation of public housing). HABC's operation of public housing is a governmental activity because: (1) according to statute, HABC exercises public and essential governmental functions; (2) HABC's operation of public housing is sanctioned by legislative authority; (3) HABC's operation of public housing tends to benefit the public health and promote the welfare of the whole public; and (4) HABC's operation of public housing does not cause profit or emolument to inure to HABC.

COURT OF SPECIAL APPEALS

Anne Arundel County v. Mary E. Rode, et al., No. 809, September Term 2012, filed November 4, 2013, Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2013/0809s12.pdf

APPEALABILITY – FINAL JUDGMENT RULE – JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISION – PRE-HEARING REMAND TO AGENCY

Facts:

Mary Rode, a school crossing guard employed by Anne Arundel County, sought unemployment insurance benefits from the Department of Labor, Licensing and Regulation ("DLLR"). Her claim was ultimately denied by the DLLR's Board of Appeals. Ms. Rode sought judicial review of that decision in the Circuit Court for Anne Arundel County. Before the circuit court took up the merits of the case, the DLLR moved to remand the case to the Board of Appeals. The DLLR wished to check over the opinion of the Board of Appeals more closely and, if necessary, to fine-tune it. The DLLR did not wish a remand for the purpose of receiving additional evidence. Anne Arundel County opposed the remand. The court granted the DLLR's motion for remand and the County appealed.

Held: Appeal dismissed.

The Court of Special Appeals held that the circuit court's granting of the DLLR's motion for a remand to the Board of Appeals was not a final judgment and the appeal was, therefore, premature. A remand to an administrative agency for the purpose of accepting additional evidence or modifying the agency's decision, requested by the agency, and granted before a hearing on the merits in the circuit court, is not an appealable order. Pre-merits hearing remands are not the same as post-merits hearing remands for purposes of appealability. A pre-hearing remand is not appealable because a circuit court retains continuing jurisdiction. By contrast, in the case of a post-hearing remand, there is an appealable final judgment because there is nothing left for the circuit court to do.

State of Maryland, Central Collection Unit v. Russell Buckingham, et al., No. 434, September Term 2012, filed November 4, 2013. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2013/0434s12.pdf

CIVIL PROCEDURE – SOVEREIGN IMMUNITY

Facts:

A judgment in the form of a "notice of lien" was entered, in the Baltimore County circuit court, in favor of the State of Maryland and against Russell Frost Buckingham, Jr., representing proceeds from the sale of lottery tickets, which he had failed to remit to the State, together with "court costs," a "service charge," and "penalties." More than twelve years later, that judgment was then "indexed" in favor of the Central Collection Unit of the Maryland Department of Budget and Management on behalf of the State Lottery Agency ("State"), though it had never been renewed. At that time, the State also obtained a writ of garnishment of wages of Buckingham which was served on RFB Trucking, Inc., and a year later, the State then obtained a second writ of garnishment of wages.

Following the second writ of garnishment, Buckingham moved to have the court declare the judgment against him "null and void" and to quash the previous two writs of garnishment on the grounds that the judgment, having not been renewed, had expired twelve years after it had been entered. Following a hearing, the circuit court granted Buckingham's motion, declaring that, pursuant to Maryland Rule 2-625, the judgment had "expired," and quashing the writs of garnishment. After its motion for reconsideration was denied, the State noted this appeal.

Held: Reversed.

Not content to rely on the principle of sovereign immunity, the Legislature expressly exempted the State from the running of limitations for an action on a judgment in Section 5-102 of the Courts and Judicial Proceedings Article. However, when the Court of Appeals adopted Rule 2-625, it did not include an express exemption from the expiration of unrenewed judgments for the State's judgments. But it did not need to, as "any waiver of immunity must emanate from the legislature." *Bradshaw v. Prince George's Cnty.*, 284 Md. 294, 300 (1979).

Section 5-102 imposes a twelve-year limitations period on the life of judgments, but it does not set out the procedures for implementing that time restriction. Rule 2-625 does. It provides that a money judgment expires after twelve years, but may be renewed by the judgment holder before that twelve year period expires. To do so, the holder of that judgment is required, by Rule 2-625, to file a notice of renewal with the clerk, who is then to "enter the judgment renewed." As that

rule implements the limitations period found in section 5-102, the rule also, by implication, incorporates that section's State-held judgment exemption.

The history of Rule 2-625 confirms that it was not intended create a new bar to the enforcement of judgments, but to implement the limitations period found in section 5-102. And it certainly was not intended to subject the State to the twelve-year limitations period found in section 5-102.

Publish America, LLP v. Sally Stern a/k/a Sally Ann Miketa Stern, No. 2965, September Term 2010, filed November 20, 2013. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2013/2965s10.pdf

LIBEL AND SLANDER – WORKS OF FICTION

LIBEL AND SLANDER – ADMISSIBILITY

LIBEL AND SLANDER – QUESTIONS FOR JURY

CONTRACT LAW – BREACH OF CONTRACT

Facts:

While working as a librarian at the Ludington Library in Ludington, Michigan, Sally Stern sought to have published a manuscript depicting patrons of the Ludington Library. She contacted Publish America, a publishing company, and on February 7, 2008, Publish America offered to publish the manuscript.

On February 13, 2008, Stern and Publish America entered into an Agreement stating, in pertinent part, that " 24. When in the judgment of the Publisher, the public demand for the work is no longer sufficient to warrant its continued manufacture, the Publisher may discontinue further manufacture. . . . 27. The Author covenants and represents that the said literary work . . . contains no matter that, when published, will be libelous. . . ."

