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http://www.mdcourts.gov/opinions/coa/2014/25a13ag.pdf

ATTORNEY DISCIPLINE – ABANDONMENT OF CLIENT – MISAPPROPRIATION OF CLIENT FUNDS – FAILURE TO COOPERATE WITH BAR COUNSEL – DISBARMENT

Facts:

Respondent Christine Gage-Cohen agreed to represent a client, Ms. Turner, in a divorce case and accepted $2,500 in fees for that representation in March 2012. Ms. Gage-Cohen performed no work for Ms. Turner and seemingly abandoned her Maryland law practice. She did not communicate with, or respond to inquiries from, Ms. Turner. Ms. Gage-Cohen did not deposit Ms. Turner's fees into a trust account, and did not maintain a trust account at all in 2012. After several months, Ms. Turner filed a complaint with the Attorney Grievance Commission ("Commission").

The Commission, through Bar Counsel, sent Ms. Gage-Cohen four letters seeking a response to the complaint; she did not respond to any of them. A Commission investigator was only successful in contacting her when he arrived at her office unannounced. At that point Ms. Gage-Cohen admitted receiving the letters and promised to respond within three days, but never did. The Commission filed a Petition for Disciplinary or Remedial Action against Ms. Gage-Cohen on June 5, 2013. Ms. Gage-Cohen apparently relocated to Tennessee, where she was eventually served, but she again failed to respond.

In March 2014, the hearing judge found Ms. Gage-Cohen violated Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.1, 1.2(a), 1.3, 1.4, 1.5(a), 1.15(a) & (c), 1.16 (a) & (d), 8.1(b) and 8.4(a), (c), & (d); Maryland Rules 16-604, 16-606.1, 16-609(a); and Maryland Code, Business Occupations and Professions Article, §10-306. Neither party filed exceptions to the findings of fact or conclusions of law. Ms. Gage-Cohen did not appear for oral argument.

Held: Disbarment is the appropriate sanction.

Ms. Gage-Cohen accepted a fee to represent a client, and then performed no work on the client's behalf, did not communicate with the client, and failed to deposit the fee into a trust account. This conduct amounted to incompetence, failure to act according to her client's decisions, lack of diligence, and lack of communication, in violation of MLRPC 1.1, 1.2, 1.3, and 1.4. Her fee was *per se* unreasonable, in violation of MLRPC 1.5, as she performed no work to earn it. Further, Ms. Gage-Cohen failed to deposit client funds into a trust account, and did not even maintain a trust account, in violation of MLRPC 1.15 and 8.4; Maryland Rules 16-604, 16-606.1, and 16-609; and Business Occupations and Professions Article, §10-306.

Ms. Gage-Cohen did not return Ms. Turner's documents or fee upon request, and only returned the documents sometime after the conclusion of the Commission's investigation. She thus failed to properly terminate the representation, in violation of MLRPC 1.16. Finally, Ms. Gage-Cohen violated MLRPC 8.1(b) when she failed to cooperate with Bar Counsel's investigation.

The Court held that Ms. Gage-Cohen's total abandonment of her client, misappropriation of client funds, and failure to cooperate with the Commission warranted the severest sanction of disbarment.

Attorney Grievance Commission of Maryland v. Michael Francis Barnett, Misc. Docket AG No. 28, September Term 2013, filed October 22, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/28a13ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission ("the Commission"), Petitioner, charged Michael Francis Barnett ("Barnett"), Respondent, with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.2(a) (Allocation of Authority Between Client and Lawyer), 1.3 (Diligence), 1.4 (Communication), 3.3(a) (Candor Toward the Tribunal), 8.1(a) (Bar Admission and Disciplinary Matters), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC).

A hearing judge found the following facts. On March 2, 2006, Barnett was admitted to the Bar of Maryland. On October 14, 2010, Sheila Wooden ("Wooden"), then self-represented, arrived late to a custody modification hearing before a Master. The Master prepared a Report and Recommendation recommending that the Circuit Court for Prince George's County ("the circuit court") award custody of Wooden's minor child to the child's father. Upon her late arrival, Wooden was provided a "piece of paper" that stated she had ten days to submit "paperwork" to the circuit court to "change th[e] result." On October 22, 2010, Wooden retained Barnett as her lawyer in the child custody case for the sole purpose of excepting to the Master's Report and Recommendation. Wooden paid Barnett $2,500. After their initial meeting, Wooden followed up with Barnett to confirm that he had timely submitted the "form." Wooden had no further contact with Barnett until January 2011, when she telephoned him to confirm that the necessary papers had been filed.

On October 27, 2010, as part of his representation of Wooden, Barnett filed Exceptions to the Master's Report and Recommendation ("the Exceptions"), a Motion to Accept Electronic Recordings of the Proceedings as the Transcript ("the Motion to Accept Electronic Recordings"), and an Affidavit of Indigency. Without Wooden's knowledge, Barnett forged Wooden's signature on the Affidavit of Indigency. At no point during his representation did Barnett discuss with Wooden the filing of an Affidavit of Indigency. At the disciplinary hearing, Wooden testified that she would have been able and willing to pay any fees associated with her case. The circuit court scheduled a hearing on the Exceptions for March 3, 2011. Barnett failed to notify Wooden of the hearing date, which the circuit court postponed until April 22, 2011. Barnett again failed to notify Wooden of the hearing date. On April 22, 2011, Wooden failed to appear at the hearing, and Barnett withdrew the Exceptions without her knowledge or consent.

On October 12, 2011, Wooden wrote a letter to the Commission, stating that she had not spoken with Barnett since January 2011. Bar Counsel, on the Commission's behalf, initiated an investigation during which Barnett made numerous intentional misrepresentations. Specifically, Barnett falsely stated that he had spoken with Wooden after January 2011 and notified her of both hearing dates.

Based on the above facts, the hearing judge concluded that Barnett had violated MLRPC 1.1, 1.2(a), 1.3, 1.4, 3.3(a), 8.4(b), 8.4(c), 8.4(d), and 8.4(a). The hearing judge did not determine whether Barnett had violated MLRPC 8.1(a). The hearing judge found no mitigating circumstances. Barnett did not except to any of the hearing judge's factual findings. Bar Counsel "informally" took exception to hearing judge's failure to determine whether Barnett had violated MLRPC 8.1(a). The Commission recommended a sanction of disbarment.

Held:

The Court of Appeals determined that Barnett violated MLRPC 1.1, 1.2(a), 1.3, 1.4, 3.3(a), 8.4(b), 8.4(c), 8.4(d), and 8.4(a) by forging Wooden's signature on an Affidavit of Indigency without her knowledge, and thereafter submitting the forged document to the circuit court; by failing to notify Wooden of the Exceptions hearing dates, or otherwise communicate with Wooden for at least ten months during his representation; by withdrawing the Exceptions without Wooden's knowledge or consent; and by making misrepresentations to Bar Counsel as to his communication with Wooden. The Court declined to consider Bar Counsel's informal exception as to MLRPC 8.1(a). The Court noted two aggravating factors: (1) multiple violations of the MLRPC; and (2) refusal to acknowledge the wrongful nature of the misconduct. The Court concluded that given Barnett's intentionally dishonest conduct, his numerous other violations of the MLRPC, and his failure to demonstrate any compelling or extenuating circumstances, disbarment was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Floyd Reynard Blair, Misc. Docket AG No. 49, September Term 2013, filed October 28, 2014. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2014/49a13ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Respondent Mr. Floyd Reynard Blair agreed to represent a client, Ms. Cheryl Nelson, in a custody case and accepted a $1,500.00 fee for that representation in November 2011. Mr. Blair performed no legal work for Ms. Nelson and abandoned his representation of her. He also failed to keep Ms. Nelson reasonably informed about her case and did not communicate with her that he had relocated to Georgia after the commencement of his representation of her or that he would be unable to represent her adequately. Mr. Blair did not deposit Ms. Nelson's fees into a trust account and failed to refund the unearned fee to Ms. Nelson. Ms. Nelson filed a complaint with the Attorney Grievance Commission ("Commission"). The Commission filed a Petition for Disciplinary or Remedial Action against Mr. Blair to which Mr. Blair failed to respond.

The hearing judge found that Mr. Blair violated Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.1, 1.3, 1.4(a)(2), 1.5(a), 1.15(a) and (c), 1.16(d), and 8.4(a), (c) and (d). Neither party filed exceptions to the hearing judge's findings of fact or conclusions of law. Mr. Blair did not appear for oral argument before the Court of Appeals.

Held:

Disbarment is the appropriate sanction.

Mr. Blair accepted a $1,500.00 fee to represent a client and then performed no legal work of value on the client's behalf, did not properly communicate with the client, and failed to deposit the fee into an attorney trust account. Mr. Blair's conduct amounted to incompetence, lack of diligence, and lack of communication, in violation of MLRPC 1.1, 1.3, and 1.4(a)(2). Mr. Blair's receipt of the $1,500.00 unearned fee became unreasonable when he failed to perform legal work of value on behalf of Ms. Nelson, in violation of MLRPC 1.5(a). Mr. Blair failed to deposit the unearned fee into an attorney trust account and failed to keep a record of the fee, in violation of MLRPC 1.15(a) and (c). Mr. Blair, additionally, failed to properly withdraw from representation and refund the unearned fee, thus constituting a violation of MLRPC 1.16(d) and 8.4(a), (c) and (d).

The Court held that Mr. Blair's abandonment of his client, failure to communicate with his client, and failure to return unearned fees warranted the severest sanction of disbarment.

Attorney Grievance Commission of Maryland v. Thomas Wesley Felder, II, Misc. Docket AG No. 33, September Term 2013, filed October 22, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/33a13ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Petitioner, Attorney Grievance Commission ("AGC") of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Thomas Wesley Felder, II. Bar Counsel alleged that Felder, in connection with his representation of Martrell and Timothy Matthews and Bernadine Ekeh, engaged in professional misconduct, violating the following Maryland Lawyers' Rules of Professional Conduct: (1) 1.1 (Competence); (2) 1.3 (Diligence); (3) 1.4(a) and (b) (Communication); (4) 1.15(a) and (c) (Safekeeping Property); (5) 1.16(d) (Declining or Terminating Representation); (6) 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law); (7) 8.1(b) (Bar Admission and Disciplinary Matters); and (8) 8.4(a), (c), and (d) (Misconduct). Bar Counsel also alleged that Felder violated Maryland Rules 16-606.1 (Attorney trust account record-keeping) and 16-604 (Trust account – Required deposits).

The Court referred the matter to the Honorable Michael R. Pearson of the Circuit Court for Prince George's County to conduct an evidentiary hearing and make findings of fact and conclusions of law. The hearing judge found that Felder failed to perform any legal services for his clients after accepting a retainer, ignored his clients' repeated requests for updates and attempts to terminate his representation, failed to maintain his clients' funds in trust, abandoned representation of his clients without communication, failed to return unearned fees to one of his clients until after that client had already filed a complaint with the AGC, and assisted the unauthorized practice of law. The hearing judge concluded that Felder committed all the violations Bar Counsel alleged.

Held:

The Court of Appeals accepted the Findings of Fact and Conclusions of Law of the hearing judge and held that Felder's conduct was harmful both to his clients and to the public perception of lawyers in general. It also highlighted Felder's knowing failure to perform services for which he had been retained and his pattern of neglect with respect to client matters. The Court imposed a sanction of disbarment.

Attorney Grievance Commission of Maryland v. Jason Robin Gelb, Misc. Docket AG No. 36, September Term 2013, filed October 22, 2014. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2014/36a13ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland ("Petitioner"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("Petition") against Respondent, Jason Robin Gelb. The Petition alleged violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), the Maryland Rules, and the Business Occupations and Professions Article ("BOP") in connection with Respondent's representation of Alan Jones, Jr. ("A. Jones"), Calvin Jones ("C. Jones"), Shawn Potochney ("Mr. Potochney"), Dwayne Holley ("Mr. Holley"), and Stephanie Dress ("Ms. Dress").

The Court of Appeals assigned the matter to the Honorable J. Barry Hughes of the Circuit Court for Carroll County (the "hearing judge"). After an evidentiary hearing, at which Respondent did not appear, the hearing judge found the following facts:

Respondent represented A. Jones and C. Jones in collection actions against the debtors of their respective businesses. During the representation, Respondent failed to memorialize his contingency fee agreements in writing and failed to provide A. Jones and C. Jones with monthly reports of the funds recovered from their actions. Respondent also issued A. Jones and C. Jones remittance checks from Respondent's operating account, instead of his trust account, and failed to prosecute a total of six collection cases on their behalf. At one point during Respondent's representation of C. Jones, Respondent issued C. Jones a check that was declined for insufficient funds, and, at another point, Respondent issued C. Jones a post-dated check.

Mr. Potochney also retained Respondent to represent him in collection actions against the debtors of his company. Respondent orally agreed to receive a 25% contingency fee, which he did not memorialize in writing, and Respondent later charged Mr. Potochney a 33% fee for the cases in which Respondent collected funds. Respondent also failed to provide Mr. Potochney with monthly reports of the debts collected, and Respondent instructed Mr. Potochney not to deposit a remittance check because Respondent had insufficient funds in his account.

Mr. Holley retained Respondent to represent him in five criminal and civil actions and paid Respondent a retainer for his services. Although Respondent represented Mr. Holley in one action (a bail review hearing), Respondent failed to represent Mr. Holley in the other pending actions for which Respondent was retained. Respondent also failed to respond to Mr. Holley's repeated attempts to contact him.

Finally, Ms. Dress retained Respondent to represent her in a personal injury claim arising from an automobile accident. During the representation, Respondent failed repeatedly to communicate with Ms. Dress. Then, when Respondent settled the matter, he promised to use a portion of the settlement proceeds to pay Ms. Dress's medical provider, but he took almost six months to do so. This delay caused the medical provider to initiate a collection action against Ms. Dress, which negatively affected her credit score. Respondent subsequently ceased communications with Ms. Dress and failed to respond to her repeated requests for her case file.

Based upon these factual findings, the hearing judge concluded, by clear and convincing evidence, that Respondent had violated MLRPC 1.1; MLRPC 1.3; MLRPC 1.4(a) and (b); MLRPC 1.5(a) and (c); MLRPC 1.15(a), (c), and (d); MLRPC 8.4(a), (c), and (d); Maryland Rule 16-606.1; Maryland Rule 16-609; and BOP § 10-306.

Held:

Because neither Respondent nor Petitioner filed exceptions to the hearing judge's findings of fact, the Court treated those findings as established for the purpose of determining the appropriate sanction. Also, neither Respondent nor Petitioner filed exceptions to the hearing judge's conclusions of law. Based on the Court's *de novo* review of the record, the Court agreed with the hearing judge that Respondent violated MLRPC 1.1; MLRPC 1.3; MLRPC 1.4(a) and (b); MLRPC 1.5(a) and (c); MLRPC 1.15(a), (c), and (d); MLRPC 8.4(a), (c), and (d); Maryland Rule 16-606.1; Maryland Rule 16-609; and BOP § 10-306.

The Court reasoned that Respondent's misconduct, namely his maintenance of insufficient funds in his trust account and his failure to pay promptly Ms. Dress's medical provider, amounted to the misappropriation of client and third party funds. Noting that this Court ordinarily disbars attorneys for the misappropriation of funds, absent compelling extenuating circumstances justifying a lesser sanction, which were not present in this case, the Court held that disbarment is the appropriate sanction for Respondent's misconduct.

Attorney Grievance Commission of Maryland, v. Donald Saunders Litman, Misc. Docket AG No. 81, September Term 2013, filed October 21, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/81a13ag.pdf

ATTORNEY GRIEVANCE – RECIPROCAL ACTION – EXCEPTIONAL CIRCUMSTANCES – CONDUCT WARRANTS SUBSTANTIALLY DIFFERENT DISCIPLINE

ATTORNEY GRIEVANCE – RECIPROCAL ACTION – PUBLIC CENSURE – NO CORRESPONDING MARYLAND SANCTION

ATTORNEY DISCIPLINE – INDEFINITE SUSPENSION

Facts:

This is a reciprocal disciplinary action involving Donald Saunders Litman ("Respondent"), who was admitted to the Bar of this Court on 18 January 1985 and to the Bar of the Commonwealth of Pennsylvania in 1989.

Respondent began the representation that would lead to disciplinary charges in Pennsylvania by appealing three actions of Pennsylvania's Department of Environmental Protection ("DEP") to the Pennsylvania Environmental Hearing Board on behalf of his client, Hanoverian, Inc. Hanoverian had purchased previously a landfill and the corporate name of its previous owner at a U.S. Bankruptcy Court-ordered auction. Between April and December 2006, the DEP: revoked the permit to operate the landfill that had been granted the bankrupt entity; declared forfeit a bond securing cloture of the landfill posted by bankrupt entity; and, issued an Administrative Order charging Hanoverian with operating the landfill without a permit, failing to post a substitute bond, and other violations.

In an untimely attempt to remove the administrative appeals to the U.S. District Court for the Middle District of Pennsylvania, Respondent: mounted frivolous legal contentions; made gross misrepresentations of existing law; made factual claims without evidentiary support; used misrepresentations as a litigation tool to increase the cost of litigation for the DEP; failed to cite the record in pleadings and papers, thereby requiring circuitous research by the District Court; and, failed to make a reasonable inquiry into the facts and law. The Respondent was sanctioned by the District Court and ordered to pay attorney's fees to the DEP.

The District Court remanded the appeals back to the Pennsylvania Environmental Hearing Board, where Respondent raised the same factual and legal contentions that had been discredited by the federal court. The DEP sought further sanctions against Litman. The administrative litigation was rendered moot, however, before the administrative tribunal could decide the case.

As a result of Respondent's misconduct before the federal court and the Pennsylvania Environmental Hearing Board, the Pennsylvania Office of Disciplinary Counsel filed a Petition for Discipline against Respondent. In a hearing before the Disciplinary Board of the Supreme Court of Pennsylvania, Respondent and the Pennsylvania Disciplinary Counsel submitted a Joint Stipulation of Fact and Law, agreeing to the material facts of Respondent's misconduct. At the hearing, Respondent presented evidence of his remorse and evidence that the managing partner of his law firm controlled the litigation strategy. The Disciplinary Board of the Supreme Court of Pennsylvania found that Respondent violated Rules 1.1, 3.3(a)(3), and 8.4(c) and (d) of the Pennsylvania Rules of Professional Conduct and recommended that Respondent be censured publically by the Supreme Court of Pennsylvania. On 27 November 2012, the Supreme Court of Pennsylvania brought Respondent physically before the Court, summarized the findings of the Disciplinary Board, and censured publically Litman.

The Attorney Grievance Commission of Maryland, through Bar Counsel, sought disbarment in Maryland for Respondent's misconduct in Pennsylvania. Respondent argued that he had been punished adequately by the Pennsylvania public censure and sanction from Maryland would be grave injustice. There was no disagreement about the material facts.

