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Table of Contents

COURT OF SPECIAL APPEALS

Corporations and Associations
Inspection of Records by Stockholder
Hogans v. Hogans Agency 2

Criminal Law
Call Records
Baker v. State 3

Double Jeopardy
State v. Hallihan 5

Petition for Writ of Actual Innocence
McGhie v. State 6

Health Occupations
Maryland Nurse Practice Act
State Board of Nursing v. Sesay 8

Taxation
Property Taxes – Tax Sales
Kona Properties v. W.D.B Corp. 10

Torts
Social Host Liability
Davis v. Stapf 12

ATTORNEY DISCIPLINE 14

RULES ORDERS 15

UNREPORTED OPINIONS 16

361 Rowe Boulevard, Annapolis, MD 21401 **410-260-1501**

COURT OF SPECIAL APPEALS

Franklin T. Hogans, Jr. v. Hogans Agency, Inc., No. 775, September Term 2014, filed August 28, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/0775s14.pdf

CORPORATIONS – INSPECTION OF RECORDS BY STOCKHOLDER – CONFIDENTIALITY AGREEMENT

Facts:

Appellant is the owner of a real estate brokerage company and a minority shareholder in appellee, an insurance and real estate corporation. Appellant requested inspection of appellee's records, pursuant to Sections 2-512 and 2-513 of the Corporations and Associations Article. Appellee provided some records per appellant's request, and agreed to schedule a time for appellant to inspect and copy the books of account, conditioned upon appellant signing a confidentiality agreement that would prohibit appellant from disclosing the company's information to third parties. Appellant refused to sign a confidentiality agreement, and instead filed a complaint for a right to inspect in the Circuit Court for Kent County. Appellee filed a motion for summary judgment, which the circuit court granted in an order requiring appellant to sign a confidentiality agreement before reviewing appellee's records.

Held: Affirmed.

The Court of Special Appeals held that appellee was entitled to judgment as a matter of law. The Court noted an apparent conflict in the only two Maryland cases on the issue, *Weihenmayer v. Bitner*, 88 Md. 325 (1898), and *Wight v. Heublein*, 111 Md. 49 (1910). Relying on the reconciliation of such conflict suggested in James J. Hanks, Jr.'s treatise, Maryland Corporation Law, the Court concluded that a corporation may require the stockholder to sign a confidentiality agreement where such agreement and its terms advance the purpose of "protect[ing] the corporation against disclosure and misuse of confidential documents and information by the stockholder." Given that appellant was both a stockholder entitled to inspect appellee's books of account as well as the owner of a competing company, the trial court was within its discretion in requiring that appellant sign a confidentiality agreement.

Michael Edward Baker v. State of Maryland, No. 1397, September Term 2014, filed July 6, 2015. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2015/1397s14.pdf

EVIDENCE – HEARSAY – BUSINESS RECORDS – CALL RECORDS

Facts:

Michael Edward Baker, appellant, was arrested charged with second degree rape, impersonating a police officer, and related offenses. The victim alleged that, on the night of the crime, she was working as a prostitute, and appellant had called her to arrange an encounter. When he arrived, he falsely informed her that he was a police officer, and then forced her to engage in sexual acts with him against her consent. The police subsequently examined the victim's phone and obtained the phone number of the person who committed the rape. They then contacted AT&T and obtained call records for the phone number, which belonged to appellant and showed that he called the victim on the night of the crime.

At trial, the State attempted to enter the call records into evidence. Appellant objected, arguing, *inter alia*, that the records were inadmissible hearsay. The circuit court admitted the records.

On appeal, appellant reiterated his argument that the call records were inadmissible hearsay. The State argued that the records were not hearsay because they were not statements of a "declarant," i.e. a human, but rather, were generated entirely by the automated processes of AT&T's computers. Even if the records were hearsay, the State argued that they were created in the ordinary course of business, and thus admissible pursuant to a hearsay exception.

Held: Reversed.

The circuit court erred in admitting the call records in the absence of a sufficient basis demonstrating that they were not hearsay or that they were records created in the ordinary course of business.

Computer-generated records, i.e. records entirely self-generated by the internal operations of the computer, do not implicate the hearsay rule because they do not constitute a statement of a "person." The AT&T call records that were admitted into evidence would not constitute hearsay if they were computer-generated. The State, however, did not produce evidence demonstrating how the call records were generated. Moreover, the portion of the call records that indicated that the phone number that called the victim's phone on the night of the rape belonged to appellant likely was data entered by a person, which would constitute hearsay. The record was not sufficient to support a conclusion that the call records were not hearsay.

Moreover, the State did not lay the proper foundation to establish that the call records were admissible pursuant to the business records exception to the hearsay rule. It did not present the testimony of an employee from AT&T describing the process by which the call records were generated, and it did not provide a certification from the custodian of records at AT&T. The Court declined to consider whether there was an alternate way to satisfy the business records exception to the hearsay rule when that argument was not raised below or sufficiently briefed on appeal. On the record presented, the Court concluded that the circuit court erred in admitting the call records.