Publish America reviewed Stern's proposed manuscript, and advised her to obtain written permission for all quotations used and presentation of real life individuals mentioned. Stern responded that she did not believe she would be able to get permission from all individuals, to which Publish America responded that she would not have to do so if her book was fictionalized. When asked by Stern what fictionalizing meant, Publish America replied that all names, places, and events should be changed so that no real-life people were in the least bit recognizable. After receiving a revised manuscript, Publish America asked Stern to confirm that she complied with paragraph 27 of the Agreement, to which she replied "yes."

Stern's manuscript was subsequently published as *The Library Diaries*, and several hundred copies were sold. On July 25, 2008, Stern's employment at the library was terminated because of the content of her book. Thereafter, after Publish America was alerted to articles in the press regarding Stern's book, it determined *The Library Diaries* should be taken off the market. On September 25, 2008, Publish America emailed Stern notifying her that it would no longer publish her book, but if she found another publisher it might be willing to transfer the publishing rights.

Stern contacted other publishers about publishing *The Library Diaries*, but was unable to find one willing to do so. On March 10, 2009, Stern emailed Publish America asking them to release

her from the Agreement because it was no longer publishing her book. Publish America responded that it was still in the process of evaluating her legal obligations because of concerns that her book was libelous and her promise to indemnify it for all legal claims arising for her book. Publish America stated that it may return the book rights to Stern, but will likely insist that the indemnification and dispute resolution provisions of the Agreement remain enforceable.

On February 7, 2010, Stern filed a First Amended Complaint for breach of contract against Publish America. She alleged that the Agreement only permitted Publish America to cease manufacture upon the exercise of its judgment that there was no longer public demand for the book, and that Publish America ceased publication without making such a finding. She also alleged Publish America breached by failing to offer to transfer the rights to Stern. The complaint sought damages for "lost revenues from the sale of the book, lost opportunities for capturing those sales, and other potential profits as contemplated in the Agreement."

Publish America made a motion for summary judgment, a motion for judgment, and a motion for judgment notwithstanding the verdict and for a new trial arguing that it discontinued publication on the basis of lack of demand, but didn't return the rights because Stern breached by failing to fictionalize the work. Publish America argued that any breach by Publish America was excused by Stern's own breach of failing to fictionalize.

The trial court denied Publish America's motion for judgment. Even though Stern testified that real-life library patrons had the same specific traits as characters in the book and places in Ludington had the same names as places in the book, the trial court found there was not enough evidence to submit to the jury the issue of whether Stern breached by failing to fictionalize. The trial court denied Publish America's proffer to introduce the Library Director's testimony that he identified characters in the book as real patrons of the library, finding that a lay person could not testify as to whether or not the book was fictionalized.

The circuit court granted judgment as to liability in favor of Stern because Publish America did not "offer" to "return" the publishing rights to *The Library Diaries*, as was required under paragraph 24 of the Agreement. The jury awarded Stern $10,880 in damages.

Held:

The trial court erred by granting Stern's motion on the issue of liability. Publish America was not required to call an expert witness to establish whether *The Library Diaries* was fictionalized. The evidence submitted at trial was sufficient to have the jury decide whether certain characters were reasonably identifiable individuals within the Ludington community, and the Library Director's testimony would have been relevant to help the jury decide that issue. The trial court effectively short-circuited Publish America's defense that any breach of the Agreement was excused by Stern's own material breach. Whether Stern breached and that breach was material, is a question of fact for the jury.

John Timothy Newell, et al. v. The Johns Hopkins University, No. 1861, September Term 2012, filed November 21, 2013. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2013/1861s12.pdf

CONTRACTS – CLEAR AND UNAMBIGUOUS LANGUAGE

CONTRACTS – CONSIDERATION OF EXTRINSIC EVIDENCE

Facts:

Elizabeth Banks co-owned with her siblings a 130-acre tract of farmland in Montgomery County, Belward Farm, that had been in their family for generations. She adamantly opposed development in the county and in an effort to protect the Farm from becoming housing or office buildings, in 1988 she contracted for the Johns Hopkins University to buy it for $5 million—a price well below market value. The contract between the parties provided that the property would be used "for agricultural, academic, research and development, delivery of health and medical care and services, or related purposes only."

Over time and as zoning restrictions changed, Hopkins altered its plans for the Farm and in 1997 it proposed (at a zoning hearing attended by Ms. Banks) the development of a research park that by all indications was within the ambit of the Contract—and that Ms. Banks supported at the time. Ms. Banks died in 2005, and after later zoning restrictions permitted the construction of higher buildings, Hopkins again changed its plans; while its current design provides for preservation of open spaces on the Farm, it also allows for buildings up to 150' tall in the center, tapering out to shorter buildings toward the property's boundaries.

Ms. Banks's descendants (the "Family") brought suit against Hopkins based on the second round of plan revisions. It sought a declaratory judgment to preclude Hopkins from implementing the amended plan, along with an injunction prohibiting Hopkins "from any action that would impair the [Family's] rights under the Contract and the Deed." The Family argued that the terms of the Contract were ambiguous, necessitating that the court look to extrinsic evidence to determine the intent of the parties. Hopkins moved for summary judgment, claiming that the terms of the Contract were clear and unambiguous, and that the uses of the Farm that it proposed fell within the limits of its use restriction clause. The trial court initially denied the motion, and discovery followed. At the close of discovery, the trial court granted Hopkins's renewed motion for summary judgment, reasoning that the Contract permitted Hopkins to use the Farm as it currently plans to, and that the Contract does not allow for restrictions on the scale/height/density of buildings on the property, nor does it prohibit Hopkins from leasing the property to third parties.

Held: Affirmed.