Held:

Respondent violated the analogous Maryland Lawyers Rules of Professional Conduct (MLRPC) 1.1, 1.16(a)(1), 3.1, 3.3(a), and 8.4(a), (c) and (d). Given Respondent's remorse over his actions, cooperation in the Pennsylvania and Maryland attorney discipline process, and otherwise clean disciplinary record, the appropriate sanction is indefinite suspension from the practice of law, with the right to apply for reinstatement in Maryland no sooner than six months after the effective date of the suspension.

Attorney Grievance Commission of Maryland v. Daun Robert Weiers, Misc. Docket AG No. 10, September Term 2013, filed October 22, 2014. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2014/10a13ag.pdf

ATTORNEY DISCIPLINE – REPRIMAND

Facts:

The Attorney Grievance Commission of Maryland filed a "Petition for Disciplinary or Remedial Action" against Respondent, Daun Robert Weiers. Petitioner charged Respondent with violations of the Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.1 (Competence), 1.15(a) and (c) (Safekeeping Property), 1.5(a) (Fees), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(d) (Misconduct), and Maryland Rules 16-606.1 (Attorney Trust Account Record Keeping) and 16-607 (Commingling of Funds).

The hearing judge found that on or about January 7, 2009, Respondent was hired by Van Hulamm on behalf of Crescendo Realty, LLC, Mr. Hulamm's company, to provide legal services related to the removal of a fence on neighboring property, which blocked access to a parking lot used by businesses renting space from Crescendo Realty, LLC. Respondent and Mr. Hulamm orally agreed that Crescendo Realty, LLC, would pay a non-refundable retainer fee of $1,000.00, with excess work to be billed at the rate of $150.00 per hour, plus $30.00 per letter and telephone call. Respondent immediately deposited the retainer fee into his client trust account.

On or about January 27, 2009, Respondent wrote a check to himself for $300.00 from his attorney trust account. The memo of the check read: "Earned Fee–Tighe/Crescendo." On or about March 13, 2009, Respondent wrote a check to himself for $300.00 from the trust account, with the check memo reading: "Earned Fee–Crescendo/Perrone." On March 18, 2010, Respondent withdrew $700.00 from the trust account. The check memo read: "Fee–Crescendo Realty."

Pursuant to the retainer agreement, Respondent researched various options for removal of the fence obstructing access to Hulamm/Crescendo Realty's parking lot. None of the options researched proved favorable to Mr. Hulamm's case.

In early 2010, the fence was removed. Mr. Hulamm advised Respondent and asked for a refund of the retainer. On November 17 and 21, 2011, Mr. Hulamm left notes for Respondent seeking a refund. Mr. Hulamm next reached out to Mr. Slade, a mutual friend who had introduced Mr. Hulamm to Respondent. Mr. Slade spoke with Respondent, who agreed to return $500.00 of the retainer fee. Mr. Hulamm sent an email to Respondent on or about January 11, 2012, confirming the agreement. He added that should the $500.00 not be received by January 17, 2012, Mr. Hulamm would expect a full $1,000.00 refund. Mr. Hulamm did not receive the money by

January 17, 2012, and he filed a grievance with the Attorney Grievance Commission the next day. On January 22, 2012, Mr. Hulamm received a $500.00 check from Respondent.

On January 27, 2012, the Commission sent Respondent a letter enclosing Mr. Hulamm's complaint and requesting a response within fifteen (15) days. A follow-up letter was sent on February 24, 2012. Respondent responded on March 8, 2012. On April 12, 2012, the Commission wrote a letter seeking a copy of the retainer agreement with Mr. Hulamm and the billing invoice. A follow-up letter was sent on May 3, 2012. Respondent answered on May 11, 2012, explaining that he did not have a written retainer agreement or time records. On June 12, 2012, the Commission wrote a letter to Respondent asking for documentation that the client's fee had been maintained in trust until earned. A follow-up letter was sent July 6, 2012. On July 25, 2012, Respondent replied that he was unaware of the specific misconduct for which he was being investigated. The Commission sent a letter on September 4, 2012, suggesting that Respondent may be in violation of MLRPC 1.15(a) and (c), and Maryland Rule 16-606.1. Respondent replied on September 10, 2012.

On October 5, 2012, the Commission's investigator, Edwin Karr, Jr., attempted to call Respondent, but the number had been temporarily disconnected. Mr. Karr checked with the Maryland State Bar directory and an internal database, both of which listed the number he had called. On October 15, 2012, Mr. Karr visited Respondent's office and left his business card. Respondent called him later that day, but refused to set up an interview with the investigator without first being advised of the charges against him.

Based on her factual findings, the hearing judge concluded that Respondent violated MLRPC 1.15(a) and 8.1(b), and Md. Rule 16-607. Neither party filed exceptions to the hearing judge's findings of fact and conclusions of law.

Held:

With regards to MLRPC 1.15(a) and Maryland Rule 16-607, the Court held that Respondent's failure to withdraw earned fees from his trust account in a timely manner resulted in an impermissible commingling of funds violative of the Rules. Mr. Weiers withdrew the remaining balance of the Crescendo Realty, LLC retainer in March of 2010, despite having admittedly completed the work for which he was retained by March, 2009. This one-year delay resulted in a violation of MLRPC 1.15(a) and Md. Rule 16-607.

The Court also concluded that Respondent's failure to cooperate readily and fully with Bar Counsel constituted a violation of MLRPC 8.1(b). Despite ultimately participating in the action, Mr. Weiers's conduct was indicative of his antipathy towards Bar Counsel and its responsibilities, as well as the legitimacy of the attorney disciplinary process. Respondent's conduct reflected a disparagement of and lack of regard for the Attorney Grievance Commission.

Mindful of Respondent's troubling attitude toward Bar Counsel and the investigative process, and having cautioned Respondent against such conduct in the future, the Court concluded that a reprimand was the appropriate sanction in this case.

State of Maryland v. Jonathan Johnson, No. 3, September Term 2014, filed October 22, 2014. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2014/3a14.pdf

CRIMINAL LAW – PRIVILEGED COMMUNICATIONS

Facts:

Respondent, Jonathan Johnson, was convicted of sexual abuse of a minor and second-degree sexual offense. Leading up to trial, Respondent sought, by means of a trial subpoena, access to the minor victim's mental health records. The counseling center filed a "Motion for Protective Order," effectively seeking to quash the subpoena. At a hearing on the motion, the counseling center explained that the records sought by Respondent are privileged and confidential because they contain communications by the minor victim to mental health providers, and include notes from psychiatrists and a licensed clinical social worker. When the trial judge inquired as to why Respondent was seeking the records, defense counsel responded that "I'd like to see the records, one, to know what is this young man's mental health diagnosis. Is he, is he bipolar? Is he paranoid schizophrenic? Is he delusional? Does he have hallucinations . . . ?" because "if he's delusional, and if [he] has hallucinations, I believe that's . . . exculpatory for [Respondent's] case." Further, when asked to provide something more specific than that, defense counsel stated "[n]ot without even having a slightest idea of what may be in the records, Your Honor, not without even knowing his diagnosis, no. So, . . . if you wish to call it a fishing expedition, it may be because I have no idea what these records may contain." Relying on *Goldsmith v. State*, 337 Md. 112, 651 A.2d 866 (1995), and *Fisher v. State*, 128 Md. App. 79, 736 A.2d 1125 (1999), the trial court concluded that defense counsel's proffer to the court was insufficient to permit disclosure of the victim's privileged mental health records and granted the motion.

Following his conviction, Respondent noted an appeal to the Court of Special Appeals. In an unreported opinion, the intermediate appellate court reversed his conviction, holding that the trial court committed reversible error by granting the counseling center's motion. Specifically, the Court of Special Appeals stated "[w]hile we cannot expect counsel to have precise information as to the content of the records, he did suggest that it would be appropriate to know of [J.C.'s] propensity for veracity." In the court's view, "[t]hose suggestions alone were sufficient, at the very least, to call for an *in camera* review of the records to determine their relevance, vis a vis [Respondent]'s constitutional rights, before ruling on the motion." On the State's petition, this Court granted *certiorari*.

Held: Reversed.

Md. Code (1973, 2013 Repl. Vol., 2014 Supp.), §§ 9-109 and 9-121 of the Courts and Judicial Proceedings Article provides that a patient has a privilege to preclude the disclosure of his or her communications to a licensed psychiatrist and communications to a licensed clinical social worker, including at trial. In *Goldsmith v. State*, 337 Md. 112, 129, 651 A.2d 866, 874 (1995), the Court of Appeals previously recognized that, in the context of a criminal trial, a "defendant's constitutional rights at trial may outweigh the victim's right to assert a privilege." Just as the victim does not have an absolute privilege against disclosure of psychotherapy records, however, nor does a defendant have an absolute right to obtain those records for use at trial. The Court's stated purpose in *Goldsmith* was "to strike a balance between the competing interests of a witness's privilege and a defendant's federal and state constitutional rights to obtain and present evidence necessary to the defense." 337 Md. at 121, 651 A.2d at 870. To achieve this goal, the trial court must apply a balancing test, whereby a defendant must meet a minimum threshold to be entitled to an in camera review of the records. The Court affirmed the test previously iterated by the *Goldsmith* court, that "in order to abrogate a privilege such as to require disclosure at trial of privileged records, a defendant must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense[, which] must be more than the fact that the records 'may contain evidence useful for impeachment on cross-examination.'" 337 Md. at 133-34, 651 A.2d at 877 (footnote omitted).

In the instant case, the Court of Special Appeals held that the suggestion regarding the apparent need to know the victim's propensity for veracity was enough to at least warrant an *in camera* review. The Court of Appeals disagreed, stating that a "fishing expedition," without more, does not satisfy the *Goldsmith* standard. The mere generalized suggestion "that it would be appropriate to know of [the minor victim's] propensity for veracity" is not enough to overcome the victim's privilege in his mental health records. Rather, in order to gain access to any information in those records, the defendant may (and must) be able to point to *some fact* outside those records that makes it *reasonably likely* that the records contain exculpatory information.

John S. Burson, et al., v. Jeffrey G. Capps, No. 2, September Term 2014, filed October 23, 2014. Opinion by Harrell, J.

Adkins and McDonald, JJ., concur in part and dissent in part.

Watts, J., joins judgment only.

http://www.mdcourts.gov/opinions/coa/2014/2a14.pdf

FEDERAL TRUTH IN LENDING ACT – RIGHT OF RESCISSION – STATUTORY INTERPRETATION

Facts:

In March of 2003, Respondent, Jeffrey G. Capps ("Capps"), purchased a home located at 2909 Loch Haven Court, Ijamsville, Maryland. Early in 2007, Capps decided to pursue refinancing his home loan. He applied for refinancing through a loan broker to EquiFirst Corporation. After rejecting two offers of refinancing packages in February and March of 2007, Capps accepted a third offer in April 2007. The Deed of Trust and Adjustable Rate Note implementing the third offer were signed by Capps on 17 April 2007, securing a loan for $350,000. The settlement date on the financing statement was April 24, and the loan proceeds were disbursed on April 25, in satisfaction of the pre-existing mortgage and credit card debts, with additional cash to the borrower directly.

On April 15 or 16, 2007—before the loan documents were signed—Capps attempted to rescind a loan by faxing to EquiFirst a form titled "Notice of Right to Cancel" referring to a property address of 2909 Loch Haven Court, Ijamsville, MD, 21754. In the subject line on the fax cover sheet of this form, Capps stated "I wish to exercise this Right[.] Please see attached form." This document was received by EquiFirst. Capps alleges that at some point after he sent the fax, someone from EquiFirst "told [him] that this rescission was not effective, that [he] could not rescind, and that the mortgage would remain in effect." Capps did not identify which EquiFirst employee made such statements, nor did he substantiate from any other source that the conversation occurred. He alleged further that he "believed what EquiFirst told [him]" and therefore began making payments on the loan. In 2009, Capps lost his job and became unable to make his monthly mortgage payments.

On 30 September 2009, on behalf of Wells Fargo, Petitioners ("Trustees") filed in the Circuit Court for Frederick County an Order to Docket Foreclosure. On 30 December 2009, Capps filed a Motion to Stay or Dismiss the foreclosure proceeding, in which he argued that he had rescinded the loan, pursuant to 15 U.S.C. § 1635, by faxing a "Notice of Right to Cancel" to EquiFirst two days before closing on the loan. Also on 30 December 2009, Capps filed in the foreclosure action a third-party complaint against EquiFirst and Wells Fargo, again arguing that he rescinded timely and validly the loan and also that EquiFirst violated the federal Truth in

Lending Act ("TILA") by refusing to recognize his rescission. Wells Fargo filed a Motion to Dismiss the Third-Party Complaint, which was granted ultimately on 2 May 2011. On 7 December 2011, the note holder purchased for $275,000 the home at a foreclosure public auction. A Report of Sale was filed on 5 January 2012. Capps filed on 23 February 2012 Exceptions to the Foreclosure Sale, where he argued again that he had rescinded the loan before it was consummated. The exceptions were overruled at a hearing on 3 April 2012, and the sale was ratified on 5 April 2012. That same day, the court entered an Order of Ratification of Sale. Capps appealed to the Court of Special Appeals.

In an unreported opinion, the Court of Special Appeals reversed the Circuit Court. Because there was no language in § 1635 or Regulation Z—TILA's implementing regulation—*prohibiting* a borrower from rescinding a loan prior to the consummation of the transaction, the Court of Special Appeals reasoned that such an action, when viewed in a light favoring the interests of borrowers, was supported by the statute. The intermediate appellate court remanded the case to the Circuit Court to (1) determine whether it is possible for all parties to return to the *status quo ante*, (2) use its equitable powers to restore Capps's credit rating should he be able to return the proceeds of the loan, and (3) determine whether EquiFirst violated TILA by ignoring intentionally Capps's rescission notice.

The Court of Appeals granted the Trustees' petition for writ of certiorari, 435 Md. 501, 79 A.3d 947 (2013), to consider three questions: (1) "Whether a TILA Notice of Rescission can be effective to cancel a loan transaction that has not yet taken place, and remain effective despite the issuing party's subsequent acceptance of the benefits of the transaction[,]" (2) "Whether a TILA action filed in December 2009 on the basis of a Notice of Rescission issued in April 2007 was untimely as beyond the one-year statute of limitation in 15 U.S.C. § 1640(e)[,]" and (3) "Whether rescission is an available remedy when the trial court has no jurisdiction over either the original lender or its assignee because all claims against both have been dismissed, with no appeal taken from that dismissal[.]"

Held: Reversed.

The Court of Appeals first turned to the text of TILA and Regulation Z in order to understand the nature of the right to rescission granted in 15 U.S.C. § 1635. Section 1635 provides that, in the case of "any consumer credit transaction," the homeowner has a "right to rescind the transaction until midnight of the third business day following the consummation of the transaction . . . ." 15 U.S.C. § 1635(a). The parties did not dispute when the three-day window for rescission shut, but rather when it opened.

Noting that TILA does not define the term "rescission," the Court of Appeals understood the term to mean, for present purposes, "to cancel" or "to undo." TILA also does not define the term "transaction," but the Court of Appeals concluded that the word "transaction," when used as a part of other defined terms (e.g., "residential mortgage transaction") implied a consummated event, indicating that credit transactions must be consummated for the right to rescind to attach

to them. Further, Regulation Z presumes that, at the time a borrower wishes to exercise his or her rescission right, there is something to rescind. Until a loan is consummated, there is no consumer credit transaction, and the consumer has no obligations from which he or she would need a right of rescission. Under TILA, then, the Court of Appeals concluded that Capps could not have rescinded what he had not created as of the date of the purported rescission. On the 15th of April, when he faxed a Notice of Right to Cancel, the arguably rescindable transaction had not come into being, and therefore could not be cancelled. Capps consummated the transaction on Tuesday, April 17, when he signed the loan documents. April 17, then, is the earliest that the three-day window could have opened.

The Court of Appeals then discussed cases from the United States Court of Appeals for the Fourth Circuit, which shares the same view of § 1635. In *Weintraub v. Quicken Loans, Inc.*, 594 F.3d 270 (4th Cir. 2010), the Fourth Circuit considered whether the TILA right to rescind applies in cases where the transaction had not closed yet, and held that no "consumer credit transaction" exists for which the right to rescind can be exercised until that transaction has been consummated. The Fourth Circuit relied also on a "commonsense" reading of the text in holding that the term transaction "refers to a consummated, binding agreement, rather than to the whole course of the parties' interactions. Otherwise, there would be nothing to rescind. The Court of Appeals also discussed a case arising from a federal district court in Illinois, *Sampanetti v. E*Trade Mortgage Corp.*, No. 02-C-3513, 2002 WL 31478269 (N.D. Ill. Nov. 5, 2002), which held similarly, as well as a case from a City Court for Mt. Vernon, New York (a trial court-equivalent), *Community Mutual Savings Bank v. Gillen*, 655 N.Y.S.2d 271 (N.Y. City Ct. 1997), which construed § 1635's right of rescission in the same manner as the Court of Special Appeals of Maryland.

Because of the Court of Appeals' disposition of the first question, it did not reach the second and third questions.

Luther Gales, III v. Sunoco, Inc. and American Zurich Insurance, No. 99, September Term 2013, filed October 23, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/99a13.pdf

WORKERS' COMPENSATION LAW – DE NOVO WORKERS' COMPENSATION JURY TRIALS – WORKERS' COMPENSATION COMMISSION ("COMMISSION") DECISIONS

Facts:

Petitioner, Luther Gales, III, sustained an accidental injury while delivering gasoline for Respondent, Sunoco, Inc. Sunoco's workers' compensation insurer, Respondent, American Zurich Insurance, compensated Gales for temporary total disability from February 2010 to December 2010. Gales requested that Sunoco, Inc. and American Zurich Insurance (collectively "Employer") pay for additional temporary total disability benefits and an evaluation by a pain management specialist. After Employer refused, Gales filed a claim with the Workers' Compensation Commission ("the Commission"). The Commission entered an Award of Compensation ("Award"), ordering Employer to pay for the additional benefits and evaluation. Employer appealed to the Circuit Court for Anne Arundel County and requested a jury trial.

After Employer rested its case during the jury trial, Gales moved for judgment, arguing that because Employer failed to move the Award into evidence, it had failed to meet its burden of proving the Commission erred. Although Employer maintained it was not obligated to offer the Award into evidence, it nevertheless moved to reopen evidence so it could do so. The trial court denied the Motion to Reopen and granted Gales's Motion for Judgment, explaining that Md. Code (1991, 2008 Repl. Vol.), § 9-745 of the Labor and Employment Article ("LE § 9-745") and *Holman v. Kelly Catering, Inc.*, 334 Md. 480, 639 A.2d 701 (1994) require the appellant in a de novo workers' compensation jury trial to offer the Commission decision into evidence.

Employer appealed to the Court of Special Appeals, which reversed the trial court, concluding that neither *Holman* nor LE § 9-745(b) requires the appellant to move the Award into evidence. Gales petitioned for writ of certiorari, which this Court granted, to consider whether an appellant in a *de novo* workers' compensation jury trial is required to move the Commission decision into evidence.

Held: Affirmed.

First, the Court of Appeals analyzed *Holman* and clarified its holding: that the Commission decision cannot be excluded during the circuit court appellate proceeding challenging that decision—the trial judge must give a jury instruction that refers to the WCC decision and explains that it is presumed *prima facie* correct. The Court then confirmed that a trial judge can,

when the Commission decision is not in evidence, give the instruction the Court prescribed in *Holman* because that instruction correctly states the law as articulated in LE § 9-745(b)(1) and that statement of the law is applicable in light of the evidence before the jury.

Second, the Court examined LE § 9-745, first concluding that the Legislature did not intend for LE § 9-745(b) to require appellants to move the Commission decision into evidence. Such a requirement, the Court observed, would do little to advance the legislative objective that juries should be informed of what the Commission decided. The Court then concluded that a jury can, without the Commission decision being in evidence, apply the presumption of *prima facie* correctness mandated by LE § 9-745(b)(1) and determine whether the appellant has met his burden, imposed by LE § 9-745(b)(2), of proving the Commission erred.

Accordingly, the Court held that an appellant in a *de novo* workers' compensation jury trial is not required to move the Commission decision into evidence.

COURT OF SPECIAL APPEALS

Baltimore Home Alliance, LLC v. Jacob Geesing, et al., No. 1140, September Term 2013, filed August 1, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/1140s13.pdf

FINAL JUDGMENTS – APPEALABLE ORDERS – FORECLOSURE SALE – ORDER FORFEITING PURCHASER'S DEPOSIT AND AUTHORIZING RESALE OF THE PROPERTY NOT FINAL JUDGMENT OR APPEALABLE INTERLOCUTORY ORDER

Facts:

Appellant purchased residential real property at a foreclosure sale for $100,000. Appellant paid a deposit of $27,000 at the time of the sale. The Terms of the Sale provided that, if appellant failed to settle within ten days of the sale's ratification, the deposit would be forfeited and the property resold at the appellant's risk and expense.

Appellant failed to settle within the ten day period, and the circuit court, upon motion by the substitute trustees, entered an Order forfeiting appellant's deposit and authorizing the resale of the property at appellant's risk and expense. Appellant noted a timely appeal from the Order.

Thereafter, the property was resold for $193,800, and the second sale was ratified by the trial court. Appellant did not note an appeal from the ratification of the second sale. Also, no auditor's report for the second sale was filed.

Held: Dismissed.

On appeal, the Court of Special Appeals dismissed the appeal, because the Order forfeiting the deposit and authorizing the resale of the property was neither a final judgment nor an appealable interlocutory order. The Court stated that a final judgment must determine and conclude the rights involved or deny a party the means of further prosecuting or defending his or her rights, and must leave nothing more to be done to effectuate the court's disposition of the matter. In the case *sub judice*, the Court ruled that the Order did not determine the rights of the parties, because whether the deposit would actually be forfeited was unclear, and appellant retained the ability to assert its rights regarding the deposit upon the filing of the auditor's report on the second sale of the property. Moreover, according to the Court, the Order created additional responsibilities for

the parties by authorizing the resale of the property, which would be subject to further review by the court, instead of leaving nothing more to be done to effectuate the court's disposition of the matter.

The Court of Special Appeals also held that the Order was not an appealable interlocutory order under Courts & Judicial Proceedings Article ("CJP"), Section 12-303. The only relevant section, CJP §12-303(3)(vi) provides that an appeal can be taken from an interlocutory order that "determin[es] a question of right between the parties and directing an account to be stated on the principle of such determination." The Court observed that the Order in the instant case neither directed an account to be stated, nor did it determine the rights of the parties. The Court concluded that, when an auditor's report on the second sale and any exceptions thereto were adjudicated by the trial court, and a final determination was made regarding appellant's deposit, both parties' rights and obligations in the instant matter would then be settled. Accordingly, the Order was not an appealable interlocutory order, and the appeal had to be dismissed.

Tower Oaks Boulevard, LLC v. Brent W. Procida, et al., Substitute Trustees, No. 2459, September Term 2012, filed October 2, 2014 Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2459s12.pdf

FORECLOSURE ACTION – MANAGEMENT OF LIMITED LIABILITY COMPANY – AUTHORITY UNDER OPERATING AGREEMENT TO DECIDE WHETHER TO DEFEND FORECLOSURE ACTION AGAINST LLC'S PROPERTY – AMENDMENT TO OPERATING AGREEMENT – DECISION MADE BY MEMBER WITHOUT AUTHORITY TO DECIDE – RATIFICATION

Facts:

Substitute trustees brought action to foreclose on deed of trust against commercial property owned by Tower Oaks, a Virginia LLC. The sole member of Tower Oaks is Oak Plaza, a Maryland LLC. Under its operating agreement, the decision whether to defend litigation against it is to be made by a majority of its members, *i.e.*, by Oak Plaza. Under Oak Plaza's operating agreement, the decision whether to defend litigation is to be made by the Manager. Before the foreclosure action was filed, the Manager became disabled and one of the members was appointed guardian of his property, with the power to act as the Manager.

The Manager died a few days before the foreclosure action was filed. The Oak Plaza operating agreement contained a succession clause by which two other members became the Manager upon the Manager's death. Nevertheless, the member acting as Manager under the guardianship order made the decision to defend the foreclosure action against Tower Oaks, and took action to do so, through counsel, filing a motion to stay and dismiss. The substitute trustees opposed the motion on substantive grounds and also on the ground that the member who made the decision to defend the foreclosure action was not authorized to do so, and therefore the motion was of no effect. The court denied the motion on the latter ground, and also commented that if the motion had been properly authorized, the court would have denied it. Tower Oaks appealed the interlocutory order denying the motion to stay and dismiss.

Held:

The member of Oak Plaza who had been acting as its Manager under the guardianship order lost his authority to act as Manager upon the death of the ward. That member's effort to amend the operating agreement to change the succession clause failed, because such an amendment only could be effected by a unanimous vote of the members. Also, there was no merit in the member's arguments that he had residual authority under the guardianship order after the Manager's death to decide whether Tower Oaks would defend itself in the foreclosure action and

that he had validly decided that Tower Oaks would defend itself in such an action before the action was filed. The circuit court correctly determined that, when the foreclosure action was filed, the member who made the decision to defend Tower Oaks in that action, and took steps in furtherance of that decision, was not authorized to do so, and therefore the motion to stay and dismiss was not effective.

The evidence at the hearing on the motion to stay and dismiss revealed that the two members who became the Manager, jointly, upon the death of the original Manager, and therefore had the authority to decide whether Tower Oaks would defend itself, did not so decide; and only one of them testified that he would approve the unauthorized decision to do so. The other testified that he did not have enough information about the foreclosure action to know whether he would approve it. Because the two were required to act jointly as Manager, and because only one provided testimony to support ratification of the unauthorized acts of the non-Manager member, the evidence as of the date of the hearing could not support a finding that the unauthorized acts had been ratified.

The substitute trustees' motion to dismiss the appeal as moot lacks merit. They argued that because Tower Oaks only challenged the circuit court's ruling on lack of authority, and not its ruling that, had the motion to stay and dismiss been authorized, it would have been denied, the appeal had become moot. The doctrine of mootness did not apply. If the court had made its decision on two separate and independent grounds, and Tower Oaks only had challenged one ground on appeal, this Court would be obligated to affirm the court's order on the other, unaddressed ground. Even in that situation, the appeal would not be moot. In any event, the court did not rule on two separate and independent grounds. The basis for its ruling was lack of authority to file the motion to stay and dismiss. Its second "ruling" -- that the motion to stay and dismiss appeared not to have a legal basis -- was an observation about how the motion would have been decided ***if*** it had been filed with proper authorization; *i.e.*, it was a contingent, not an independent, "ruling."

Prince George's County, Maryland v. Columcille Building Corporation, No. 2355, September Term 2012, filed August 29, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/2355s12.pdf

MOOTNESS – LACK OF EFFECTIVE REMEDY – APPELLANT CANNOT PREVAIL ON RETRIAL FOR FAILURE TO FILE A CROSS-CLAIM

Facts:

Two Prince George's County police officers, who were working as private security guards, shot Donte Guzman in a parking lot after an event in a building owned by Columcille Building Corporation ("Columcille"). Guzman brought a tort action against, among others, Prince George's County ("the County") and Columcille as co-employers of the police officers under the theory of *respondeat superior*. The County did not file a cross-claim against Columcille. At the end of all of the evidence at trial, the circuit court granted judgment in favor of Columcille, ruling, as a matter of law, that Columcille was not an employer of the police officers who sot Guzman. The jury returned a verdict in favor of Guzman and against the officers and the County for $216,131.05, which was later reduced by the court to $200,000.

On appeal to the Court of Special Appeals, the County did *not* ask for review of the judgment against it and in favor of Guzman. Instead, the County asked the Court to reverse the judgment in favor of Columcille and against Guzman, claiming that the trial court erred by holding, as a matter of law, that Columcille was not an employer of the police officers involved in the shooting. The County contended that the issue of Columcille's status as an employer of the police officers was a jury issue and thus should have been submitted to the jury. Guzman did not appeal the judgment in favor of Columcille.

At oral argument before the Court of Special Appeals, Guzman's counsel represented that, if the Court should reverse the judgment in favor of Columcille and remand the case for a new trial, Guzman did not intend to relitigate his claims against Columcille.

Held: Appeal dismissed as moot.

The Court of Special Appeals began by observing that a case is moot where there is no longer an existing controversy or *when there is no longer an effective remedy the Court could grant*. Here, because the County did not file a cross-claim, the only claims that could be litigated on retrial were Guzman's claims against Columcille. Guzman, however, represented that he would not pursue those claims, and thus the trial court would have no choice but to enter judgment in favor of Columcille for lack of evidence. The County would have no right to litigate Guzman's claims against Columcille, nor would the County be able to introduce evidence in support of a non-

existent cross-claim. Accordingly, the Court held that a judgment in favor of the County in the appeal would not provide any remedy to the County.

In addition, the Court of Special Appeals determined that the County was not entitled to any relief on remand through a post-trial motion for contribution under the Uniform Contribution Among Joint Tort-Feasors Act ("the Act"). Although the County did not have to file a cross-claim to recover under the Act, the County still had to have a *right* to contribution under the Act and Rule 2-614. The trial court had already determined that Columcille was not a joint tort-feasor, and there is nothing in the Act that would permit the County to relitigate that issue as a part of a post-trial motion for contribution. Also, the right to contribution arises when a joint tort-feasor has paid more than his or her pro rata share of the common liability. There was no indication in the record that the County had paid any part of the judgment against it, much less paid more than its pro rata share.

The Court concluded that without the ability to provide the County with an effective remedy, the appeal had to be dismissed as moot.

Lisy Corporation v. McCormick & Co., Inc., et al., No. 1231, September Term 2013, filed on October 7, 2014. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2014/1231s13.pdf

CIVIL PROCEDURE – TRIALS – JURY TRIALS – RIGHT TO JURY TRIALS

Facts:

Appellant Lisy Corporation filed a complaint against Barry A. Adams, McCormick & Company Inc., and Mojave Foods Corporation (a subsidiary of McCormick) in the Circuit Court for Howard County on February 28, 2011, alleging, inter alia, tortious interference with contract, tortious interference with business relations, and breach of Adams's employment contract. Along with its complaint, Lisy filed a civil non-domestic case information report ("CIR"), which was subsequently served on all of the defendants. On the CIR, Lisy checked the "yes" box in the jury demand section. Lisy did not file any separate document demanding a jury trial.

On July 25, 2012, the circuit court issued a notice scheduling the case for a jury trial to begin on September 18, 2012. On August 29, 2012, the Court of Appeals issued its opinion in *Duckett v. Riley*, 428 Md. 471 (2012). In *Duckett*, the Court of Appeals held that a case information report which was filed with the court but not served on the opposing party was not a proper jury trial demand.

McCormick filed a "Motion to Confirm Non-Jury Proceeding" on September 6, 2012. On September 18, 2012, the circuit court ruled that the case would proceed as a non-jury trial. The circuit court applied *Duckett* and found that the CIR was not a pleading or a paper as contemplated by Maryland Rule 2-325. The circuit court further found that Lisy had waived its right to a jury trial under Rule 2-325.

Lisy moved to postpone the trial in order to seek appellate review of the court's ruling on the jury demand issue. Lisy's motion to postpone was granted, and Lisy subsequently filed a petition for a writ of mandamus in the Court of Appeals, which was denied on November 15, 2012 without a written opinion.

The circuit court rescheduled the case as a non-jury trial beginning on April 15, 2013. Follow a ten-day trial, the circuit court issued a memorandum opinion on July 22, 2013, entering judgment in favor of McCormick against Lisy. The circuit court found in favor of Lisy against Adams.

This appeal followed.

Held: Affirmed.

The Court of Special Appeals held that, under *Duckett*, a CIR is not a "pleading" or "paper" for the purposes of Maryland Rule 2-325(a). The Court observed that in *Duckett*, the Court of Appeals had considered the plain language of the term "paper," the common understanding of the term by the Maryland Bar and Bench, the context of the use of the term in other rules, and the legislative intent when reaching the conclusion that the term "paper" does not include a CIR.

The Court of Special Appeals held that the fact that the CIR was served in this case did not render the CIR a proper demand for jury trial. The Court noted that the Maryland Rules are precise rubrics which are required to be strictly followed and held that Lisy's jury demand was defective because Lisy failed to strictly follow the requirements of Maryland Rule 2-325. The Court of Special Appeals further held that McCormick had not waived its right to object to the defective jury demand.

Allstate Lien & Recovery Corporation, et al. v. Cedric Stansbury, No. 1025, September Term 2013, filed October 7, 2014. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2014/1025s13.pdf

GARAGEMAN'S LIEN STATUTE – CL§ 16-202 – CL § 16-207 – MCDCA – CL § 14-202

Facts:

Mr. Stansbury brought his vehicle to Russel Auto Imports, LLC ("Russel") service department for repair. Russel subsequently repaired Mr. Stansbury's vehicle and advised that the total amount owed was $6,330.37. Mr. Stansbury requested a payment plan, but he was informed that the repair bill had to be paid in full.

Russel and Allstate Lien & Recovery Corporation ("Allstate") began the process of selling Mr. Stansbury's vehicle, executing a "Notice of Sale of Motor Vehicle to Satisfy a Lien" ("Lien Notice"). The Lien Notice sent to Mr. Stansbury provided that Allstate, on behalf of Russel, would sell Mr. Stansbury's vehicle at public auction to satisfy Russel's lien, unless Mr. Stansbury paid the following: repair charges in the amount of $6,630.37; and "Costs of Said Process," in the amount of $1,000, for a total of $7,630.37. The Lien Notice provided that, unless Mr. Stansbury paid that amount in full within ten days of the Lien Notice, Allstate would sell the vehicle on June 23, 2011. The repair charges in the Lien Notice were $300 more than the total amount owed for repairs, but Allstate suggested that Russel include the additional amount for storage charges, even though Mr. Stansbury did not consent in writing to storage charges for the vehicle, and the repair authorization form did not mention storage fees. The additional $1,000 was not related to repair or storage.

After the vehicle was sold at auction, Mr. Stansbury brought suit in the Circuit Court for Baltimore County, alleging that appellants violated Maryland's Consumer Protection Act ("MCPA") and Consumer Debt Collection Act ("MCDCA") by, among other things, including the "processing fee" of $1,000 as part of the amount of the lien that Mr. Stansbury was required to pay to redeem his vehicle. The circuit court ruled, as a matter of law, that the processing fee was not part of the garageman's lien. It instructed the jury of that ruling, and the jury subsequently found that appellants violated the MCPA and the MCDCA. It awarded Mr. Stansbury $16,500 in compensatory damages, plus attorney's fees.

Held: Affirmed.

A motor vehicle lien pursuant to CL § 16-202(c) is based solely on charges incurred for repair or rebuilding, storage, or tires or other parts or accessories. The lien does not encompass "cost of

process" fees, and such fees should not be included in the amount the customer must pay to redeem the vehicle.

The MCDCA prohibits a debt collector from claiming, attempting, or threatening to enforce a right with knowledge that the right does not exist. Because appellants did not have a right to include processing fees in the lien, the jury could properly find that appellants violated the MCDCA by including those costs in the amount of the lien that Mr. Stansbury was required to pay to redeem the vehicle.

Donald R. Twigg v. State of Maryland, No. 1878, September Term 2011, filed October 1, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/1878s11.pdf

CRIMINAL LAW – SENTENCING – MERGER – AUTHORITY TO RESENTENCE AFTER MERGER

Facts:

Appellant was convicted of second degree rape, third degree sexual offense, incest, and sexual child abuse. The victim was appellant's daughter, and the offenses were committed between 1974 and 1979, when she was between nine and fourteen years old. The trial court imposed consecutive sentences of twenty years for second degree rape, ten years for third degree sexual offense, ten years for incest, and a suspended sentence of fifteen years for sexual child abuse, with five years' supervised probation. Appellant thus received a total of forty years' incarceration followed by a fifteen year suspended sentence.

On appeal, appellant raised the sole issue of whether appellant's convictions for second degree rape, third degree sexual offense, and incest should merge, for sentencing purposes, into the conviction for sexual child abuse.

Held: Sentences on all convictions vacated, and case remanded to the trial court for the imposition of a new sentence on sexual child abuse conviction.

In reaching that holding, the Court of Special Appeals stated:

> 1. Pursuant to the *Blockburger* required evidence test as set forth in *State v. Lancaster*, 332 Md. 385 (1993) and *Nightingale v. State*, 312 Md. 699 (1988), appellant's convictions for second degree rape, third degree sexual offense, and incest merge into the conviction for sexual child abuse for sentencing purposes.
>
> 2. In *White v. State*, 318 Md. 740 (1990), the Court of Appeals determined that there was no clear legislative intent in the child abuse statute to provide separate punishment for any offense underlying a child abuse conviction.
>
> 3. In 1990, the General Assembly amended the child abuse statute to overrule the *Nightingale* and *White* decisions by expressly providing for a separate sentence, concurrent or consecutive, for any offense based on an act or acts that also establish the child abuse. The 1990 amendment was prospective only, and thus did not apply to appellant.

4. Under the principles of merger, appellant's sentences totaling forty years' incarceration must be vacated. What is left is a fifteen-year suspended sentence on the sexual child abuse conviction. It is clear, however, that had the trial judge been aware that a sentence could be imposed on only the sexual child abuse conviction, the imposition of a fifteen-year suspended sentence would have been highly unlikely.

The Court of Special Appeals held that (1) under the circumstances of the instant case, the Court has the discretionary authority to remand the case to the trial court for the purpose of imposing a new sentence on appellant for his sexual child abuse conviction, and (2) on remand, the trial court may impose any sentence it deems proper up to the maximum penalty prescribed by the child abuse statute for such offense committed from July 1, 1974 through January 1, 1979.