As a general matter, Maryland law does not permit the trial court to look beyond the four corners of a contract to determine the parties' intent. The court may look beyond the specific contested phrase in a contract to the remainder of the contract in determining the parties' intent (as long as other parts of the contract bear a significant relationship to the contested language). Beyond that, however, the court may look to extrinsic evidence only where a contract's terms are ambiguous. *City of Bowie v. MIE, Props., Inc.*, 398 Md. 657, 681 (2007).

The Court of Special Appeals applied these rules and determined that the uses Hopkins proposed did not violate the terms of the Contract. The Court emphasized that it was not accepting Hopkins's vision for the Farm as necessarily being true to the Family's; nonetheless "because the unambiguous words the parties used to memorialize their agreement limits Hopkins's future development of the property only in terms of how it uses the Farm, not in terms of scale or density or ownership structure," summary judgment was appropriate. The Family could not impose additional terms about the property's use that were not in the Contract in the first place.

The Family argued that the use of the term "campus" in a naming requirement in the Contract limited Hopkins to uses typically found in an academic setting. The Court disagreed and found the term "campus" did not change the outcome, where that term was not defined anywhere in the Contract. Even if Ms. Banks may have had a setting in mind more akin to a college campus than Hopkins ultimately did, there was nothing in the language of the Contract to circumscribe the specifics of its design based simply on the fact that it was required to (and has) put the word "campus" in its name. (The property is now called the "Belward Campus of the Johns Hopkins University.") The Court also stressed that the Family's agreement to see Hopkins through one round of zoning changes did not limit Hopkins altogether from seeking rezoning a second time.

Falls Garden Condominium Association, Inc. v. The Falls Homeowners Association, Inc., No. 443, September Term 2012, filed November 1, 2013, Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2013/0443s12.pdf

CONTRACTS – SETTLEMENT AGREEMENT – LETTER OF INTENT – ENFORCEABILITY – EXECUTORY ACCORD – MOTION TO ENFORCE SETTLEMENT – HEARING

Facts:

Falls Garden Condominium Association, Inc. ("Falls Garden"), believed, erroneously, that it held title to sixty-five parking spaces adjacent to one of the buildings in its complex. The parking spaces were actually owned by a neighboring residential community, The Falls Homeowners Association, Inc. ("The Falls"). Falls Garden filed a declaratory judgment action in the Circuit Court for Baltimore County claiming it had obtained ownership of the parking spaces by adverse possession or, alternatively, that it had obtained an easement over the parking spaces by prescription or necessity. The Falls filed a counterclaim for trespass.

The parties attempted to negotiate a settlement. Attorneys for both parties executed a letter of intent that set forth the essential terms of an agreement to conclude the litigation. The Falls agreed to lease to Falls Garden twenty-four specific parking spaces at a rate of $20.00 per space per month for a term of ninety-nine years. The agreement referenced a then un-drafted lease and settlement agreement. It was contingent on The Falls obtaining the approval of two thirds of its membership. The Falls obtained membership approval, drafted a lease, and submitted it to Falls Garden. Falls Garden refused to sign the lease, and The Falls moved to enforce the letter of intent as a settlement agreement.

After a non-evidentiary hearing, the court construed the letter of intent as a binding agreement that contained all essential terms and ordered Falls Garden to sign the lease. Falls Garden appealed.

Held: Affirmed.

The Court of Special Appeals held that the letter of intent was an enforceable agreement to conclude the litigation. It contained all essential terms of the parties' basic agreement. It did not suggest, on its face, that the parties did not intend to be bound by it. Any contemplated subsequent writing would serve merely as evidence of the agreement.

As the letter of intent was enforceable, it operated as an executory accord. Falls Garden agreed to discharge its claim against The Falls in exchange for a leasehold interest in twenty-four of the disputed parking spaces. The accord suspended Falls Garden's claim until such time as The Falls breached the agreement or provided a reasonable basis for concluding it would not perform. The Falls performed by obtaining the consent of two thirds of its membership and drafting a lease consistent with the terms of the letter of intent. Falls Garden was obligated to return The Falls's performance by executing the lease. When Falls Garden refused to do so, The Falls was entitled to seek specific performance.

The court was not required to hold a full evidentiary hearing to determine whether the parties had reached an enforceable agreement. It had before it an unambiguous written document signed by attorneys for both parties. That was sufficient evidence. Any testimony as to the parties' subjective intent would have been irrelevant.

Effie Dolan v. Christopher McQuaide, No. 1433, September Term 2012, filed November 5, 2013. Opinion by Matricciani, J.

http://www.mdcourts.gov/opinions/cosa/2013/1433s12.pdf

SUMMARY JUDGMENT – EXPRESS CONTRACT – ORAL CONTRACT – WRITTEN CONTRACT – CONTRACT IMPLIED-IN-FACT – CONTRACT IMPLIED-IN-LAW – QUASI-CONTRACT – UNJUST ENRICHMENT – QUANTUM MERUIT

Facts:

According to appellant, Effie Dolan, she agreed and contracted with appellee, Christopher McQuaide, to become equal partners in McQuaide's nascent carwash business, in exchange for her "efforts to do the planning, financial and otherwise." Dolan alleges that she then provided various services for the business, including drafting a business plan, financial projections, and contracts, and creating a logo and website.

The parties' personal and professional relationship ended just before the business opened. McQuaide allegedly did not compensate Dolan as promised, and he refused to allow her to inspect the business's records. Dolan therefore brought various claims against McQuaide, including breach of contract, promissory estoppel, accounting, and unjust enrichment. Following post-trial proceedings, the court granted summary judgment in favor of McQuaide on all counts.