Mario Sibug v. State of Maryland, No. 2211, September Term 2012, filed October 2, 2014 Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2014/2211s12.pdf

CRIMINAL PROCEDURE – COMPETENCY

Facts:

After being charged, in 1999, with multiple counts of assault and related handgun offenses, Mario Sibug was found not competent to stand trial and committed to the State Department of Health and Mental Hygiene for inpatient care and treatment. Over three years later, the circuit court received a letter from the hospital where Sibug had been committed opining that Sibug had regained his competence to stand trial.

In 2004, Sibug appeared before the circuit court and, though no competency hearing had been held or a formal finding of competency made, he entered a plea of not guilty, on an agreed statement of facts, to one count of second-degree assault and was sentenced to a term of four-and-a-half years' imprisonment. A year later, however, the circuit court vacated his conviction and sentence, concluding that Sibug's trial counsel had rendered ineffective assistance of counsel, and granted Sibug a new trial.

In 2008, Sibug was retried and a jury found him guilty of multiple counts of assault, using a handgun in the commission of a crime of violence, and giving minors access to a firearm. At no time before or during his new trial did Sibug allege that his competence to stand trial might be in question. But, after the jury rendered its verdict, Sibug's counsel filed a motion for a new trial in which it was asserted, for the first time, that Sibug had not been competent to stand trial.

The court considered the motion one month later, at Sibug's sentencing proceeding. After observing that neither Sibug nor his counsel had alleged, either before or during trial, that Sibug's competency was in question; that the court file contained the hospital's letter stating that Sibug was competent to stand trial; and that Sibug had "seemed to understand exactly what was going on" during his trial proceedings, the court found that Sibug was competent to stand trial and denied the motion. Sibug noted this appeal, contending that the court denied him due process of law in failing to determine whether he had regained his competence to stand trial before proceeding with his new trial.

Held: Affirmed.

The State may not prosecute a defendant who is not competent to stand trial. Section 3-101(f) of the Criminal Procedure Article states that a defendant is "not competent to stand trial" when he is not able "(1) to understand the nature or object of the proceeding; or (2) to assist in [his]

defense." Section 3-104(a) of the Criminal Procedure Article states that if "before or during trial, the defendant in a criminal case . . . appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented in the record, whether the defendant is incompetent to stand trial."

In the case at bar, Sibug properly alleged his incompetence to stand trial before his first trial; however, the conviction and sentence from that first trial were vacated and he was granted a new trial. The reversal of his conviction with an order for a new trial "wiped the slate clean" and Sibug's case began anew procedurally. Thus, Sibug was required to raise the issue of his competence to stand trial anew after a new trial was granted. When neither he nor his counsel raised the issue of incompetency, and when his behavior in the courtroom did not trigger the circuit court's *sua sponte* duty to evaluate Sibug's competency, the issue of his competence to stand trial was not before the court at his new trial.

Moreover, the court was not required to address the issue of Sibug's competence to stand trial when the issue was raised, for the first time, in a motion for a new trial filed after the jury had rendered its verdict. Section 3-104(a) of the Criminal Procedure Article requires a judicial determination of a defendant's competence to stand trial only if the question of competency is raised before or during the trial. Since Sibug's competence to stand trial was never made an issue before or during his trial, section 3-104(a) is not applicable to this case and the court had no obligation, at the sentencing hearing, to make a judicial determination of Sibug's competence to stand trial.

Deandre Ricardo Williams v. State of Maryland, No. 651, September Term 2012, filed October 1, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/0651s12.pdf

CRIMINAL LAW – CUSTODIAL INTERROGATION – INVOCATION OF RIGHT TO SILENCE – IMPROPER INDUCEMENT UNDER MARYLAND NON-CONSTITUTIONAL LAW

Facts:

Appellant was arrested in Washington, D.C. concerning a fatal shooting in College Park, Maryland. After arriving at the homicide unit in a District of Columbia police station, appellant was charged with first degree murder and related offenses and was then placed into an interrogation room, along with two Prince George's County police officers. Immediately prior to being advised of his *Miranda* rights, appellant made the comment, "I don't want to say nothing. I don't know, – ". The police then gave appellant his *Miranda* rights, after which he confessed to shooting the victim.

After appellant's subsequent motion to suppress his confession was denied by the circuit court, appellant and the State agreed to proceed via a not guilty plea on an agreed statement of facts. The court convicted appellant of first degree murder and use of a handgun in the commission of a crime of violence. Appellant received a total of forty-nine years' incarceration.

Held: Affirmed.

In its opinion, the Court addressed three questions.

1. Were Appellant's Comments Made in the Context of Custodial Interrogation? The State claimed that appellant's comments, "I don't want to say nothing. I don't know, – " was not an invocation of his right to silence, because the statement was made before he was advised of his Miranda rights and was not in response to custodial interrogation. The Court of Special Appeals disagreed. Citing *McNeil v. Wisconsin*, 501 U.S. 171 (1991), and *Marr v. State*, 134 Md. App. 152 (2000), the Court stated that the requirements of *Miranda* attach "in the context of custodial interrogation," which means that the "custodial interrogation has begun or is imminent." Because appellant's comment was made after he was placed in the interrogation room and after he began speaking with the police, the Court concluded that custodial interrogation was "imminent," and thus appellant could invoke his right to silence under Miranda.

2. Was Appellant's Invocation of His Right to Silence Unambiguous? Appellant contended that his comment, "I don't want to say nothing. I don't know, – " was an unambiguous and unequivocal invocation of his right to silence. The Court of Special Appeals disagreed. Citing

Davis v. United States, 512 U.S. 452 (1994) and *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the Court stated that a suspect in custodial interrogation must unequivocally and unambiguously invoke his or her right to silence before the police are required to terminate the interrogation. The State conceded that the isolated statement "I don't want to say nothing" would be unambiguous. The Court, however, agreed with the trial court that the "I don't know, – " appended to the statement, and made by appellant in the same breath as the first portion of his comment, rendered what would otherwise have been a clear statement an ambiguous and equivocal statement. The Court concluded that the classic expression of uncertainty, "I don't know," introduced a level of doubt into the message being communicated by appellant to the police, and thus a reasonable police officer faced with the same circumstances would not find appellant's comment to be unambiguous and unequivocal invocation of the right to silence.

3. Did the Police Improperly Induce Appellant to Give a Confession In Violation of Maryland Nonconstitutional Law? Appellant argued that his confession was involuntary under Maryland common law because the police implied that he might "see outside again" if he confessed to a robbery gone bad instead of premeditated murder. The Court of Special Appeals disagreed. Relying on *Ball v. State*, 347 Md. 156 (1997), the Court stated that deception short of an overbearing inducement is a valid weapon in the police arsenal and that an appeal to the inner psychological pressure of conscience to tell the truth does not constitute coercion. In the instant case, the detectives, like the officer in *Ball*, stated that there were two different charges: premeditated murder or an accidental killing during the course of a robbery. What the officers did not tell appellant was that he would face the identical criminal penalty, conviction of first degree murder. Under *Ball*, such conduct was not an improper inducement. In addition, although one detective told appellant that he "may never see outside again," the detective did not promise or give any indication that he would obtain special consideration from the court or the prosecutor on appellant's behalf. Finally, the detective told appellant that he wanted to ensure that appellant "get every opportunity to tell us the truth." Such appeals to conscience are plainly permissible under the law and were among the last words appellant heard before confessing to killing the victim. Therefore, the Court concluded that the police did not make any improper promises or inducements to secure appellant's confession. Accordingly, appellant's confession was not involuntary under Maryland nonconstitutional law.

Montray Eugene Williams v. State of Maryland, No. 2622, September Term 2012, filed October 28, 2014. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2014/2622s12.pdf

CRIMINAL LAW – ENHANCED SENTENCING.

EVIDENCE – ADMISSION OF OTHER CRIMES

Facts:

On the morning of January 10, 2012, an African-American man, about five foot, four inches tall, wearing a skull cap, a beige or khaki colored jacket, and a distinctive silver ring, entered the M&T Bank in Woodlawn, Maryland. He pushed his way to the front of the line and demanded money from the two tellers who were servicing customers. Taking approximately $516.00 from the two tellers, the man ran out of the bank. The robbery was recorded on the bank's video surveillance system.

Later that day, appellant was arrested while he was walking toward his residence at 5406 Gwyndale Avenue. When approached by the police officers, he ran towards the back of the residence, discarding his jacket, cell phone, and wallet as he ran. Some of the discarded money matched the serial numbers of the money that had been taken from the bank. Appellant's former girlfriend confirmed that appellant sometimes wore a beige parka and a silver ring. The State also produced surveillance images from a police camera near appellant's residence that show appellant leaving his house about fifteen minutes prior to the robbery, wearing a hat, pants, and beige parka that were similar to those worn by the bank robber.

Appellant was previously convicted for armed robbery in 1991 and 1995, and for robbery in 2001. He served three separate terms of incarceration for these convictions. Months prior to appellant's trial in the instant case, the State filed notice of its intent to proceed against appellant as a repeat violent offender under Md. Rule 4-245. On December 6, 2012 he was convicted of two counts of robbery and sentenced to serve two concurrent terms of life in prison without the possibility of parole.

Held:

The trial court did not err in using appellant's previous robbery convictions for enhanced sentencing purposes. Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C.L.") §14-101(a) lists the enumerated crimes for enhanced sentencing. Among the enumerated crimes of violence that form the basis for an enhanced penalty, the statute includes "robbery under §3-402 or §3-403 of this article[.]" C.L. §14-101(a)(9). Although appellant's previous robbery convictions were prior to the codification of robbery under C.L. §3-402 or §3-403, his robbery

convictions under common law and Art. 27 §486 can be used for enhanced sentencing purposes. For as long as there has been an enhanced penalty statute in Maryland, robbery and armed robbery have been included in the enumerated list of violent crimes that form the basis for the imposition of a more severe sanction against repeat violent offenders. Not applying prior robbery convictions under common law and Art. 27 §486 is illogical and contrary to both common sense and code revision principles.

We have repeatedly opined that in cases where multiple convictions for crimes of violence arise from a single incident, the circuit court, applying the enhanced penalty statute under which appellant was sentenced, may impose only a single enhanced punishment; the sentences imposed for any additional convictions must be within the applicable statutory limits. See *Calhoun v. State*, 46 Md. App. 478, 488-89 (1980), *affirmed*, 290 Md. 1 (1981). For the purposes of sentencing enhancement, however, the bank robbery on January 10, 2012, was a single criminal incident, and therefore, C.L. §14-101 authorized the circuit court to impose only one enhanced penalty against appellant. The court, however, erred as a matter of law in imposing the same sentence for the second robbery conviction.

At appellant's trial, during the State's direct examination of the investigating detective, the prosecutor asked the detective how he knew that appellant resided in the area of 5406 Gwyndale Avenue. When the detective responded, "from target of investigation," defense counsel objected. The trial court allowed the testimony. Upon review, we are persuaded that the evidence elicited from the detective by the State was relevant under Maryland Rule 5-401. Furthermore, the testimony of the detective that defense counsel found objectionable did not implicate the Rule proscribing the admission of "other bad acts" evidence. Accordingly, the trial court did not abuse its discretion in the evidentiary ruling.

Keith S. Barkley v. State of Maryland, No. 1593, September Term 2013, filed September 2, 2014. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2014/1593s13.pdf

CRIMINAL LAW – POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE – EXPERT TESTIMONY – OPINION ON ULTIMATE ISSUE – MD RULE 5-704(b) – DISCHARGE OF COUNSEL

Facts:

The appellant was convicted of possession of cocaine, possession of heroin, and possession of heroin with the intent to distribute. The evidence consisted, in part, of 53 baggies, each containing less than one tenth of one gram of heroin, as well as one $10 bill and five $20 bills, all recovered from the appellant's person. At trial, a police officer witness was offered and accepted as an expert on street level identification, sales, packaging, and marketing of narcotic drugs for distribution. The officer testified, without objection, that heroin on the street is "normally" sold "in those little packages in 100th of a gram." He testified, without objection, that what was in the bags recovered from the appellant was what "you normally purchase." He testified, without objection, that a baggie of heroin "on average will cost you about $20 a fold." He testified, without objection, that "oftentimes" drug dealers "utilize 20s and 10s, smaller denominations, there's not change." He testified, without objection, that heroin users do not typically carry more than one or two bags of heroin with them at once. The appellant finally objected when the officer was asked if he was "able to form an expert opinion as to whether an individual with this set of facts was engaged or possessing the heroin with the purpose of distributing it?" and he answered, based on the evidence and his training and experience, that it was "pretty evident" to him "that it was destined to be distributed to persons here in Wicomico County."

In the middle of cross-examination of the State's third witness, the appellant moved to discharge counsel. The appellant claimed that the State's witnesses were not telling the truth and he was dissatisfied that his attorney had not been able to bring that out. The judge cleared the courtroom and allowed the appellant to put his reasons for wishing to discharge counsel on the record. The appellant stated that he desired to discharge counsel so that he could recall the State's witnesses and examine them himself, or, alternatively, that he wished to abort the jury trial and proceed to a bench trial at a later date. The judge ruled that he would not be allowed to do either of those things. Defense counsel was not discharged and the trial proceeded without further incident.

Held: Affirmed.

The officer's expert opinion did not violate Rule 5-704. The factual premises had all been established without objection. The expert witness had laid out the characteristic behavior of a

distributor as contrasted to the more innocuous behavior of a mere user. The obvious syllogism before the jury was, stating it simplistically:

> All persons who exhibited such behavior probably intended to distribute.
>
> The appellant is a person who exhibited such behavior.
>
> ERGO: The appellant probably intended to distribute.

We are persuaded beyond all reasonable doubt that the jurors would have drawn this inference, or would validly have reached this conclusion, for themselves even if no one else, from the witness stand or in closing argument, had articulated it for them.

Maryland Rule 4-215 does not apply to a request to discharge counsel made after meaningful trial proceedings have begun. The court is required to inquire as to the reason for the requested discharge, but the decision whether to permit the discharge is committed to the court's sound discretion. The court provided the appellant an adequate forum to state his reasons, and the court's decision to deny the requested discharge was not an abuse of discretion.

Joseph Christian v. State of Maryland, No. 2565, September Term 2012; *James Milligan v. State of Maryland*, No. 1986, September Term 2012, filed October 3, 2014. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2014/2565s12.pdf

CONFRONTATION CLAUSE – JOINT TRIAL – BRUTON VIOLATION

DUE PROCESS PROTECTIONS – CONFESSIONS – VOLUNTARINESS

INCHOATE CRIMES – CONSPIRACY – DOUBLE JEOPARDY – REMEDY

APPEAL AND ERROR – SENTENCING – MERGER – REMEDY

Facts:

On December 28, 2010, four perpetrators – Joseph Christian, James Milligan, Nathaniel Lounds, and Albert Parker – in various capacities, planned a robbery of the victim, Curtis Jones. Jones was injured when, in the course of the attempted robbery, Lounds shot him with a handgun.

Lounds, Milligan, and Christian (as well as Lounds' sister and the mother of Christian's baby daughter) lived in a number of apartments at the apartment complex at Woodland Avenue in Baltimore City.

Jones testified that on the night in question he came to the apartments, having been invited there to sell marijuana to Christian. Christian greeted Jones there, then walked into the building at 3503 Woodland Avenue. Jones followed, and as he reached the top of the stairs he was accosted by two men whom he did not recognize. The men told him to "kick it out," after which one of the men reached for Jones's car keys and cell phone. When Jones "reached back" in response, one of the men instructed the other to "bust him" – *i.e.*, to shoot him.

Lounds separately testified that when he arrived at the apartments that day, the other three perpetrators were in the hallway discussing a plan to rob Christian's connection for money and marijuana. Lounds testified that he did not know a gun would be used until Milligan handed him a handgun and told him that he would kill him if Lounds if he did not brandish the gun in the robbery. Christian was present at this time.

Lounds stated that when Jones arrived at the apartments, the others identified him to Lounds, at which point Milligan gave the gun to Lounds. When the two accosted Jones at the top of the stairwell, as described above, Milligan twice instructed Lounds to shoot. Lounds pulled the trigger, then went to his sister's house, where he had been living. Jones managed to escape the scene and survive the shooting.

Detectives McMorris and Brown were assigned to the case. McMorris followed leads to Lounds's sister, Shinae Rabey, who, after being arrested for controlled substance violation, implicated all four perpetrators (including her brother) in the crime. Parker was arrested a week later, and Lounds a month after that.

In recorded statements Lounds confessed to his role, and identified Christian and the others in photo arrays. McMorris then obtained arrest warrants for Christian and Milligan. The two detectives then conducted a recorded interview of Christian, after reading him his *Miranda* rights, during which Christian confessed to his role in planning and aiding the botched robbery. (Christian specifically stated that the plan was to stage a hold-up, in which they would steal the drugs from Jones and steal the $125 Christian purported to pay Jones for the drugs. The circuit court suppressed the portion of Christian's statement that followed the detectives' improper threat to implicate Christian's child's mother, Precious Hicks, in the offense.

The jury convicted Christian of various charges: 20 total years of executed prison time for use of a handgun in the commission of a felony or crime of violence; first-degree assault, conspiracy to commit first-degree assault, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon.

The jury convicted Milligan of various charges: 55 years of executed prison time for use of a handgun in the commission of a felony or a crime of violence, possession of a regulated firearm by a prohibited person, attempted second-degree murder, conspiracy to commit first-degree assault, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon.

Held:

(1) Reverse Milligan's convictions because of a *Bruton* violation. Because of disposition of Milligan's convictions on *Bruton* grounds, we do not address his other challenges.

(2) Vacate Christian's sentence for conspiracy to commit robbery with a dangerous weapon and, for sentencing purposes, merge his convictions for first-degree assault and conspiracy to commit robbery with a dangerous weapon into his conviction for attempted robbery with a dangerous weapon.

(3) Affirm Christian's convictions in all other respects.

1. No Violation of Christian's Rights Under *Bruton v. United States*

Trial judge's admission of out-of-court statements by appellant Milligan that mentioned appellant Christian and his girlfriend did not violate the *Bruton* rule or the Confrontation Clause to the United States or Maryland Constitutions, as the statements did not "expressly implicate" Christian in the commission of the crimes with which he had been charged. Where the statements did in fact mention Christian by his name (nickname), they mentioned no

involvement in the crimes at issue, and guilt would have to be inferred only by connecting facts adduced from *other facts* adduced at trial.

2. Confession Did Violate Milligan's *Bruton* Rights

Trial court violated appellant Milligan's confrontation clause rights under *Bruton* when it admitted the entirety of an audiotape of appellant Christian's confession to police, as the out-of-court confession on several occasions expressly implicated Milligan by name in the planning of, preparation for, and execution of the robbery and assault with which Milligan had been charged. Additionally, Milligan succeeded in preserving this challenge for appeal, because he registered an objection "at the time the evidence is offered," and because the essence of counsel's *Bruton* objection was clear from the pre-trial and trial context in which it was made.