Held: Affirmed in part and reversed in part

The Court of Special Appeals affirmed in part and reversed in part. The plaintiff did not generate a genuine dispute of material fact showing promissory estoppel or an oral contract where the only terms communicated between the parties were that the defendant would help to "plan" the opening of a carwash business. An express contract arises from verbal communication of *definite terms*; 2) a contract implied-in-fact arises from *actions* implying *definite terms*; and 3) unjust enrichment arises from *actions* that do *not* imply *definite terms*. *Quantum meruit* is a theory of recovery that can take more than one value in a given case. In an action for breach of contract implied-in-fact, the *quantum meruit* value is the market price of the plaintiff's services; in an action for unjust enrichment, the *quantum meruit* value is the benefit actually conferred upon the defendant. The two values can be identical, and evidence of the former is *prima facie* evidence of the latter. Therefore, appellant's evidence of the fair market value of her services generated a genuine dispute as to whether the defendant received a benefit from plaintiff's services.

Brenden L. Dashiell v. State of Maryland, No. 485, September Term 2012, filed November 4, 2013. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2013/0485s12.pdf

CRIMINAL LAW – AFFRAY

Facts:

Appellant, Brenden L. Dashiell, attended a cookout at the home of a friend, Justin Carter. Perhaps fueled by consumption of alcohol and marijuana, appellant and Carter engaged in a playful wrestling match that escalated into a fistfight when Carter "grabbed" appellant's arm and "twisted it back" painfully. The fight was broken up, but it flared up again a few minutes later, when Carter's wife tripped and fell, a fall that Carter attributed to appellant. The fight was again broken up, but it flared up a third time when appellant rebuffed Carter's attempt to shake hands and, in response to that rebuff, Carter kicked over appellant's parked moped, turned and walked towards appellant, and swung at him. Appellant then struck several blows to Carter's head, and he fell to the ground, unconscious. Carter died that evening of blunt force head trauma.

Appellant was indicted for involuntary manslaughter and was tried by a jury in the Circuit Court for Montgomery County. As that charge requires proof that the defendant committed an unlawful act and that the act resulting in the victim's death occurred during the commission of the unlawful act, the State presented evidence of two unlawful acts committed by appellant: assault and affray. Appellant requested that the circuit court give a self-defense instruction as to both assault and affray, but the State objected. The court ultimately refused appellant's requested instruction in part, instructing the jury that it may consider whether appellant acted in self-defense, but only in considering whether he had committed an assault. As to affray, the court adopted the State's contention that the "mutuality" of affray was inconsistent with self-defense, and it therefore instructed the jury that it may not consider self-defense when deciding whether appellant had engaged in an affray. Appellant also requested that the circuit court give a defense-of-property instruction, but the court refused that request.

Appellant was convicted of involuntary manslaughter and was sentenced to five years' imprisonment. He appealed, raising three contentions: (1) that the circuit court erred in instructing the jury that self-defense is not a defense to affray; (2) that the circuit court erred in allowing the jury to consider whether affray was an underlying unlawful act, because the evidence was insufficient to show that the fighting occurred in public or that it caused terror to the people; and (3) that the court erred in refusing appellant's defense-of-property jury instruction.

Held: Reversed and remanded.

The Court of Special Appeals held that it was error to refuse to give appellant's requested jury instruction that self-defense is a defense to affray. In reaching that conclusion, the Court first looked to the common law of other states and determined that, as a general matter, self-defense is a defense to affray. It therefore concluded that appellant's proposed jury instruction was a correct statement of the law. Because it was clear that the subject matter of the proposed instruction was not covered by the other instructions actually given, the Court turned to the question whether self-defense was generated by the facts, and it determined that there was "some evidence" as to each of the elements of self-defense.

The Court further held that, to prove the "terror to the people" element of affray, the State need only show that the acts and surrounding circumstances were likely to strike terror in anyone, not that they actually have in any specific individual; and that, to prove the "public place" element of affray, it is sufficient to show that fighting occurred on private land that is sufficiently near a public road or neighboring dwellings. Because there was "some evidence" that the fighting in this case occurred, in part, on the lawn of the Carters' home, which was within a few feet of a street in a heavily populated residential area, the Court concluded that there was no error in permitting the jury to consider whether affray was an underlying unlawful act for purposes of establishing manslaughter.

As to appellant's requested defense-of-property jury instruction, the Court concluded that, even construing the facts in the light most favorable to appellant, the third and final confrontation between appellant and Carter was not the result of an attempt to protect appellant's property. Indeed, when asked why he struck Carter "at that point," appellant replied, "Because he swung," not because he was trying to protect his property, and furthermore, all of the evidence showed that, when the fight between appellant and Carter resumed, Carter's intrusion upon appellant's moped had already ended. Thus, the circuit court properly refused to give appellant's defense-of-property instruction.

Donald Edward Browne, Jr. v. State of Maryland, No. 1853, September Term 2012, filed November 6, 2013. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2013/1853s12.pdf

CRIMINAL PROCEDURE – JURY DEADLOCK – MOTION FOR MISTRIAL – COERCION OF VERDICT

Facts:

Defendant was tried by a jury on numerous charges arising out of a violent home invasion.

After the jury had deliberated for an hour and forty minutes, the foreman sent a note stating that the jury was deadlocked. With the approval of counsel, the court instructed the jury to continue deliberating. Immediately after the court gave the instruction, a juror asked to approach the bench and was allowed to do so. The juror did not say much before the court interrupted him, but what he said was sufficient to reveal that he was the lone holdout juror and that he was against convicting the defendant because he did not think the evidence warranted that result. The judge privately instructed the holdout juror to listen to his fellow jurors, consider all of the evidence very carefully, and look through the written jury instructions. The jury then was returned to the jury room to deliberate.

About an hour and ten minutes later, the foreman sent a note saying that the holdout juror had examined the evidence and read the instructions and had not changed his mind, so the jury remained deadlocked. The prosecutor suggested that the jurors be sent home for the night and return in the morning to resume deliberations. Defense counsel moved for a mistrial. The court denied the motion and sent the jurors home for the night, without giving them any instructions. The jurors returned the next morning and, after about an hour of deliberating, returned a verdict of guilty on all counts.

Held: Reversed.

In these circumstances, the trial court abused its discretion by not granting defense counsel's motion for mistrial in order to prevent a coerced verdict. The potential for coercion became high when the individual juror identified himself to the court as the sole holdout in favor of a not guilty verdict, based on his belief that the evidence was not sufficient to convict. The court erred in privately instructing that juror, and in giving an instruction that did not include the essentials of the modified *Allen* charge, i.e., that an individual juror should not surrender his honest conviction for the mere purpose of returning a verdict. Instead of decreasing the potential for coercion, the court's actions increased that potential. The second deadlock note revealed that the holdout juror had communicated his private instruction to the other jurors, who took it to mean

that it was up to the holdout juror to change his mind. By then, the likelihood of a coerced verdict was extremely high, and sending the jurors home with instructions to return to deliberate likely gave the holdout juror the impression that deliberations were continuing in order to eliminate his dissent. Given the evolution of events, a modified *Allen* charge would not have changed that impression, and the only means to avoid a coerced verdict was to grant the mistrial motion.

Willie Quinones v. State of Maryland, No. 1370, September Term 2012, filed November 5, 2013. Opinion by Bair, J.

http://www.mdcourts.gov/opinions/cosa/2013/1370s12.pdf

CRIMINAL LAW AND PROCEDURE – DOUBLE JEOPARDY – MANIFEST NECESSITY FOR A MISTRIAL – PLACING IMPROPER STATEMENTS BEFORE A JURY IN CLOSING ARGUMENT

Once jeopardy has attached, retrying the accused is prohibited if the trial court declares a mistrial over defendant's objection unless there is a showing of manifest necessity to declare the mistrial. In order to determine manifest necessity to declare a mistrial, the trial judge must weigh the unique facts and circumstances of each case, explore reasonable alternatives, and determine that no reasonable alternative exists. However, neither party has a right to have its case decided by a jury which may be tainted by bias. There comes a point when a theoretically available remedy becomes ineffective. By disregarding multiple admonitions from the court and making numerous improper statements during closing argument, Appellant placed highly prejudicial information before the jury that could not be cured by the trial court in any way. Accordingly, the trial court did not abuse its discretion in finding manifest necessity to declare a mistrial.

Facts:

On September 13, 2011, Willie Quinones and Quentin Milner were indicted in the Circuit Court for Prince George's County on charges of armed robbery and related offenses. A joint jury trial was held on March 19 and 20, 2012. On the second day of trial, subsequent to the jury instructions and immediately before closing arguments, the State informed the court that it would be entering the case against Milner *nolle prosequi* due to information received from the victims. Specifically, the victims told the State that based on Milner's height; they believed he was not the second defendant at the crime scene. The trial court accepted this disposition and Milner was taken out of the courtroom. At a subsequent bench conference, Quinones' counsel informed the court that he had advised Quinones of his right to request a mistrial and that Quinones desired to go forward with the trial. The trial court allowed defense counsel to speak with Quinones further and provided defense counsel with time to think of some curative instructions for the jury. After a recess, Quinones reiterated his desire to go forward with the trial and the court gave a curative instruction with the consent of the parties which informed the jury that Milner would be absent, prior instructions on separate consideration as to multiple defendants were no longer applicable, and that the jury was to make no inferences or discuss anything in their deliberations regarding Milner's absence.

The circumstances that led the trial court ultimately to declare a mistrial occurred during Quinones' closing argument. Defense counsel repeatedly referred to the fact that there was only one person in front of the jury at this point when there had been two at the beginning and also made statements that the "team" the State had purported to show no longer existed. The State

repeatedly objected and several conferences were held at the bench where the judge told defense counsel that his closing argument was asking the jury to make the exact inference he instructed them not to and warned him that if he continued down that road he would have to declare a mistrial out of manifest necessity. After defense counsel failed to follow the judge's admonishments the trial court declared a mistrial based on manifest necessity. The manifest necessity was due to defense counsel continually referring to the State's opening, which was not in evidence, and to Milner's absence despite the trial court's instruction to the jury to make no inference whatsoever as to that. After the mistrial, Quinones filed a Motion to Dismiss the charges against him on double jeopardy grounds, which was denied. Finally, Quinones noted this interlocutory appeal.

Held: Affirmed.

Quinones argued that the trial court abused its discretion in finding manifest necessity because it failed to consider reasonable alternatives before declaring a mistrial *sua sponte*, and that failure was grounds for barring retrial. In response, the State argued that the finding of manifest necessity was within the sound discretion of the trial judge, manifest necessity existed because of Quinones' placement of prejudicial and inadmissible information before the jury during closing arguments, the trial court considered and exercised several reasonable alternatives prior to declaring a mistrial, and that there came point where there was no effective alternative left for the trial court to consider due to Quinones' actions.

The Court of Special Appeals first considered *Carter v. State*, 366 Md. 574 (2001) where the Court of Appeals noted that "generally cautionary instructions are deemed to cure most errors, and jurors are presumed to follow the court's instructions . . . ." The Court noted, however, that the Court of Appeals stressed that "there are some contexts in which the risk that the jury will not, or cannot follow instructions is so great that such instructions would not be able to cure the improperly placed information."

The Court then considered *Arizona v. Washington*, 434 U.S. 497 (1978) where the U.S. Supreme Court granted a mistrial at the beginning of a second trial based upon an "improper and prejudicial comment" made by defense counsel in opening statement. The Court highlighted the Supreme Court's explanation that "neither party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, 'the public's interest in fair trials designed to end in just judgments' must prevail over the defendant's 'valued right' to have his trial concluded before the first jury impaneled."