3. No Trial Error in Exercising Discretion to Exclude Detective's Coercive Remark From Evidence

Trial judge did not err in refusing to admit detective's previously-excluded coercive statement, as there was no "causal nexus," and thus no coercion, between detective's coercive remark and the entirety of appellant Christian's statements that preceded it. Even if we were to disagree, we would still be compelled, under the proper standards of review, to hold that the trial court was within its discretion to conclude otherwise.

4. Jury Instructions Were Proper

The jury instruction in this case fairly covered the law on accomplice liability and was neither misleading nor confusing for the jury. Under that instruction, the jury could find appellant Christian guilty of the weapons charges only if it found, beyond a reasonable doubt, not only that he knowingly aided, counseled, commanded, or encouraged the commission of the crime, but also that he had the intent to make the crime happen. Under the accepted legal standard in Maryland, "intent" incorporates both specific intent as well as "*such results as are known to be substantially certain to follow.*"

5. Evidence Sufficient to Sustain Christian's Conviction.

First, Christian's challenge asserted at trial level was sufficiently detailed and similar in nature to current challenge on appeal, to avoid being waived. We view knowledge of a weapon and intent that a weapon be used as sufficiently similar shades of the required *mens rea* element, and thus decline to adopt State's view that Christian appeals for "reasons stated for the first time on appeal."

Second, the jury was presented with enough evidence from which it reasonably could convict appellant Christian on a theory of accomplice liability, as the jury could reasonably infer that, under the applicable legal standard, Christian aided, commanded, counseled, or encouraged the crime of using a handgun in commission of a robbery and that he either intended for two other perpetrators to use the handgun or knew or had reason to know that they intended to do so.

6. Court Properly Refused to Strike Certain Statements at Closing Arguments

First, trial court's refusal to strike part of the State's closing argument – wherein the State asked testifying detective to state why he thought it was not necessary to start tape-recording appellant Christian's confession until after they gave him his *Miranda* warnings and his responses to those questions – was not prejudicial error, as the State's comment was a permissible response to counsel's insinuation that the police had some nefarious reason for not recording the *Miranda* waiver.

Second, trial court did not err in not striking State's admonition to jury that in reviewing the evidence at trial, "you know what you were thinking. You knew in your hearts and you knew in your minds." State did not ask the jury to disregard the required burden of reasonable doubt or to disregard the law inherent in the trial court's jury instructions; rather it was asking the jurors to recall the impact of some of the powerful evidence they heard and asking them to reach a rational and intelligent conclusion.

7. Court Erred in Convicting and Sentencing on Two Conspiracy Counts

Trial court erred in convicting and sentencing appellant Christian for two counts of conspiracy, as the record contains no evidence from which a trier of fact reasonably could conclude that appellant Christian engaged in two distinct unlawful agreements: one to commit first-degree assault and another to commit robbery with a dangerous weapon. All evidence admitted at trial points to one single agreement to commit robbery, one key component of which was the use of a handgun during its commission. Thus, as the appellate court we should vacate one of appellant Christian's two conspiracy convictions, to wit, his conviction for conspiracy to commit first-degree assault.

8. Christian's Conviction for First-Degree Assault Merges with Conviction for Attempted Robbery With Dangerous Weapon

This court shall merge appellant Christian's convictions and sentences for first-degree assault and conspiracy to commit robbery with a dangerous weapon into his conviction and sentence for attempted robbery with a dangerous weapon, as the assault arose out of and was perpetrated in furtherance of the attempted robbery.

James Lee Travis v. State of Maryland, No. 1774, September Term 2013, filed August 26, 2014. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2014/1774s13.pdf

RAPE – SEXUAL OFFENSE – CONSENT – PHYSICALLY HELPLESS INDIVIDUAL – SLEEPING VICTIM – INCONSISTENT VERDICTS – LEGALLY INCONSISTENT VERDICTS IN A BENCH TRIAL

Facts:

A group of four acquaintances consisting of the female victim, the male defendant, Travis, the victim's female friend, Belay, and a second male, Fisher, went out for a night of mild drinking and ended up at Belay's apartment sometime after 1:00 a.m. Between 2:00 and 2:30 a.m., the victim went to bed, alone. Approximately two hours later, she awoke, in the process of being raped by Travis. The victim tried to push Travis off of her, and then told him "No, I can't do this," or "No, this can't happen." Travis stopped, pulled up his pants, and left. The victim reported the rape to Belay and Fisher the next day; she reported it to police six days later. After a bench trial, Travis was convicted of second-degree rape, second-degree sexual offense, third-degree sexual offense, and second-degree assault. He was acquitted of fourth-degree sexual offense. Travis noted an appeal to the Court of Special Appeals, arguing 1) that the evidence was legally insufficient to support his convictions; 2) that his convictions were inconsistent with his acquittal of fourth-degree sexual offense; and 3) that the court erroneously found him guilty of second-degree sexual offense after first announcing a verdict of not guilty.

Held: Affirmed.

Upon finding that the victim was "physically helpless" by virtue of being asleep, the trial court correctly ruled that the State was not required to otherwise prove lack of consent. To be asleep is *ipso facto* to be "physically helpless." In assessing sexual intercourse with a physically helpless individual, the absence of consent is automatic, as a matter of law, and does not have to be redundantly proved a second time over. See Md. Code, Criminal Law Article, §§ 3-304(a)(2) (second-degree rape), 3-306(a)(2) (second-degree sexual offense), 3-307(a)(2) (third-degree sexual offense).

The convictions were not legally inconsistent with the acquittal for fourth-degree sexual offense, § 3-308. Unlike the crimes of second-degree rape, second-degree sexual offense, and third-degree sexual offense, the crime of fourth-degree sexual offense has no provision for an implied lack of consent for victims who are physically helpless or unconscious.

The appellant's double jeopardy claim was not preserved for appellate review. Even if it had been, the trial court's initial finding of "not guilty" was part of a relatively informal discussion between the court and counsel, not a final verdict.

Robert Mitchell Acker v. State of Maryland, No. 513, September Term, 2011 filed September 30, 2014. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2014/0513s11.pdf

CRIMINAL LAW – MD RULE 5-802.1(b) – PRIOR CONSISTENT STATEMENTS

Facts:

In a child abuse prosecution, defense counsel attempted to impeach the victim by alleging, in addition to a temporally-specific allegation of bias, several bald assertions about the victim, including that she was starved for attention and was, therefore, unworthy of belief. In response to these allegations, the State elicited prior consistent statements of the victim pursuant to Rule 5-802.1(b), which permits the introduction of a witness's prior consistent statements as substantive evidence "if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive…." On appeal, Acker contended that the statements were improperly admitted because they were made while at least one of the victim's alleged biases existed: her inherent desire to seek attention from her mother.

Held: Affirmed

The Court of Special Appeals noted that in *Thomas v. State*, 429 Md. 85, 101-02 (2012), the Court of Appeals made it clear that Rule 5-802.1(b) includes a temporal restriction that prohibits the admission of a witness's prior consistent statements if those statements were made after the occurrence of the facts or events that gave rise to the alleged motive to fabricate. Applying this rule, the Court of Special Appeals concluded that the victim's prior consistent statements were properly admitted to rebut one of the alleged motives to fabricate because the statements were made before the alleged bias arose. Turning to the remaining alleged motives to fabricate, the Court concluded that those allegations did not invoke the rule's temporal restriction because they consisted of bald and conclusory statements by defense counsel that had no logical or factual relationship to the evidence before the jury.

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Charles Robert Phillips v. State of Maryland, No. 1772, September Term 2013, filed October 7, 2014. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2014/1772s13.pdf

SENTENCING AND PUNISHMENT – SENTENCING PROCEEDINGS IN GENERAL – IN GENERAL – EVIDENCE – DEGREE OF PROOF – FACTORS ENHANCING SENTENCE

Facts:

Appellant, Charles Robert Phillips, was convicted of first degree murder and robbery with a deadly weapon and sentenced to life with the possibility of parole, plus an additional consecutive twenty year sentence. Following his convictions, appellant appealed, the Court of Appeals reversed, and the case was remanded back to the circuit court for a new trial.

Between his first conviction and his retrial, appellant remained incarcerated. During incarceration, he received three different weapons related disciplinary infractions. After his second trial, appellant was convicted again of first degree murder, robbery with a deadly weapon, and misdemeanor theft. At his second sentencing hearing, the State sought an enhanced sentence, relying on his conduct while in the correctional institutions. The trial court agreed and sentenced appellant to life without the possibility of parole and a consecutive twenty year sentence.

Held: Affirmed.

Appellant argued that he was deprived of his due process rights because the factual findings relied upon to increase his sentence – the three disciplinary infractions – were not established beyond a reasonable doubt by a jury. The Court of Special Appeals held that under Courts & Judicial Proceedings Article §12-702(b), when a defendant's sentence is increased after a successful appeal, the burden of proof is not beyond a reasonable doubt. Since any potential increase in sentence would not be greater than the statutory maximum, the factual findings are not subject to the *Apprendi* rule and therefore, do not need to be established beyond a reasonable doubt.

Wade Smith v. State of Maryland, No. 1895, September Term 2011, filed October 1, 2014. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2014/1895s11.pdf

CORAM NOBIS RELIEF – SIGNIFICANT COLLATERAL CONSEQUENCES – EFFECT OF NONCOMPLIANCE WITH MARYLAND RULE 15-1207

Facts:

Wade Smith pleaded guilty, in 1994, to possession with intent to distribute marijuana. Although he never filed an application for leave to appeal his conviction, seventeen years later, in 2011, he filed a petition for writ of error *coram nobis*, alleging that his plea was tendered involuntarily. Specifically, Smith maintained that, when he pleaded guilty, he was unaware of any potential immigration consequences that could result from his plea.

In Smith's *coram nobis* petition, Smith failed to allege that he was facing significant collateral consequences from his conviction, such as deportation proceedings. Rather, Smith alleged: "The spirit of the law as well as justice demands that the conviction be vacated in order to prevent the Petitioner from adverse immigration consequences."

The *coram nobis* court denied Smith's petition without holding a hearing and without providing a statement of reasons for the denial. Smith noted this appeal, contending that the *coram nobis* court erred in failing to hold a hearing on his petition and in failing to provide a statement of reasons for the denial.

Held: Affirmed.

To be eligible for *coram nobis* relief, a petitioner must allege grounds: (1) that are of a "constitutional, jurisdictional or fundamental character," *Skok v. State*, 361 Md. 52, 78 (2000); (2) that he is "suffering or facing significant collateral consequences from the conviction," *id*. at 79; (3) that the grounds for challenging the criminal conviction were not waived or finally litigated in a prior proceeding, *id*.; and (4) that he is not, as a result of the underlying conviction, incarcerated or subject to parole or probation such that he would possess another statutory or common law remedy. *Id.* at 80.

Although Smith's petition alleged all of the other qualifications for *coram nobis* eligibility, it did not allege that Smith was facing significant collateral consequences of his 1994 conviction. Significant collateral consequences, as contemplated by the *Skok* Court, are those that are "actual, not merely theoretical." *Graves v. State*, 215 Md. App. 339, 353 (2013) *cert. granted*, 437 Md. 637 (2014). Smith did not allege that he was actually undergoing deportation proceedings. Rather, Smith indicated that he feared that at some unknown time in the future, he

may experience deportation proceedings. Consequently, Smith's petition for writ of error *coram nobis* was deficient on its face.

Because of this deficiency, the *coram nobis* court's failure to hold a hearing was not error. The court's failure to provide a statement of reasons for the denial of the petition, although error, was not reversible error.

Maryland Rule 15-1207, which requires that a *coram nobis* court prepare a "statement setting forth separately each ground on which the petition is based, the federal and state rights involved, the court's ruling with respect to each ground, and the reasons for the ruling," does not prescribe consequences of noncompliance. Pursuant to Maryland Rule 1-201, when a Maryland Rule does not prescribe consequences of noncompliance, "the court may compel compliance with the rule or may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule." The purpose of Rule 15-1207, like its post-conviction counterpart, Rule 4-407, is to provide a comprehensive review of each claim, while eliminating delay. *State v. Borchardt*, 396 Md. 586, 636-37 (2007). This purpose would not be served by remanding the matter for a statement of reasons when this Court can decide the case on the record before it, as Smith's petition was deficient on its face for failure to allege significant collateral consequences.

Torian A. Underwood v. State of Maryland, No. 792, September Term 2013, filed October 7, 2014. Opinion by Rodowsky, J.

http://www.mdcourts.gov/opinions/cosa/2014/0792s13.pdf

CRIMINAL PROCEDURE – FOURTH AMENDMENT – SEARCH AND SEIZURE – STOP AND FRISK – REASONABLE SUSPICION – TOTALITY OF CIRCUMSTANCES

Facts:

A police officer stopped the appellant for speeding. Throughout the entire encounter, the appellant sat motionless with his eyes facing forward, "like a statue." The appellant was wearing a jacket, the two front pockets of which were "bulging out as if they were packed with something." The officer checked the appellant's criminal history and learned that he was on probation for a possession of a handgun in a vehicle charge. The officer summoned a K-9 unit to scan the vehicle. When the K-9 unit arrived, the appellant refused to exit the vehicle and the officer physically removed him. When the officer reached to cuff the appellant's right hand, the appellant reached for his right pants pocket. A frisk revealed gloves in the appellant's jacket pockets, a loaded handgun in his right pants pocket, a retractable razor knife in his watch pocket, a cigarette pack containing three baggies of cocaine in his left pants pocket, and $280 in cash. The Circuit Court for Harford County denied the appellant's motion to suppress, and a jury convicted the appellant of possession of cocaine, wearing, carrying, or transporting a handgun in a vehicle and on his person, concealing a dangerous weapon, and speeding. On appeal, the appellant relied on Ransome v. State, 373 Md. 99, 816 A.2d 901 (2003), and contended that the State's argument and appellate review of the suppression ruling were limited to the basis of suspicion articulated by the police officer, specifically, the appellant's bulging jacket pockets.

Held: Judgments affirmed.

On review of a suppression ruling, an appellate court takes a holistic view of the suppression record, focusing on the entire picture rather than on individual facts. In this case, the officer did not testify that the sole basis for his suspicion was the appellant's jacket pockets. Rather, the officer's suspicion also came from the appellant's unusually stoic behavior, his being on probation for a handgun charge, and his reaching for his right hand pants pocket. Considering the totality of the circumstances, the officer had reasonable articulable suspicion to frisk the appellant.

Charles Brandon Martin v. State of Maryland, No. 2413, September Term 2010, filed July 30, 2014. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2014/2413s10.pdf

CRIMINAL LAW – WIRETAP ACT

Facts:

This appeal arose out of the attempted murder of Jodi Lynne Torok, a former girlfriend of appellant, Charles Brandon Martin. Ms. Torok had been shot in the head, during the day and at her dwelling, after answering the door to respond to a man purporting to be a door-to-door salesman. Police evidence technicians responding to the crime scene observed no apparent signs of a robbery, and they recovered, among other things, a Gatorade bottle, which appeared to be fashioned into a home-made silencer; a spent projectile as well as a spent shell casing; and the victim's Blackberry cell phone.

Subsequent DNA testing of the bottle, as well as a hair fragment found attached to that bottle by a piece of tape, was consistent with appellant's DNA. It was further established, through federal firearms purchase records as well as trial testimony, that appellant owned a handgun of the same caliber as that of the spent projectile and shell casing. As for the victim's cell phone, police officers examined it and later recovered text messages stored on it; some of those text messages implicated appellant, circumstantially, in the crime, as they established that he knew of the victim's whereabouts throughout the day of the shooting. Moreover, those text messages also led, in part, to the issuance of search warrants which, upon execution, led to the recovery of other evidence linking appellant to the construction of the Gatorade bottle/home-made silencer.

Appellant was charged, in a ten-count indictment, for his role in the attempted murder. Prior to the ensuing trial, he moved to suppress the text messages, recovered from the victim's cell phone, contending that those messages had been "intercepted" by police and that such "interception" violated the Maryland Wiretap Act. In pertinent part, that motion was denied.

In addition, he filed a demand for a bill of particulars, contending that the short-form indictment, charging him with, among other things, attempted murder in the first degree, conspiracy to murder, and solicitation to murder, was insufficient to adequately inform him of facts necessary to prepare a defense. Specifically, appellant demanded that the State inform him, prior to trial, whether he was being charged as a principal in the first degree (which required that the State prove his presence at the crime scene) or as a principal in the second degree (which did not). The State's response to appellant's demand for particulars was that no further response was necessary, given the State's "open file discovery" in appellant's case. The trial court thereafter denied appellant's exceptions to the State's response to his demand for particulars.

The case then proceeded to trial. The State ultimately *nol prossed* all but the attempted murder (and lesser included offenses subsumed by that charge) and solicitation charges. During trial, one of the State's DNA experts testified as to her conclusions regarding the "match" of appellant to the DNA recovered from the hair sample. Upon the conclusion of her direct testimony, appellant objected and moved to strike all of her testimony, contending that, because that expert had not, herself, performed the tests but had merely relied upon them in performing the statistical analysis of the results, and because the technicians who actually had performed the tests (the "bench work") had not been made available to testify (and hence, subject to cross-examination), his Confrontation Clause rights had been violated. The trial court overruled appellant's objection and denied his motion to strike, concluding that his objection had been untimely and therefore waived.

Appellant was thereafter convicted of attempted first-degree murder but acquitted of solicitation. He was sentenced to the statutory maximum, life imprisonment, and he appealed, raising seven issues: that the trial court had erred in denying his motion to suppress; that his Confrontation Clause rights had been violated through the admission of "surrogate" testimony by the State's DNA expert; that the trial court had erred in overruling his exceptions to the State's response to his demand for particulars; that the evidence was insufficient; that the trial court had erred in instructing the jury that he was charged with being an accessory before the fact but not as an aider and abettor; that the jury verdicts, convicting him of attempted first-degree murder but acquitting him of solicitation to commit that murder, were inconsistent; and that, in imposing sentence, the trial court had based that sentence upon an impermissible consideration.

Held: Affirmed.

The Court of Special Appeals held that the victim's text messages, which had already been received by her and stored on her cell phone before they were examined by police, had not been "intercepted" within the meaning of the Maryland Wiretap Act, because such "interception" must be contemporaneous with transmission of the communication. And because the Maryland Wiretap Act proscribes "interception" of an electronic communication, the Court concluded that there had been no violation of that Act, and, therefore, the trial court had properly denied appellant's motion to suppress.

The Court upheld the trial court's ruling that the Confrontation objection had been waived. The Court further held that, because there was no statutory entitlement to particulars that was applicable to appellant's demand in this case; because, in the absence of a statutory entitlement, it was within the trial court's discretion whether to require the State to respond to such a demand; and because appellant's demand was a thinly-veiled attempt to require the State to disclose its legal theory (which it is not required to do), the trial court did not abuse its discretion in denying appellant's exceptions to the State's (non)-response to his demand.

The Court of Special Appeals also concluded that the evidence was sufficient; that there was no instructional error; that appellant had failed to preserve his inconsistent verdict claim because he

did not object when the verdicts were rendered and that, in any event, the verdicts in this case were not inconsistent; and that the trial court did not base appellant's sentence upon an impermissible consideration.