The Court determined that while Maryland courts have considered many different types of cases relating to manifest necessity and mistrials, this issue was one of first impression. Then the Court reviewed several out-of-state cases with factually similar circumstances, i.e., where defense counsel made improper remarks during closing argument. The Court explained that taken together, the out-of-state cases along with *Carter* and *Washington*, supported the conclusion that the trial court did not err in finding manifest necessity for mistrial. Quinones

contended that less severe alternatives were still available prior to the trial court's finding of manifest necessity. But the Court found that throughout Quinones' closing, the trial court considered reasonable alternatives to granting a mistrial by: (1) sustaining objections by the State; (2) calling counsel to the bench to discuss the parameters of his argument and to evaluate whether and to what extent it would contradict the court's instructions; (3) allowing defense counsel to continue after multiple instances of improper arguments; and (4) admonishing counsel multiple times that if he continued his line of argument, a mistrial would likely result.

The Court explained that the State, like the Defense, is entitled to a fair trial and agreed with the State's argument that there comes a point when a theoretically available remedy becomes ineffective. Accordingly, the Court found that Quinones placed highly prejudicial information before the jury by disregarding multiple admonitions from the court and making numerous improper statements during closing argument that could not be cured by the trial court in any way. As a result, the trial court did not abuse its discretion in finding manifest necessity to declare a mistrial, double jeopardy principles did not prevent a retrial, and the circuit court did not err in denying Quinones' motion to dismiss the charges against him.

Charles William Callahan v. State of Maryland, No. 2365, September Term 2011, filed November 20, 2013. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2013/2365s11.pdf

PROBATION – CONDITIONS – VIOLATIONS – REVOCATION – MANDATORY SUPERVISION RELEASE

Facts:

In 1995, Charles Callahan pleaded guilty to kidnapping and third-degree sexual offense and was sentenced to twenty-five years of incarceration, with all but seventeen years suspended. The sentencing court also imposed a five-year period of supervised probation upon release, subject to "standard conditions," including the condition that Callahan report as directed to his probation agent and follow the agent's "lawful instructions."

In March 2009, after serving fourteen years in prison, Callahan was released on "mandatory supervision," subject to conditions imposed by the Maryland Parole Commission. One of the special conditions of the mandatory supervision release required that Callahan participate in a sexual offender management program, which could include polygraph testing. Both Callahan's mandatory supervision release and probation were monitored by the same agent with the Division of Parole and Probation.

After Callahan failed to report for a polygraph test as directed by his agent, the Maryland Parole Commission revoked his mandatory supervision release and Callahan was returned to prison. A violation of probation proceeding was also initiated and, following a hearing, the Circuit Court for Anne Arundel County found that Callahan had violated the condition of his probation which required him to follow the agent's "lawful instructions" when he failed to abide by the agent's directive to report for the polygraph test. The circuit court then ordered that Callahan serve the previously suspended portion of his sentence.

Callahan appealed the circuit court's order. Callahan argued that, because polygraph testing was not a condition of his probation, the agent's directive that he submit to a polygraph test was not a "lawful instruction" he was required to follow to remain compliant with the conditions of his probation. The State argued that, because polygraph testing was a condition of Callahan's mandatory supervision release, the agent's directive was a "lawful instruction" and, therefore, the circuit court did not err in finding that Callahan had violated his probation.

Held: Vacated.

The Court of Special Appeals vacated the decision of the circuit court. The Court of Special Appeals highlighted the distinction between mandatory supervision release, which is a "purely

executive function," and probation, which is a "a peculiarly judicial act." Because, in this case, polygraph testing was not a condition associated with Callahan's court imposed probation, the circuit court erred in concluding that Callahan had violated a "lawful instruction" of his agent when he failed to submit to a polygraph test as instructed by his agent. That instruction, the Court noted, was "a 'new, more onerous condition' that was 'not fairly within the ambit of those laid down by the court.'" (quoting *Edwards v. State*, 67 Md. App. 276, 281 (1986)).

Jean Paul Butler v. State of Maryland, Nos. 176 & 177, September Term 2012, filed November 1, 2013. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2013/0176s12.pdf

CRIMINAL LAW – JURY TRIAL WAIVER – RULE 4-246(b)

CRIMINAL LAW – OFFICER'S STOP BASED ON "REASONABLE SUSPICION"

CRIMINAL LAW – SPEEDY TRIAL

CRIMINAL LAW – POSSESSION OF EQUIPMENT TO MANUFACTURE CDS

Facts:

Appellant Jean Paul Butler was arrested on October 21, 2008 by an off-duty police officer who had seen Mr. Butler on a security monitor meet with another man in a parked car in a secluded area of a parking lot, where the two exchanged a tied-off plastic baggie that appeared to have a substance at the bottom. The officer stopped Mr. Butler based on his suspicion that a drug deal had just taken place; he discovered that the baggie contained what he believed to be oxycodone, and found two oxycodone pills and cash in Mr. Butler's pockets. He also found a digital scale in the back seat of Mr. Butler's car that later tested positive for cocaine residue.

Mr. Butler appealed his conviction for possession of controlled dangerous substances, possession with intent to distribute, and possession of a device adapted to produce a CDS, raising several issues. He argued first that the court did not properly announce his waiver of a right to jury trial; that the court should have suppressed the evidence found in his car because the officer's search was unconstitutional; that the earlier of the two cases that were the basis of the charges should have been dismissed for lack of speedy trial; and that the evidence was insufficient to convict him for possession of the scale as a "device adapted to assist in the production and distribution of a CDS."

Held: Reversed.

Under *Valonis & Tyler v. State*, 431 Md. 551 (2013), the trial court's examination of Mr. Butler did not comply with Maryland Rule 4-246(b), which requires that the defendant be examined on the record and the court find that his waiver is knowing and voluntary. The test after *Valonis* does not permit the reviewing court to look to the totality of the circumstances, but requires that the trial court make "an express determination on the record" that the defendant fully understands and voluntarily chooses to waive a jury trial. Mr. Butler merely had a brief colloquy with the court that he was waiving a jury trial, much like the dialogue the defendant in *Valonis*

had with his counsel (which the Court of Appeals deemed inadequate under the Rule), and it did not comply with the Rule given the *Valonis* Court's guidelines.

The Court of Special Appeals addressed the remaining issues for the sake of judicial economy, and held first that the trial court properly denied Mr. Butler's motion to suppress, in which he claimed that the detective who detained him lacked reasonable suspicion to believe he was engaging in an illegal activity. The Court disagreed, holding that under *Terry v. Ohio*, 392 U.S. 1, 27 (1968), the detective had reasonable suspicion to believe that a drug deal was taking place, based not only on his training and experience, but also on the details of what he saw take place, which he recounted with specificity (including seeing the tied-off baggie, with an unidentified substance at the bottom, change hands in a remote part of the parking lot).

Second, the Court held that Mr. Butler was not denied the right to a speedy trial. Examining the factors laid out in *Barker v. Wingo*, 407 U.S. 514 (1972), it concluded that the length of delay (twenty-seven months), while presumptively prejudicial, did not weigh heavily against the State; that the reasons for the delay did not show there was any negligent or intentional conduct by the State; that Mr. Butler had only asserted the right perfunctorily, as part of omnibus motions; and that he could show no real prejudice given that the only witness whose testimony he claimed was lost as a result of the delay would have been of no help to him in the first place. On balance, these factors did not demonstrate that Mr. Butler was deprived of the right to a speedy trial.

Last, the Court disagreed with Mr. Butler's claim that the trial court lacked sufficient evidence to convict him of possession of the scale for the purpose of manufacturing a CDS. A predecessor statute had been phrased in a way that required the State to show that a defendant intended not just to produce the CDS, but also that he directly manufactured it in the first place. But the now-current version of the statute (under which Mr. Butler was charged) contains a change in a modifying article that allows for prosecution when the State shows possession of equipment for the purpose of manufacturing any CDS—and not just one that the defendant has directly manufactured, so he was properly charged under the statute.

Scott Baldwin v. Amy L. Baynard, No. 65, September Term 2013, filed November 6, 2013. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2013/0065s13.pdf

FAMILY LAW – CUSTODY AND VISITATION

Facts:

Amy Baynard ("Mother") and Scott Baldwin ("Father") are the parents of a 14-year-old daughter. Mother and Father never married, and since Mother and Father's relationship ended in May 2001, Mother has had primary physical custody at all times. Prior to the litigation in the instant case, Father had visitation on alternate weekends and specified holidays.

In April 2009, Mother learned that her niece alleged that she had been sexually abused by Father between the years of 2000 and 2004, when the niece was between the ages of eleven and fifteen years old. Mother filed a motion to modify custody and visitation; the custody and visitation issues proceeded to trial in January 2013. After a five-day trial, the circuit court issued its order granting Mother sole legal and physical custody. The court granted Father supervised visitation on alternating Sundays.

On appeal, Father argued that the circuit court erred in granting him only supervised rather than unsupervised visitation, in granting Mother sole legal custody, and in awarding Mother attorney's fees.

Held: Affirmed.

The Court of Special Appeals held that the circuit court properly applied Md. Code (1984, 2012 Repl. Vol.), § 9-101 of the Family Law Article ("FL"). In a child custody or visitation matter, when a court has reasonable grounds to believe that a party to the proceeding has previously neglected or abused a child, the court must determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party, pursuant to § 9-101 of the Family Law Article. The circuit court found, by a preponderance of the evidence, that Father had abused Mother's niece.

The second prong of the §9-101 test requires the circuit court to determine whether there is a likelihood of further abuse. The burden is on the party previously found to have abused or neglected a child to prove there is no likelihood of further abuse. If the court does not make a finding that there is no likelihood of further abuse, the court must deny custody or visitation, except to the extent the court may approve a supervised visitation arrangement that assures the safety and well-being of the child. The circuit court properly applied the standard and determined that Father had not demonstrated that there was no likelihood of further abuse. Moreover, the

circuit court also considered the history of abuse in the context of the general best interests of the child standard. Accordingly, the Court of Special Appeals held that the circuit court did not err in granting Father supervised rather than unsupervised visitation.

Regarding legal custody, the Court of Special Appeals held that, given the significant history of conflict between Mother and Father and their inability to communicate effectively, the circuit court was within its discretion when determining that joint custody was inappropriate and granting Mother sole legal custody.

Regarding attorney's fees, the Court of Special Appeals held that the circuit court properly considered the factors set forth in FL § 12-103 in reaching its determination to award Mother attorney's fees. Accordingly, the Court of Special Appeals affirmed the circuit court's order granting Mother attorney's fees.

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David McClure, et al. v. William T. Lovelace, Jr., No. 1020, September Term 2012, filed November 4, 2013. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2013/1020s12.pdf

LABOR AND EMPLOYMENT – LABOR ORGANIZATIONS – JUDICIAL REVIEW OR INTERVENTION IN INTERNAL AFFAIRS – EXHAUSTION OF INTERNAL REMEDIES

Facts:

In June 2007, appellant, David McClure ("Mr. McClure"), was elected President of Local 1300, Amalgamated Transit Union ("Union"). Appellee, William Lovelace, Jr., was reelected to his third term as Financial Secretary in the same election. As a result of Mr. McClure's suspicions regarding appellee's alleged financial practices, a series of disagreements ensued between the two regarding the management of the Union and its finances.