Orlando Ray Coleman v. State of Maryland, No. 104, September Term 2012, filed October 1, 2014. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2014/0104s12.pdf

CRIMINAL LAW – WRIT OF ERROR CORAM NOBIS

Facts:

In 1999, Orlando Ray Coleman pleaded guilty to possession with intent to distribute cocaine and was sentenced to a term of five years' imprisonment, with all but ten days suspended, to be followed by a five-year period of supervised probation. Coleman did not seek leave to appeal his conviction or sentence or seek post-conviction relief. Twelve years after pleading guilty, however, Coleman filed a petition for writ of error *coram nobis* challenging the validity of the guilty plea on the grounds that he was not advised, on the record of the plea hearing, of the maximum sentence he was facing or of the nature or elements of possession with intent to distribute.

The circuit court determined that Coleman had waived his right to seek *coram nobis* relief because he had not filed an application for leave to appeal following his conviction and that there were no "special circumstances" excusing that omission. But, even if not waived, the circuit court concluded that Coleman had received "exactly what he [had] bargained for and that any error in not advising him of the maximum possible sentence was "harmless." The circuit court also found that the offense of possession with intent to distribute "is so simple in meaning that it can be readily understood by a lay person." The circuit court, therefore, denied Coleman's request for relief.

Held: Affirmed.

In 2012, the General Assembly enacted § 8-401 of the Criminal Procedure Article of the Maryland Code (2008 Repl. Vol., 2013 Supp.) which provides: "The failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error *coram nobis*." In *Graves v. State*, 215 Md. App. 339 (2013), *cert. granted*, 437 Md. 637 (2014), this Court held that this statute applied retroactively. As such, Coleman did not waive his right to seek *coram nobis* relief by not filing an application for leave to appeal following his 1999 conviction and sentence.

A petition for writ of error *coram nobis* is an equitable action, often filed many years after a conviction, and not a belated direct appeal. As such, it is an "extraordinary remedy" that should be granted "only in extreme cases." When a *coram nobis* petitioner is challenging the validity of a guilty plea, Md. Rule 15-1206(a) (permitting a court, in a *coram nobis* action, to consider

evidence presented by "affidavit, deposition, oral testimony, or any other manner that the court finds convenient and just"), supports the conclusion that a court may look beyond the "four corners" of the plea hearing to determine whether the petitioner entered the plea knowingly and voluntarily and with an understanding of the nature of the offense and its consequences.

When reviewing the entire record (including the charging documents and the court commissioner's advisements to Coleman), it is clear that Coleman was informed that possession with intent to distribute carried a maximum sentence of twenty years of imprisonment. Moreover, Coleman was sentenced to a five-year term of imprisonment (with all but ten days suspended), a period well below the statutory maximum. In addition, the offense of possession with intent to distribute is "'straight forward and simple,'" *Gross v. State*, 186 Md. App. 320, 342 (2009), and a layperson in Coleman's position would have readily understood it. The statement of facts in support of the plea, moreover, sufficiently described the offense. Based on these circumstances, *coram nobis* relief was not warranted.

Matthew Nicholas Burton v. Garry Mumford, Warden, No. 2100, September Term 2013, filed October 8, 2014. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2014/2100s13.pdf

CRIMINAL PROCEDURE – EXTRADITION – EXTRADITION DOCUMENTS AND CLERICAL MISTAKES – PROSECUTORIAL VINDICTIVENESS

Facts:

The Worcester County police found the body of a missing Delaware resident near the Delaware-Maryland border. Through investigation, Maryland authorities believed that appellant was responsible and charged him with first- and second- degree murder. Because appellant was a resident of Delaware, Maryland Governor Martin O'Malley submitted an application for requisition to Delaware Governor Jack Markell, who, in turn, issued a Governor's Warrant of Rendition for appellant. Delaware authorities apprehended appellant, and after failing to obtain *habeas corpus* relief in Delaware, he was transported to Worcester County. Appellant was indicted by a Maryland grand jury, and the State notified him that it would be seeking the death penalty. When Maryland repealed the death penalty in 2013, that notice was withdrawn.

The State's Attorney for Worcester County informed appellant's counsel that the Delaware Department of Justice also intended to indict appellant on charges related to the incident and initiate a capital prosecution. The State's Attorney offered to conclude the matter in Maryland if appellant agreed to enter into a binding sentence agreement. Appellant rejected the plea offer and the State's Attorney *nol prossed* the pending charges in Maryland.

Governor Markell submitted an application for requisition to Governor O'Malley, and Governor O'Malley signed a Governor's Warrant of Rendition. As authorized by Maryland Code (2001, 2008 Repl. Vol.), § 9-110 of the Criminal Procedure Article ("C.P."), appellant filed a Writ of Habeas Corpus challenging his extradition to Delaware. The circuit court held a hearing and, after considering the factors in *Michigan v. Doran*, 439 U.S. 282, 289 (1978),[1] whether

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[1] In *Michigan v. Doran*, the Supreme Court stated that

> [o]nce the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

439 U.S. at 289.

appellant's constitutional rights had been violated, and whether the prosecution's attempt to extradite appellant back to Delaware was vindictive, denied the *habeas* petition.

Held:

The circuit court did not err in denying appellant's Writ of Habeas Corpus. When considering Writs of Habeas Corpus arising from extradition proceedings, a court begins its inquiry with the presumption that "once a governor has granted extradition, . . . there is *prima facie* evidence that constitutional and statutory requirements have been met." *Doran*, 439 U.S. at 289. To rebut those presumptions, and receive *habeas corpus* relief, the accused must "prove beyond a reasonable doubt either that he was not present in the demanding state at the time of the alleged offense or that he was not the person named in the warrant. . . ." *Solomon v. Warden, Baltimore City Jail*, 256 Md. 297, 300-01 (1969).

Even though two extradition documents refer to appellant residing in Wicomico County rather than Worcester County, such a mistake is equivalent to a typo or clerical error when other documents accompanying Delaware's application for requisition indicate that he was located in Worcester County. Additionally, the statement in the documents that "no former application for requisition for [appellant] growing out of the same transaction has been made" was not an error even though Maryland had filed an application for requisition of appellant. Delaware had not previously done so, and Delaware's extradition documents were only certifying that *Delaware* had not submitted an application for requisition. Accordingly, the extradition documents were, on their face, in order.

Appellant's contention that his constitutional rights were violated was rejected. Delaware is the appropriate forum to consider whether appellant's right to a speedy trial was violated as well as whether Delaware's death penalty violates his right against cruel and unusual punishment. Furthermore, appellant's cruel and unusual punishment claim would not materialize until *after* he has gone to trial and been sentenced.

Appellant also failed to prove that his due process rights had been violated and that the Maryland State's Attorney engaged in prosecutorial vindictiveness. Appellant must show that the circumstances "pose a realistic likelihood of 'vindictiveness,'" warranting a presumption of prosecutorial vindictiveness. *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). That the State's Attorney informed appellant that Delaware intended to initiate a capital prosecution and offered a plea agreement to resolve the matter in Maryland, and *nol prossed* the charges to have the case tried in Delaware after appellant rejected the plea offer, did not amount to prosecutorial vindictiveness in this case. A review of the record reveals that the State's Attorney was simply informing appellant and his counsel that if he did not accept the plea offer, Maryland would drop the pending charges and "any prosecution by Delaware would supersede the current criminal case in Maryland." The presentation of an alternative does not rise to a due process violation.

Lauren McClanahan v. Wash. County Dep't of Social Services, No. 737, September Term 2013, filed July 31, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/0737s13.pdf

CHILD ABUSE – INDICATED CHILD ABUSE BY MENTAL INJURY – NO REQUIREMENT OF SCIENTER

Facts:

On May 6, 2005, Raven was born to appellant and her then husband, John H. ("Father"). On August 2, 2006, the parties separated, and on February 25, 2008, they were legally divorced. In the divorce, appellant was granted primary physical custody of Raven, with liberal unsupervised visitation to Father.

From June 2007 to November 2010, appellant took Raven to the hospital nine times for physical examinations related to sexual abuse allegations against Father. None of these examinations confirmed that Raven had been sexually abused. In addition, and importantly, during two years of the same time period, the Washington County Department of Social Services ("the Department") conducted fourteen sexual abuse investigations regarding Raven, all of which ruled out sexual abuse.

In May of 2010, the Department began an investigation into appellant for causing child abuse by mental injury to Raven. As required by statute, Raven was evaluated by two licensed social workers. Raven was diagnosed with a mental injury, namely an Axis I Adjustment Disorder with Mixed Anxiety and Depressed Mood. The disorder related to an unhealthy attachment to appellant and resulted in impairment of Raven's emotional, social, and intellectual functioning. The cause of Raven's mental injury was identified as appellant's exploitation of Raven by making repeated sexual abuse allegations against Father.

The Department determined that appellant was responsible for indicated child abuse by mental injury. That determination was upheld by the administrative law judge ("ALJ") and thereafter by the circuit court.

Held: Affirmed.

Appellant argued that the evaluations by the licensed social workers did not support the ALJ's decision, because the evaluations (1) identified unconscious acts by appellant as the cause of Raven's mental injury, (2) identified acts by appellant that were unacceptably vague, and (3) speculated as to the causal relationship between appellant's behavior and Raven's mental injury. The Court of Special Appeals disagreed.

The Court acknowledged that the evaluations of the social workers referred to "unconscious" and "inadvertent" behavior on the part of appellant. According to the Court, the use of these terms was not intended to define appellant's abusive acts, but to describe the motivation behind appellant's conduct. The evaluations identified the acts as repeated sexual abuse allegations against Father.

The Court also determined that the evaluations made references to specific acts that caused Raven's mental injury. One of the social workers explained the mechanism that caused Raven's mental injury as "exaggerated positive feedback," where the child senses the parent's need to hear certain things, and when those things are said, the parent responds with animated closeness and protectiveness, which reinforces the child's behavior. The social workers pointed to appellant's making allegations of sexual abuse and taking Raven to exams, actions that they placed in the context of the positive feedback loop as a trigger for Raven to assert an unhealthy protectiveness of appellant. The ALJ accepted the "exaggerated positive feedback" loop as the cause of Raven's mental injury, and the Court of Special Appeals concluded that such finding was supported by substantial evidence.

Appellant also argued that the ALJ erred by failing to determine that child abuse by mental injury required some element of scienter. Appellant cited to the case of *Taylor v. Harford County Dep't of Soc. Servs.*, 384 Md. 213 (2004) in support of a requirement of scienter. The Court of Special Appeals was not persuaded.

The Court reviewed COMAR 07.02.07.12, which defines "ruled out" child abuse. In that regulation, scienter is specifically required for physical child abuse, but not for child abuse by mental injury. Because the agency included scienter in one place and excluded it in another, the Court concluded that scienter should not be implied where excluded. The legislative history of the mental injury statute also did not indicate an intention to include a scienter requirement. Finally, the Court distinguished the *Taylor* case on the ground that the Court of Appeals in *Taylor* was addressing physical child abuse, where, as indicated above, a scienter requirement appears in the regulation. Therefore, the Court held that the ALJ did not err by failing to include scienter as an element of indicated child abuse by mental injury.

John Leineweber v. Michele Leineweber, No. 1011, September Term 2013, filed October 29, 2014. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2014/1011s13.pdf

FAMILY LAW – CHILD SUPPORT – INCOME

Facts:

Appellant/Cross-Appellee, John Leineweber ("Father"), and Appellee/Cross-Appellant, Michele Leineweber ("Mother"), were divorced in the Circuit Court for Howard County on April 4, 2005. The Judgment of Absolute Divorce granted the parties joint legal custody of their minor children with Mother having primary physical custody. Pursuant to a Mediated Settlement Agreement, that was incorporated in the Judgment but not merged, Father agreed to "pay to [Mother] the sum of $2,199.00, per month, as and for child support."

On April 29, 2011, Mother filed a motion to modify custody and child support, which the court granted on January 3, 2012. On October 31, 2012, Father filed a complaint to modify child support which Mother moved to strike. After hearing the matter on April 30, 2013, the Master recommended that the circuit court deny Father's request for modification. On May 9, 2013, Father filed exceptions arguing in pertinent part that "although the Master determined that [Father's] previous deferrals were counted as income in the year in which they were earned . . . and [Father] introduced sufficient evidence to identify the amounts which were previously deferred, the Master failed to take into consideration the evidence presented in reaching her recommendation." On July 3, 2013, the court held a hearing on Father's exceptions and, thereafter, denied Father's request for modification of child support. On July 31, 2013, Father timely appealed. He asks us to determine whether the circuit court abused its discretion in denying his motion to modify child support.

Held: Affirmed.

Deferred income should be included in the child support calculation only during the year that it was earned and not during the year that it is actually received. Otherwise, the non-custodial parent would be able to decrease his or her child support obligation by shifting income earned presently into the future. But, in this case, because Father failed to prove that the court previously included his deferrals in its child support calculations, we cannot give him the benefit of reducing his present income by that amount.

Beryl Fitzzaland a/k/a Beryl Zahn v. Jeffrey Zahn, No. 748, September Term 2013, filed August 1, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/0748s13.pdf

FAMILY LAW – CHILD SUPPORT – DETERMINATION OF DESTITUTE ADULT CHILD WHERE ADULT CHILD IS AUTISTIC – CHILD SUPPORT GUIDELINES – AWARD OF ATTORNEY'S FEES

Facts:

Appellant ("Mother") and Appellee ("Father") are the parents of two children, Douglas and Thomas. When Mother and Father divorced in 2001, Father was given sole custody of the boys, but was not awarded any child support. A few years after the divorce, Douglas was diagnosed with autism, anxiety, oppositional defiant disorder, and attention deficit/hyperactivity disorder. Shortly after Douglas turned eighteen years old, Father filed a motion for child support in which he asked the circuit court, among other things, to find that Douglas was a destitute adult child and to order Mother to pay child support. Mother opposed the motion, and the trial court conducted a four-day trial on the matter. At the conclusion of the trial, the court found Douglas to be a destitute adult child and ordered Mother to pay child support to Father and to pay a portion of Father's attorney's fees.

Held: Affirmed.

Mother challenged the trial court's finding that Douglas was a destitute adult child on the grounds that (1) the court failed to consider Douglas's total expenses, (2) there was no causal link between Douglas's mental infirmity and the lack of capacity to be self-supporting, and (3) Douglas could become self supporting. The Court of Special Appeals disagreed.

The Court began by citing to the definition of a destitute adult child in Section 13-101(b) of the Family Law Article ("F.L.") as "an adult child who: (1) has no means of subsistence; and (2) cannot be self-supporting, due to mental or physical infirmity." The Court noted that the phrase "no means of subsistence" encompasses adult children with no financial resources or earning capacity, as well as those with financial resources, but whose reasonable living expenses exceed their financial resources. The Court determined that Douglas fell in the first category, because he was not employed and had no other means of support. All of Douglas's expenses for food, clothing, and shelter were paid or provided for by Father and Father's wife. The Court held that there was no need for the trial judge to consider Douglas's expenses, because such expenses would be relevant only if Douglas had financial resources at the time of trial.

The Court of Special Appeals next addressed the question of whether the circuit court erred in finding that Douglas's current inability to be self-supporting was due to his autism and other disabilities. The record in the instant case, according to the Court, demonstrated that Douglas's disabilities pervaded his day-to-day life and were the cause of his inability to be self-supporting. The Court pointed to Father's vocational rehabilitation expert, who testified that Douglas's disability was "most severe," in that it affected his social behavior, communication, and life skills, and that as a result Douglas could not live independently or be self-supporting.

Mother, however, claimed that Douglas could become self-supporting, and pointed to Douglas's above average scores on a variety of career assessment tests and to the fact that the expert never testified that Douglas could not be self-supporting in the future. The Court rejected this argument, stating that whether the adult child's disability impedes him or her from being self-supporting allows consideration of only the child's current abilities. Accordingly, Court concluded that there was no error in the trial court's finding that Douglas was a destitute adult child.

The Court of Special Appeals also upheld the trial court's award of child support to Father. The Court reaffirmed its prior opinions in *Stern v. Stern*, 58 Md. App. 280 (1984) and *Goshorn v. Goshorn*, 154 Md. App. 194 (2003) that, once a child has been determined to be a destitute adult child, the court's next step is to apply the child support guidelines in F.L. §12-204 to ascertain the support obligation a parent owes to that child. Because the trial court correctly applied the child support guidelines to Mother and Father, there was no error in the resulting child support award to Father.

Finally, the Court of Special Appeals affirmed the award to Father of a portion of his attorney's fees. The attorney's fee award was based on Mother's filing of a custody petition in the middle of the trial, in which she sought a change in custody of Thomas, who was then a minor. The trial court determined that the custody petition was unjustified and extended the trial two days longer than otherwise would have been necessary. The court awarded Father $7,500 in attorney's fees to cover those two unnecessary days of trial.

On appeal, Mother conceded that the trial court applied the required factors under F.L. §12-103(b). She argued, however, that the amount of $7,500 was arbitrary, because the court did not articulate how it arrived at that amount, and the award exceeded the total cost of attorney's fees for the two unnecessary days of trial. The Court of Special Appeals rejected her argument.

The Court cited to *Lieberman v. Lieberman*, 81 Md. App. 575 (1990) for the four factors that a trial court should consider in determining the appropriate amount of an attorney's fee award. The Court determined that the $7,500 award, out of a total of $33,642.12 in attorney's fees incurred by Father, was adequately supported by the testimony and exhibits, was reasonably necessary because of the unjustified custody petition, was reasonable for the work done, and could reasonably be afforded by Mother. Accordingly, the Court found no error or abuse of discretion in the award of attorney's fees to Father.

In re: Tavon T., No. 156, September Term 2013, filed October 6, 2014. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2014/0156s13.pdf

JUVENILE LAW – COMPUTATION OF TIME

Facts:

Appellant was charged, as a juvenile, with theft under $100. The circuit court granted the Master's recommendations and placed appellant on probation supervised by the Department of Juvenile Services ("DJS") with specific terms and conditions. For approximately two years the disposition remained the same.

At a review hearing on March 5, 2013, DJS requested that appellant's commitment be terminated and that his case be closed unsuccessfully. The Master agreed, finding that "the Respondent no longer requires the Court's guidance, treatment, and rehabilitation" and "recommend[ed] rescinding his commitment and closing the case unsuccessfully, terminating the Court's jurisdiction and sealing the file." On March 20, 2013, the circuit court denied the Master's recommendations, scheduled a hearing before another circuit court judge, with a notation to "make mental health [treatment] a condition of [appellant's] supervision."

Held:

The circuit court timely denied the Master's findings of fact and recommendations. The Master's findings and recommendations were filed on March 7, 2013. That same day, copies of the Master's Report and Recommendations, Proposed Order for Final Termination, and a Notice of Right to File Exceptions were delivered to the Office of the State's Attorney, DJS, and appellant's attorney in their courthouse mailboxes and sent to appellant's mother by regular U.S. Mail. No exceptions were filed and on March 20, 2013.