During an executive board meeting in 2009, a Union member attended the meeting and stated that in April 2009, Mr. McClure told him that appellee "has been caught red handed misappropriating funds and stealing money to finance his family personal vacations." Both parties ran for their respective positions on the 2010 executive board. Mr. McClure was reelected as Union president, but appellee lost.

On September 2, 2010, appellee filed a complaint in the Circuit Court for Baltimore City against appellants, Mr. McClure and the Union, alleging that Mr. McClure made defamatory statements about him, specifically that he was stealing money from the Union. Appellants filed a motion to dismiss, arguing that appellee did not exhaust the available internal Union remedies and that if he had, the alleged harm suffered may have been avoided. The trial court denied the motion.

After a jury trial, the jury returned with a verdict in favor of the appellee. Appellants appealed challenging, among other issues, the trial court's denial of their motion to dismiss.

Held: Affirmed.

The Court of Special Appeals held that the plaintiff was not required to exhaust the Union's remedies because he sought monetary damages, a remedy which the Union could not provide. The trial court did not err when it excused appellee's failure to exhaust and denied appellant's motion to dismiss.

The U.S. Supreme Court, in *Clayton v. International Union*, 451 U.S. 679 (1981), outlined three factors that courts may consider to excuse the exhaustion requirement. The second of the three factors requires that the union remedies be adequate to award the full relief plaintiff seeks. Appellee sued seeking monetary damages for lost wages but the Union's constitution did not

allow its internal disciplinary procedures to award money damages. Accordingly, the Court concluded that under *Clayton*, the Union's remedy was not adequate and therefore appellee did not have to exhaust them.

In the case at bar, there were two Union disciplinary procedures available to appellee, however both of them only could have resulted in the assessment of a fine or the suspension of appellee. Neither could have resulted in an award of monetary damages. Because the remedy sought by appellee was not available through the Union, even if he had exhausted all of the Union procedures, he still would have had to seek monetary relief through the courts.

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D.A.M. Carpentry Corp., et al. v. Gerald Scruggs, No. 1614, September Term 2012, filed November 21, 2013. Opinion by Raker, J.

http://www.mdcourts.gov/opinions/cosa/2013/1614s12.pdf

LABOR AND EMPLOYMENT – WORKERS' COMPENSATION ACT – MEDICAL MILEAGE – TRANSPORTATION EXPENSES – REASONABLE AND NECESSARY

Facts:

Mr. Gerald Scruggs, a workers' compensation claimant, filed a claim in 2011 for reimbursement with his employer D.A.M. Carpentry Corp. and insurer Erie Insurance Group requesting medical mileage for miles traveled to and from his medical appointments. Mr. Scruggs admitted that he did not drive to any of his appointments; rather he used public transportation, taxi services, or his mother drove him. Mr. Scruggs also admitted that he did not recall which mode of transportation he took to which appointment, nor did he retain any receipts. The employer and insurance company denied his claim because he failed to document the actual costs of his travel. In 2012, the Workers' Compensation Commission ("Commission") decided that Mr. Scruggs was still entitled to be reimbursed for mileage at the Commission's prevailing rate. The employer and insurer noted a petition for judicial review, and the Circuit Court for Montgomery County agreed with the Commission's decision.

Held: Reversed.

In *Breitenbach v. N.B. Handy Co.*, 366 Md. 467, 484 (2001), the Court of Appeals held that Maryland Code (1991, 2008 Repl. Vol.) § 9-660(a)(1) of the Labor & Employment Article should be liberally construed to allow a workers' compensation claimant to recover "reasonable and necessary" transportation expenses to and from medical treatment.

The Court of Special Appeals held that it is not "reasonable and necessary" for one who did not drive to an appointment to be reimbursed based on the Commission's mileage rate. Instead, one who did not drive should retain receipts and will be reimbursed based on the actual expenses incurred.

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ATTORNEY DISCIPLINE

This is to certify that

JONATHAN SETH SHURBERG

has been replaced upon the register of attorneys in this state as of October 31, 2013.

*

By an Order of the Court of Appeals dated November 22, 2012, the following attorney has been suspended:

NIKOLAOS PANAGIOTIS KOURTESIS

*

By an Opinion and Order of the Court of Appeals dated November 25, 2013, the following attorney has been indefinitely suspended:

DAVID EUGENE BOCCHINO

*

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JUDICIAL APPOINTMENTS

On October 17, 2013, the Governor Announced the appointment of **YOLANDA LAURANZON CURTIN** to the Circuit Court for Harford County. Judge Curtin was sworn in on November 15, 2013 and fills the vacancy created by the retirement of the Hon. Emory A. Plitt, Jr.

*

On October 17, 2013, the Governor announced the appointment of **DAVID EARL CAREY** to the District Court of Maryland – Harford County. Judge Carey was sworn in on November 22, 2013 and fills the vacancy created by the retirement of the Hon. John L. Dunnigan.

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Eighty-First Report of the Standing Committee on Rules of Practice and Procedure was filed on November, 6, 2013:

http://mdcourts.gov/rules/rodocs/181ro.pdf

*

A Rules Order pertaining to the One Hundred Seventy-Seventh Report of the Standing Committee on Rules of Practice and Procedure was filed on November 21, 2013:

http://mdcourts.gov/rules/rodocs/177rosupp.pdf

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A Rules Order Pertaining to the One Hundred Eightieth Report of the Standing Committee on Rules of Practice and Procedure was filed on November 21, 2013:

http://mdcourts.gov/rules/rodocs/180ro.pdf