Under Maryland Rule 11-111(c), "[a]ny party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders." Exceptions must be "filed with the clerk within five days after the master's report is served upon the party[.]" Maryland Rule 1-203 dictates the rules for computing time and determining filing deadlines and provides that "if the period of time allowed is seven days or less, intermediate Saturdays, Sundays, and holidays are not counted." Subpart c further provides that when a party has to act within a prescribed period and "service is made by mail, three days shall be added to the prescribed period."

We do not aggregate the days for service with the prescribed period, and, in line with the federal analogue to Maryland Rule 1-203(c), Rule 6(e) of the Federal Rules of Civil Procedure, we hold that the three-day period includes weekends and holidays. But, if the three-day period ends on a

weekend or legal holiday, the final day is the next day that is not a weekend, legal holiday, or a day on which the court is not open during its regular hours. To do so in this case also eliminates the question of whether the three day period should be added before or after the prescribed period because the final day for filing will be the same. Here, if the five-day prescribed period is calculated first, eliminating the intervening Saturday and Sunday, the period begins Friday 3/8, includes Monday 3/11, Tuesday 3/12, Wednesday 3/13, and ends Thursday 3/14. The three days for mail service begins on Friday 3/15 and ends on Sunday 3/17. Because the period cannot end on a weekend, the final day for exceptions to be filed is Monday 3/18. Rule 11-111(d), which governs the actions by the court when, as in this case, no exceptions are filed. The rule provides, in pertinent part: "[a]ction by the court under this section shall be taken within two days after the expiration of the time for filing exceptions." Accordingly, the court was required to take action within two days, i.e. by Wednesday, March 20, 2013, which it did.

Maryland Rule 11-111(d), provides that "[t]he court may remand the case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. The circuit court's specific instruction to make mental health a condition of appellant's supervision, while not expressly permitted, was not prohibited by the statute. Additionally, that mental health treatment was made a part of appellant's supervision was not reduced to a judgment by a court order until after the subsequent court hearing on April 15, 2013. In sum, there was no summary action changing any conditions of appellant's probation.

James F. Blackwell v. CSX Transportation, Inc., No. 1739, September Term 2013, filed October 29, 2014. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2014/1739s13.pdf

LABOR AND EMPLOYMENT – FEDERAL EMPLOYERS' LIABILITY ACT (FELA) – EMPLOYEE'S RELEASE OF CLAIMS AGAINST EMPLOYER – PERMISSIBLE SCOPE OF RELEASE

Facts:

Appellant James F. Blackwell ("Blackwell") filed a complaint against CSX Transportation, Inc. ("CSX"), his former employer, in the Circuit Court for Baltimore City on July 2, 2013. Blackwell alleged that he developed a repetitive trauma related disorder to his feet (bilateral plantar fasciitis) as a result of being required to walk on uneven ballast along railroad tracks as part of his employment with CSX.

Previously, in 2007, Blackwell filed a separate complaint against CSX alleging that he had developed repetitive stress disorders to his knees. Blackwell's 2007 complaint attributed his injuries to his occupational exposure to walking on uneven ballast. In 2009, Blackwell settled the claims raised in his 2007 complaint. Through this settlement agreement, Blackwell received a payment from CSX in return for executing a release that forever released CSX from any liability for Blackwell's development of repetitive stress and cumulative trauma injuries to his knees or lower extremities. The release also expressly provided that a substantial portion of the settlement payment was intended to compensate Blackwell for any new repetitive stress or cumulative trauma injuries that he may develop in his lower extremities.

On October 9, 2013, the circuit court granted summary judgment in favor of CSX, ruling that Blackwell's 2013 claims were precluded by the release he executed in 2009. Blackwell contended that the 2009 release was invalid under Section 5 of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 55, because the release allegedly exempted CSX from all liability under the FELA. The circuit court, however, upheld the validity of the 2009 release and found that Blackwell's 2013 claims against CSX had already been released. The circuit court reasoned that the 2009 release precluded Blackwell's 2013 claims because the feet are part of the lower extremities and bilateral plantar fasciitis is a repetitive stress or cumulative trauma disorder.

This appeal followed.

Held: Affirmed.

The Court of Special Appeals held that, under Section 5 of the FELA, a release executed by a railroad employee is valid if the release is executed in settlement of a claim arising under the

FELA and the scope of the release is limited to risks known to both the employer and employee at the time the release is executed.

In so holding, the Court of Special Appeals adopted the "known risk" test first formulated by the United States Court of Appeals for the Third Circuit in *Wicker v. Consol. Rail Corp.*, 142 F.3d 690 (3d Cir. 1998). The 2009 release executed by Blackwell is valid under Section 5 of the FELA when analyzed using the "known risk" test. The 2009 release was executed in settlement of Blackwell's then extant claim for knee injuries. Furthermore, the terms of the release demonstrate that Blackwell and CSX knew that Blackwell's history of walking on uneven ballast created a risk that he would develop future injuries to his lower extremities. The Court of Special Appeals, therefore, held that this particular risk was taken into account when the 2009 settlement was negotiated.

Grady Management, Inc. v. Jesse Epps, No. 2037, September Term 2012, filed August 28, 2014. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2014/2037s12.pdf

REAL PROPERTY – LANDLORD-TENANT – JUDGMENT

Facts:

Mr. Epps is a tenant residing in the Snowdens Ridge Apartments at 2103 Harlequin Terrace in Silver Spring, Maryland, an apartment project that receives federal funds under the Section 8 New Construction Program[1] to subsidize the rent for its tenants. Mr. Epps and Grady Management entered into a model lease for such subsidized programs, which provides that "[a]fter the initial term ends, the Agreement will continue for successive terms of one Year each unless automatically terminated as permitted by paragraph 23 of this Agreement." The termination clause (Paragraph 23) states that the Landlord may terminate the Agreement for the tenant's "material noncompliance" or "for other good cause," which includes, but is not limited to, the tenant's refusal to accept change to this agreement. Terminations for "other good cause" may only be effective as of the end of any initial or successive term."

On November 3, 2010, Grady Management brought an action, under the breach of lease statute, Md. Code (1974, 2010 Repl. Vol.), § 8-402.1 of the Real Property Article ("R.P."), in the District Court. The case was transferred to the circuit court after Mr. Epps requested a jury trial. The action alleged that Mr. Epps, a member of "his household[,] or guest [made] excessive noises" and "threatened another resident." On July 29, 2011, a jury found that Mr. Epps had breached the lease, and that the breach was substantial, but that it did not warrant eviction.

On January 31, 2012, Grady Management sent Mr. Epps a Notice to Vacate by April 1, 2012 based on "other good cause and/ or material noncompliance with the covenants and conditions of [Mr. Epps's] lease agreement" based on the same set of facts from the breach of lease case. When Mr. Epps refused to vacate, Grady Management filed a tenant holding over complaint pursuant to R.P. § 8-402. Both parties filed motions for summary judgment, and the circuit court granted Mr. Epps's motion finding that because Mr. Epps's had a right to automatic renewal of his lease, terminating the lease at the end of the term was effectively an eviction. The issue of

[1] The New Construction Program was established by Congress through enactment of Section 8 of the Housing and Community Development Act of 1974. See 42 U.S.C. § 1437f. Regulations pertaining to this program are promulgated by the Department of Housing and Urban Development (HUD), found at 24 C.F.R. Part 880 et seq. *See Greenwich Gardens Assoc. v. Pitt*, 484 N.Y.S.2d 439, 440 (1984). The New Construction Program provides subsidies to project owners who develop newly constructed rental housing for low income tenants. See U.S. Dep't of Hous. & Urban Dev., *Section 8 Program Background Information*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/s8bkinfo (last visited July 10, 2014).

whether Mr. Epps's actions warranted an eviction had been litigated in the breach of lease case, so the tenant holding over action was precluded by res judicata.

Held:

The trial court did not err in granting summary judgment in favor of Mr. Epps. Because Mr. Epps's lease continues for successive terms, his right to possession continues for an indefinite period, and thus, until termination for good cause, he is in possession under what at that point in time is an "unexpired lease." *See Cottman v. Princess Anne Villas*, 340 Md. 295, 298 (1995). It follows that a decision to terminate "for other good cause," effective at the end of the term, or not to renew at the end of a term is an eviction and, when based only on lease violations of the quiet enjoyment nature as claimed in this case, it is essentially a breach of lease case that should be treated no differently than a mid-term eviction. Therefore, good cause to terminate a project-based lease at the end of a lease term or successive term based on a claimed lease violation, appropriately and reasonably, should be subjected to Maryland's breach of lease standard for eviction.

The Court is not holding that a holding over action based on a breach of a lease in the nature of the kind before us in this case cannot be brought based on "other good cause" to terminate effective at the end of a term. But, if that is done, there has to be a finding in the holding over action that good cause warrants an eviction. On the other hand, it also would be appropriate (and, because a tenant holding over case does not allow for pretrial discovery, perhaps better) to bring a breach of lease case together with a tenant holding over action. The R.P. § 8-402.1 case could be decided first and then, if the claimed breach warrants an eviction, the R.P. § 8-402 holding over action would follow. Moreover, if the termination is based on "other good cause," as in this case, but termination is not effective until the end of the term, the right to terminate could be obtained earlier so that, at the end of the term, the tenant is in fact holding over.

When Grady Management sought to terminate Mr. Epps's lease in the breach of lease case, the jury found that his breach of the lease, even though substantial, did not warrant an eviction. Even to the extent that a tenant holding over claim and action under R.P. § 8-402 may differ from a claim and action under R.P. § 8-402.1, they are, in the context of this case, essentially the same claim. Not only was Mr. Epps not a holdover tenant when the tenant holding over action was initiated, he does not reach holdover status until good cause has been established under the R.P. § 8-402.1 standard. The breaches of the lease that the landlord now claims constitute good cause to terminate the lease at the end of the term are the same lease violations that were fairly litigated in the breach of lease case and found not to warrant an eviction. Therefore, the grant of summary judgment in Mr. Epps's favor did not constitute error.

Teleta S. Dashiell v. Maryland State Police Department, No. 1078, September Term 2011, filed October 8, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/1078s11.pdf

MARYLAND PUBLIC INFORMATION ACT – EXEMPTION FROM DISCLOSURE – TRIAL COURT MUST MAKE DETERMINATION ON EACH EXEMPTION CLAIMED AND ON SEVERABILITY OF ANY EXEMPT DOCUMENT – NECESSITY OF REVIEW OF EACH DOCUMENT WITHHELD

Facts:

Maryland State Police ("MSP") Sergeant John Maiello made racially disparaging remarks about appellant, who was a potential witness to a crime, that were inadvertently recorded on appellant's voicemail system. As a result of appellant's complaint against Sergeant Maiello, an internal investigation was conducted that resulted in appellant's complaint being sustained and disciplinary action being taken.

Thereafter, appellant filed a request under the Maryland Public Information Act ("MPIA") for disclosure of the records generated by the MSP as a result of her complaint. The MSP denied the request, claiming exemption of the records from disclosure under the MPIA as (1) "personnel records" under State Government Article ("SG") § 10-616(i), (2) "records of investigations conducted by a police department" under SG § 10-618(f), and (3) "intra-agency memoranda" under SG § 10-618(b). Appellant brought the instant case, claiming that none of the exemptions advanced by the MSP applied to the requested records.

The trial court concluded that all of the records were "personnel records" under the MPIA, without analyzing the other bases advanced by the MSP. The court, however, did not review the subject records and documents *in camera*, nor did it require the MSP to identify and provide detailed information about each withheld document.

Held: Vacated and remanded.

The Court noted that under *Montgomery County v. Shropshire*, 420 Md. 362 (2011), the Court of Appeals determined that, "because the internal affairs records involving [the individual officers] related to employee discipline, the records are indeed 'personnel records' exempt from disclosure pursuant to Section 10-616(i) of the State Government Article." Id. at 381. At first blush, that holding would support the trial court's decision in the instant case. But, according to the Court of Special Appeals, the trial court did not have the benefit of the recent Court of Appeals' opinion in *Md. Dep't of State Police v. Md. State Conference of NAACP Branches*, 430 Md. 179 (2013) ("*NAACP Branches*").

The Court of Special Appeals determined that under *NAACP Branches*, a trial court must determine whether each requested document in the investigatory record is exempt from disclosure under any provision of the MPIA advanced by the agency, and if exempt, whether any such document is subject to disclosure as severable under SG § 10-614(b)(3)(iii). Because, in this case, there was no *in camera* review, or identification of and detailed information about each withheld document, the Court held that the trial court did not have a sufficient factual basis to determine the applicability of an exemption from disclosure under the MPIA, and, if exempt, the severability of any portion thereof. Moreover, according to the Court, the trial court could not determine whether any redactions agreed to by appellant might remove a document from an exemption or make it severable.

Steven L. McCormick, et ux. v. Medtronic, Inc., et al., No. 670, September Term 2013, filed October 6, 2014. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2014/0670s13.pdf

EXPRESS PREEMPTION – IMPLIED PREEMPTION – MEDICAL DEVICES

Facts:

In July 2007, Steven McCormick underwent spinal-fusion surgery to relieve his persistent back pain. His surgeon, Dr. Michael K. Rosner, implanted an Infuse bone graft in an "off-label" manner – i.e., in a manner other than the one for which it has been approved by the FDA. Dr. Rosner used a Medtronic cage that the Food and Drug Administration ("FDA") had not approved for use with the Infuse device, and he took a posterior approach rather than the FDA-approved anterior approach. At least one Medtronic sales representative was present in the operating room during Mr. McCormick's surgery.

The McCormicks alleged that the surgery did not relieve Mr. McCormick's back pain, but instead caused a host of other problems that forced Mr. McCormick to go on permanent disability from work. They claimed that Mr. McCormick suffered from a narrowing of the cervical disc space at the site where the Infuse device had been implanted. Eventually, Mr. McCormick underwent revision surgery to remove the "bony overgrowth" and inflammation that had allegedly resulted from the earlier surgery in 2007. Additionally, Mr. McCormick learned that he had two nodules in his lungs that he must monitor to ensure that they do not become cancerous. The McCormicks contended that Mr. McCormick's exposure to the Infuse product significantly increases the risk that the nodules will become cancerous.

The McCormicks alleged that after obtaining FDA approval of the Infuse device, Medtronic engaged in an extensive and illegal effort to promote the off-label use of the device, apparently by means of a posterior approach without the required cage. The McCormicks alleged specifically that Medtronic promoted the off-label use of the Infuse device by giving financial incentives to physicians, by providing physicians with information from consultants and "key opinion leaders" whom Medtronic had targeted and paid, and by placing Medtronic sales representatives in operating rooms when surgeons were performing surgeries in which they employed the off-label, anterior approach.

On the basis of these allegations, Mr. McCormick asserted a series of claims against Medtronic, a Medtronic subsidiary, the Medtronic sales representative who was in the operating room during his surgery (collectively, "Medtronic"), and Dr. Rosner.

After a hearing, the circuit court dismissed the claims against Medtronic based on federal preemption.

Rather than dismiss the claims against Dr. Rosner, however, the court stayed the proceedings to permit the McCormicks to file the claim in the Health Care Alternative Dispute Resolution Office. The McCormicks initially asked the court to allow them to appeal the order as to Dr. Rosner under the collateral order doctrine. After the court granted their request, however, the McCormicks dismissed the claims against Dr. Rosner, without prejudice. Then they took this appeal.

Held: Affirmed in part; reversed in part.

Although the circuit court granted Medtronic's motion to dismiss, there was no final judgment because the court did not adjudicate all of the claims against Medtronic's co-defendant, Dr. Rosner. The collateral order doctrine, which the McCormicks briefly invoked, did not apply. The McCormicks did not solve the problem by dismissing all claims against Dr. Rosner without prejudice. Nonetheless, this Court had the power to decide the appeal under Md. Rule 8-602(e)(1), which authorizes this Court to "enter a final judgment on its own initiative" if it confronts an improper, interlocutory appeal in a case where the circuit court could have certified its ruling as final and appealable under Rule 2-602(b).

The Medical Device Amendments ("MDA") expressly preempts state-law requirements that relate to the safety or effectiveness of federally-regulated medical devices and are "different from, or in addition to, any requirement applicable" under the MDA itself. Meanwhile, under *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), a state-law claim may be impliedly preempted if it is based *solely* on a violation of federal law or if the claim would not exist but for federal law. Thus, to escape express preemption and implied preemption, the conduct on which the plaintiff's claim is premised must violate the Federal Food, Drug, and Cosmetic Act ("FDCA") and must also be the type of conduct that would traditionally give rise to liability under state law even if the FDCA had never been enacted.

While off-label use of medical devices by members of the medical profession is permissible under the terms of the MDA, off-label promotion by a manufacturer may constitute "misbranding," a criminal violation of the FDCA. Although the FDA has recognized a safe harbor that allows manufacturers of medical devices to provide members of the medical profession with peer-reviewed articles discussing off-label uses of the device, the safe harbor does not apply to off-label promotion that is false or misleading. Therefore, the MDA does not expressly preempt state-law claims that are based on a violation of the federal prohibition of false or misleading off-label promotion.

The McCormicks' misrepresentation claims are preempted insofar as they attack the accuracy or adequacy of the statements that Medtronic made in the FDA-mandated and FDA-approved labeling. To fault Medtronic for making the statements that the FDA required it to make, or to impose liability on Medtronic for not making statements that the FDA required it not to make, would be to impose state-law requirements that are "different from, or in addition to," those imposed by the FDCA.

However, claims concerning the misrepresentations that Medtronic allegedly made in voluntary communications with the medical profession or the public are not expressly preempted. Insofar as Medtronic's alleged misrepresentations consist of false statements of material fact in the context of off-label promotion, outside the scope of the safe harbor, a state-law misrepresentation claim would not impose any requirements different from or in addition to those imposed under federal law. Furthermore, these state-law misrepresentation claims are not impliedly preempted because those claims predate the FDCA and would continue to exist even if the FDCA were repealed.

Federal law also does not expressly preempt the claims concerning the alleged failure to disclose material facts, *provided* that those omissions occurred in the context of off-label promotion *and* that the omitted facts were necessary to make Medtronic's other statements not misleading. However, if the claims solely concern an alleged failure to disclose material facts or test results to the FDA during the premarket approval process, they are impliedly preempted because they would amount to allegations of fraud on the FDA, which the FDA alone may pursue. The claims are also impliedly preempted to the extent that they may concern the act of off-label promotion itself, divorced from any misrepresentations that Medtronic may have made in the course of off-label promotion.

Federal law would preempt any effort to impose a duty to warn that required Medtronic to give warnings "different from, or in addition to," those in the FDA-approved labeling. However, to the extent that the failure to warn claim simply restated the McCormicks' claim for the failure to disclose material facts that were necessary to make Medtronic's other statements not misleading in the context of off-label promotion, it may proceed.

Any strict liability claims based on the risk-utility or consumer-expectation tests are expressly preempted. The FDA has approved the Infuse product, and the agency neither has prohibited nor can prohibit its off-label use by members of the medical profession. Similarly, any strict liability claim premised on a products liability claim for on off-label use is preempted.

Claims of breach of the implied warranties of merchantability or fitness for a particular purpose are expressly preempted: to impose additional warranties by operation of law would be to impose requirements that are "different from, or in addition to," the specific warranties or representations that the FDA required Medtronic to make in the packaging and labeling that accompanies the product. Similarly, to the extent that the breach of express warranty claim is based solely on alleged warranties in the FDA-approved labeling, the claim is expressly preempted.

On the other hand, to the extent that the McCormicks contend that Medtronic breached express warranties that it made in voluntary communications with the medical profession or the public, the FDCA does not expressly preempt those claims. Because federal law already prohibits false or misleading off-label promotion outside the safe harbor, a state would not impose any requirements that are "different from, or in addition to," those under federal law if it held a manufacturer liable for making misleading warranties outside the label. Nor would such a claim be impliedly preempted.

The McCormicks did not plead fraud with particularity. The complaint lacks specificity in alleging when and how the Medtronic defendants made the false statements of material fact (or failed to disclose material facts that were necessary to make other statements not misleading). On remand, the circuit court should allow the McCormicks a reasonable opportunity to amend their complaint and to plead fraud with greater particularity.

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Jakeem Roy v. Elliot Dackman, et al., Case No. 558, September Term 2013, filed October 6, 2014. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2014/0558s13.pdf

STANDARD OF REVIEW – SUMMARY JUDGMENT – EXPERT TESTIMONY

NEGLIGENCE – LEAD PAINT POISONING – EXPERT TESTIMONY

NEGLIGENCE – LEAD-PAINT POISONING – CAUSATION

Facts:

According to blood tests taken on September 17, 1997, Jakeem Roy ("Roy") was exposed to lead before he reached age two. Roy filed a complaint through his mother, Latisha Hillery, in the Circuit Court for Baltimore City on June 29, 2011, against the owners of a two-story brick row house located at 2525 Oswego Avenue, Elliot and Sandra Dackman, Jacob Dackman & Sons, L.L.C., and Brina Corporation ("the Dackmans"). Roy lived at 2525 Oswego Avenue for a short period as a baby and claimed he was exposed to lead paint there. Roy asserted that as a result of the Dackmans' acts and omissions, he was exposed to quantities of chipping, peeling, and flaking lead-based paint powder and dust that was a direct and proximate cause of the injuries he maintains he sustained from lead poisoning.

In support of his claim, Roy sought to introduce the expert testimony of Dr. Eric Sundel, a board-certified pediatrician. Dr. Sundel was retained to provide an opinion on whether Roy had been exposed to toxic lead levels at 2525 Oswego Avenue and whether that exposure resulted in injury. However, Dr. Sundel had no specialized training or experience in treating children with lead poisoning; had never evaluated, diagnosed, or monitored the progress of children with lead poisoning; and had never treated a child for symptoms related to lead ingestion where he determined that the child was injured or had some issues related in any way to lead.

The Dackmans filed a motion to exclude the expert testimony of Dr. Sundel and for summary judgment. On May 7, 2013, the circuit court granted summary judgment in favor of the Dackmans, finding that Dr. Sundel was not qualified to testify about either the source of Roy's lead exposure or the medical injuries alleged. Roy appealed, contending that Dr. Sundel was qualified to testify as an expert in a lead-based poisoning case and that, even without such expert testimony, Roy could prove causation through circumstantial evidence.

Held: Affirmed.

The Court of Special Appeals first noted that when a circuit court grants a summary judgment motion on the ground that the plaintiff's expert lacks the qualifications or a sufficient factual

basis to offer expert testimony, the circuit court is making a decision on the admissibility of the expert's testimony as part of its summary judgment decision, which is reviewed on appeal without deference.

Turning to the qualifications of an expert witness, the Court found that although an expert may base an opinion on data and facts not directly ascertained by that expert but contained in the reports and studies of others, those bases must permit reasonably accurate conclusions, not mere conjecture. Applying this standard, the Court found that Roy's proposed expert lacked sufficient qualifications and factual basis for his testimony to assist the jury in making reasonably accurate conclusions as to whether Roy suffered injury as a result of exposure to lead-based paint at 2525 Oswego Avenue.

The Court next stated that in establishing a *prima facie* case in a lead-based paint negligence action, although the plaintiff may prove the "source" causation element through circumstantial evidence, the plaintiff must put forth sufficient evidence to establish that the increase in blood lead level associated with the source property was substantial enough to cause medical injury. The Court acknowledged that circumstantial evidence may support an inference of causation as long as it amounts to a reasonable likelihood, rather than a mere possibility. The Court noted, however, that previous lead-based paint poisoning cases, which address the sufficiency of circumstantial evidence, relied on that evidence to connect the dots between a specific property and a plaintiff's childhood exposure to lead rather than to establish a medical link between elevated blood lead levels and injury. The Court concluded that although circumstantial evidence may be sufficient to establish the link between the property and the plaintiff's exposure to lead, it remains true, as a general matter, that expert medical testimony is required to show that any associated increase in blood lead level was substantial enough to cause injury.

The Court held that the proffered expert testimony was appropriately excluded because the proffered expert was not sufficiently qualified and because there was insufficient evidence to form the factual predicate to support his testimony. Further, the circumstantial evidence presented (and upon which the pediatrician relied) was also insufficient to independently establish a *prima facie* case for causation in a lead-based paint poisoning action. Accordingly, Roy failed to offer sufficient evidence from which a reasonable fact-finder could reasonably infer that his injuries resulted from his exposure to lead at 2525 Oswego Avenue, and the circuit court's grant of summary judgment in favor of the Dackmans was proper.

Tyrone Francis, et al. v. Michael Brian Johnson, Jr., No. 673, September Term 2013, filed October 6, 2014. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2014/0673s13.pdf

ADMISSION OF EVIDENCE – MD. RULE 5-403 – LOCAL GOVERNMENT TORT CLAIMS ACT – COURTS AND JUDICIAL PROCEEDINGS § 5-302 – MALICE – DUPLICATIVE DAMAGE AWARDS

Facts:

Michael Johnson was in front of his cousins' house at 1648 North Gilmor Street when a Baltimore City Police Department ("BCPD") van pulled up. After some conversation, Detective Smith got out of the van, grabbed Mr. Johnson and pulled him into the back of the van. Detective Smith began hitting Mr. Johnson with his police baton. He then took Mr. Johnson's cell phone, broke it in half, and threw the battery out the window. Detective Francis told Detective Smith that he would "keep driving until you say stop." Detective Smith did not tell Detective Francis to stop until they had arrived in Ellicott City, Maryland.

Detective Francis told Mr. Johnson to give him his shoes. Detective Hellen told Detective Smith to "take his socks too." Mr. Johnson complained that it was raining, to which Detective Smith responded: "We don't care." Detective Smith then opened the door to the van and pushed Mr. Johnson out onto the grass. Mr. Johnson walked to a gas station and called 911. The Howard County Police Department ("HCPD") drove Mr. Johnson back to his home in Baltimore City.

Mr. Johnson filed a complaint in the Circuit Court for Baltimore City against the three officers. The complaint alleged a violation of Articles 24 and 26 of the Maryland Declaration of Rights, false imprisonment, battery, and, assault. A jury found in favor of Mr. Johnson. After the court granted, in part, appellants' motion for judgment notwithstanding the verdict, on the ground that the verdict was excessive, Mr. Johnson was left with an award of $300,000 in compensatory damages and $35,000 in punitive damages.

Held: Judgment affirmed, in part, and reversed, in part. Case remanded to the Circuit Court for Baltimore City to revise duplicative damages award.

Evidence that the police, one hour before the incident at issue, engaged in a similar course of conduct, i.e., taking a juvenile into custody in a police van, threatening him, driving him to a far away location, and pushing him out of the van, was relevant to show the intent of the officers, as well as address the issue of the juvenile's consent.

The cap on damages for the local government, pursuant to Md. Code (2006 Repl. Vol.) § 5-302(b)(2)(i) of the Courts & Judicial Proceedings Article ("CJP"), does not apply to an individual police officer who is found to have acted with actual malice.

There can be only one recovery of damages for one wrong or injury. Duplicative or overlapping recoveries in a tort action are not permissible. Where a constitutional claim is based on the same facts as a tort claim, damages awarded for each count are duplicative.

The circuit court did not err in denying the motion for judgment notwithstanding the verdict on the ground that there was insufficient evidence that the officers acted with actual malice. There was overwhelming evidence to support a finding of malice.

Philip Royce May, et al. v. Air & Liquid Systems Corporation etc., et al., No. 2670, September Term 2012, filed October 3, 2014. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2014/2670s12.pdf

PRODUCTS LIABILITY – DUTY TO WARN

Facts:

Plaintiff Philip Royce May worked as a machinist mate from 1956 until 1976 in the United States Navy. His duties included replacing asbestos gaskets and "packing" in the pumps that pumped superheated steam through the steam-propulsion systems of Navy ships. Mr. May's work exposed him to airborne asbestos fibers.

In January 2012, Mr. May learned that he was suffering from malignant pleural mesothelioma, a rare form of cancer that is commonly caused by asbestos exposure. Shortly thereafter, he and his wife filed suit against numerous defendants, including the manufacturers of the steam pumps on the ships on which he served.

Defendants Air & Liquid Systems Corp., Warren Pumps LLC, and IMO Industries, Inc., manufactured the steam pumps whose gaskets and packing Mr. May would replace. In accordance with the Navy's specifications, the defendants' pumps contained asbestos gaskets and packing when the defendants first delivered them to the Navy.

Mr. May was not exposed to any asbestos-containing products that had been made or sold by any of the defendant-manufacturers. Instead, he was exposed to asbestos-containing replacement parts that were made and sold by entities other than the defendant-manufacturers.

The defendant-manufacturers neither required nor recommended that the Navy use their own products as replacement parts, nor did they require or recommend the use of asbestos-containing replacement parts. The defendant-manufacturers also did not instruct or advise Mr. May about how to make or change gaskets.

At the close of discovery, the manufacturers moved for summary judgment on the ground that, as a matter of Maryland law, they had no duty to warn of the dangers of the asbestos-containing replacement parts that they neither manufactured nor placed into the stream of commerce. The circuit court granted the motions. After the denial of the Mays' motions for reconsideration, the Mays noted a timely appeal.

Held: Affirmed.

Defendant companies were entitled to summary judgment because they have no liability for injuries caused by replacement or component parts that they neither manufactured nor placed into the stream of commerce.

This decision reaffirms *Ford Motor Co. v. Wood*, 119 Md. App. 1, cert. denied, 394 Md. 494 (1998). In *Wood*, the Court of Special Appeals held that an automobile manufacturer would have no liability for replacement or component parts that it neither manufactured nor placed into the stream of commerce. *Wood* explained that a manufacturer could be held liable for defective component parts manufactured by another person only if the manufacturer incorporated the defective part into its finished product. The *Wood* Court also stated that it would impose liability only on the entities in the chain of distribution for the defective part.

This case falls squarely under *Wood*. The Mays had no evidence that any of the defendant-manufacturers manufactured, marketed, sold, or otherwise placed into the stream of commerce any of the asbestos-containing gaskets or packing to which Mr. May was exposed. It was undisputed that Mr. May was exposed to asbestos only because of his exposure to replacement parts that persons other than the manufacturer-defendants had manufactured and placed into the stream of commerce.

Uninsured Employers' Fund, et al. v. Ronald White, No. 6, September Term 2013, filed October 3, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/0006s13.pdf

WORKERS' COMPENSATION – CROSS-APPEALS

Facts:

In 2004, Ronald White sustained an injury to his right ankle during the scope of his employment and applied for workers' compensation benefits. Following a hearing on March 7, 2007, the Workers' Compensation Commission (the "Commission") awarded him disability benefits to be paid by the Uninsured Employers' Fund (the "Fund").

In 2010, Mr. White sought treatment for pain in his lower back and left ankle. His doctor opined that the original injury to the right ankle caused Mr. White to favor that ankle, producing compensatory pain in his lower back and left ankle. This diagnosis drove Mr. White to seek to revise his claim with the Commission to include the new injuries purportedly caused by his original right ankle injury. After a hearing on March 31, 2011, the Commission entered an order on April 26, 2011 finding a causal relation between the original injury and his back injury but not between the original injury and the left ankle injury.

On May 16, 2011, the Fund petitioned the Circuit Court for Anne Arundel County to review the revised order of the Commission regarding the decision to extend compensation for Mr. White's back injury. *See* Md. Code (1991, 2008 Repl. Vol.), § 9-737 of the Labor & Employment Article. In response, Mr. White filed his intent to participate in the petition for review June 8, 2011. However, he did not file a cross-petition for judicial review of the denial of benefits for his left ankle injury until October 21, 2011, well past the deadline specified in Maryland Rule 7-203(b). The Fund moved to dismiss Mr. White's cross-petition for untimeliness and the circuit court acquiesced, dismissing the cross-petition on November 21, 2011.

The circuit court held a jury trial to hear the Fund's appeal from the Commission's revised order on February 5, 2013. Despite the previous dismissal of Mr. White's cross-petition, the circuit court ordered the jury to consider the full scope of the decision of the Commission, including the issues appealed by Mr. White. Following this *de novo* review, the jury affirmed the grant of benefits for the back injury and reversed the denial of benefits for the left ankle injury. The Fund appealed this decision.

Held: Reversed and remanded.

The Court of Special Appeals held that the claims in Mr. White's cross-appeal to the circuit court were barred as untimely and that he was not entitled to a full *de novo* review on the aspects of the Commission's decision from which he sought affirmative relief.

The initial focus of the Court was on the requirement of Rule 7-203(b) that parties respond to another party's timely petition for appeal with any cross-claims within ten days of receiving notice of that petition. Under this timeframe, Mr. White was obligated to file a cross-appeal for any claims he wished to appeal from the Commission's decision within ten days of receiving notice of the Fund's appeal. As he did not submit his cross-appeal within the timeframe mandated by Rule 7-203(b), the Court held that the claims within his cross-petition were not preserved for review by the circuit court.

Mr. White argued that the Fund's timely appeal entitled him to a full *de novo* appeal on both the claims appealed by the Fund and the claims raised in his belated cross-appeal, but the Court of Special Appeals rejected this argument. The Court differentiated from past cases involving full de novo appeals of Commission decisions on the basis of whether the non-appealing party would have reason to appeal from the Commission decision. *See Darby v. Marley Cooling Tower Co.*, 190 Md. App. 736, 743-44 (2010) (citing *Griggs v. C & H Mech. Corp.*, 169 Md. 556, 564 (2006). If a party prevailed *in toto* before the Commission, then the party would not have reason to challenge the decision via cross-appeal. In the event of an appeal from a party aggrieved by the Commission decision, the party prevailing *in toto* would have a right to have his or her issues heard in the appeal, with or without a cross-appeal.

In other words, a cross-appeal is not required for the circuit court to revisit an issue decided by the Commission against the non-appealing party that, if decided in that party's favor, would support affirmance of the Commission's decision. By contrast, a cross-appeal is required for the circuit court to revisit an issue decided by the Commission against the non-appealing party that, if decided in that party's favor, would require the circuit court to reverse or vacate at least a portion of the Commission's decision.

The Court of Special Appeals applied this latter principle to the present case, where Mr. White sought affirmative relief in the absence of a timely cross-appeal on the issue of benefits for his left ankle injury. As Mr. White did not receive a favorable decision from the Commission for disability benefits for his left ankle injury, his failure to cross-appeal prevented him from receiving affirmative relief from the circuit court.

Lisa Tomlinson, et al. v. BKL York LLC, et al., No. 1533, September Term 2013, filed October 7, 2014. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2014/1533s13.pdf

ZONING AND PLANNING – CONSTITUTIONAL AND STATUTORY PROVISIONS; JUDICIAL REVIEW

ADMINISTRATIVE LAW AND PROCEDURE – JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

Facts:

Appellants appeal the decision of the Circuit Court for Baltimore County on September 13, 2013, which affirmed the decision of the Baltimore County Board of Appeals, which affirmed the decision of the Office of Administrative Hearings of Baltimore County, which found that appellees were not required to obtain a County Council Resolution authorizing a material amendment of their planned unit development plan. Appellants filed this appeal on September 30, 2013.

Appellees seek to materially amend their plan and install a Wawa service station and gasoline store. A development plan conference and special hearing were held to review the proposed amendment, after which the amendment was approved. Appellants contend that appellees were required to seek a resolution as a part of the amendment process before the approval could be granted.

Held: Affirmed.

An amendment to a planned unit development plan must be reviewed and approved in the same manner as the original plan. To determine the manner of approval of the original plan, it must be discerned what law was in effect at the time of the approval of the original plan. This requires a review of legislative history in order that the law that was in effect at the time of approval can be applied. Appellees' amendment to their development plan was, thus, governed by the law in place at the time of the development plan's original approval. Because the law in place at the time of the original plan's approval did not require approval of an amendment so long as it materially conformed to the original plan, appellees were not required to seek further authorization in the form of a resolution for the amendment.

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ATTORNEY DISCIPLINE

This is to certify that the name of

J. CHRISTOPHER LLINAS

has been replaced upon the register of attorneys in this State as of October 2, 2014.

*

By a Per Curiam Order of the Court of Appeals dated October 3, 2014, the following attorney has been disbarred:

TALIEB NILAJA WILLS

*

By a Per Curiam Order of the Court of Appeals dated October 3, 2014, the following attorney has been disbarred:

MICHAEL FRANCIS BARNETT

*

By a Per Curiam Order of the Court of Appeals dated October 3, 2014, the following attorney has been disbarred:

MICHAEL CRAIG WORSHAM

*

By a Per Curiam Order of the Court of Appeals dated October 7, 2014, the following attorney has been disbarred:

MICHAEL CARL HODES

*

By an Order of the Court of Appeals dated October 9, 2014, the following attorney has been disbarred by consent:

SALEH A. STEVENS

*

By an Order of the court of Appeals dated October 20, 2014, the following attorney has been disbarred by consent:

DARRELL JAY BENNETT, JR.

*

By an Opinion and Order of the Court of Appeals dated October 21, 2014 the following attorney has been indefinitely suspended:

DONALD SAUNDERS LITMAN

*

By an Opinion and Order of the Court of Appeals dated October 21, 2014, the following attorney has been disbarred:

CHRISTINE BOCO GAGE-COHEN

*

By an Opinion and Order of the Court of Appeals dated October 22, 2014, the following attorney has been disbarred:

JASON ROBIN GELB

*

By an Order of the Court of Appeals dated August 25, 2014, the following attorney has been indefinitely suspended by consent, effective October 24, 2014:

TABATHA KARINA CUADRA

*

By an Opinion and Order of the Court of Appeals, dated October 28, 2014, the following attorney has been disbarred:

FLOYD REYNARD BLAIR

*

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the Category 1 One Hundred Eighty-Sixth Report of the Standing Committee on Rules of Practice and Procedure was filed on October 2, 2014:

http://mdcourts.gov/rules/rodocs/186ro.pdf