State of Maryland v. Ryan Christopher Hallihan, No. 886, September Term 2014, filed August 28, 2015. Opinion by Salmon, J.

http://www.mdcourts.gov/opinions/cosa/2015/0886s14.pdf

CRIMINAL LAW – DOUBLE JEOPARDY – Principles of double jeopardy do not prevent the State from appealing the trial judge's grant of a motion to dismiss an indictment if, at the hearing concerning the dismissal motion, the circuit court receives no evidence.

Facts:

Ryan Christopher Hallihan ("Hallihan") was charged, in a criminal information filed in Worcester County, with nine crimes. The four relevant ones were: First Degree Burglary (Count I); First Degree Assault against Dennis Joseph Smith (Count IV); First Degree Assault against Stacy Marie Smith (Count V); and Reckless Endangerment (Count VIII).

Hallihan, by counsel, filed a motion to dismiss the aforementioned four counts on the grounds that, purportedly, none of the counts stated an offense. A hearing to consider the motion was held in the Circuit Court for Worcester County, Maryland. At the hearing, the motions judge heard argument but no evidence was presented. The matter was taken under advisement and, on May 28, 2014, the court dismissed Counts I, IV, V, and VIII. The State of Maryland entered the remaining five counts *nolle prosequi* and filed an appeal challenging the dismissal.

On appeal, Hallihan, relying upon *Taylor v. State*, 371 Md. 617 (2002), contended that double jeopardy principles barred the State from filing the appeal. The State disagreed and argued that Taylor was distinguishable. It also argued that the motions judge erred in dismissing the aforementioned four counts.

Held: Reversed

The Court, in arriving at its conclusion that principles of double jeopardy did not bar the State's appeal, analyzed the *Taylor* case in depth and ruled that *Taylor* was distinguishable from the case at bar because in *Taylor* (which involved two separate cases) the circuit court (in both cases) actually received evidence at the hearing and the dismissal of both cases depended on the judge's evaluation of the evidence received. By contrast, in the subject case, no evidence was received and therefore the motions judge could not possibly have dismissed the case based on evidence.

The Court also ruled that the four counts at issue clearly stated a cause of action and that the motions judge erred in dismissing the counts.

Robert Anthony McGhie v. State of Maryland, No. 2469, September Term 2013, filed August 26, 2015. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2015/2469s13.pdf

CRIMINAL LAW – PETITION FOR WRIT OF ACTUAL INNOCENCE – NEWLY DISCOVERED EVIDENCE – PERJURED EXPERT TESTIMONY

Facts:

In 1994, Robert Anthony McGhie, appellant, was accused of murder and several other offenses related to a botched robbery during which two people were shot, one fatally. The evidence at trial was that appellant and three other men plotted to rob the American Mailbox store in Montgomery County, Maryland. Appellant was overheard expressing his desire to commit the robbery and discussing what he intended to do with the money the men hoped to steal. One of appellant's co-conspirators shot Joseph Atkins, the store's owner, in the face. After the men failed to find any money in the store, and as they were leaving the store, Randolph Covington entered the store, and appellant's co-conspirator shot Mr. Covington and then shot Mr. Atkins two more times. Mr. Covington later died from his wounds.

Appellant subsequently was overheard bragging that he could not be implicated in the crime because he had not actually entered American Mailbox, his fingerprints had not been left on anything, and no one had seen him there. Appellant also lamented that one man died, but appellant "didn't get a damn dime." A witness testified that appellant had fired a gun in the week preceding the robbery.

Joseph Kopera, an employee of the Maryland State Police Ballistics Laboratory, testified as an expert in ballistics and firearms identification. He testified that the gun appellant had fired in the week preceding the robbery was the same gun used to shoot Mr. Atkins and Mr. Covington. With regard to his qualifications, Mr. Kopera testified that he had a Bachelor of Science degree in engineering from the University of Maryland and the Rochester Institute of Technology, he had worked with the Maryland State Police Ballistics Laboratory in the Crime Lab for more than three years, and he had spent 22 years with the Baltimore City Crime Lab in their ballistics unit. He had testified numerous times and personally conducted between 1,200 and 1,400 ballistics examinations each year. He stated that there was no such thing as a degree in "ballistics" and that "all knowledge of the field is done by way of on-the-job training."

Appellant was convicted of murder and several other crimes and sentenced to life imprisonment. Subsequently, in 2007, the Office of the Public Defender discovered that Mr. Kopera had lied about having a Bachelor of Science degree in engineering from the University of Maryland and the Rochester Institute of Technology, and that he did not, as he testified, have a degree from either institution.

Appellant then filed a Petition for Writ of Actual Innocence, alleging that Mr. Kopera's perjury was newly discovered evidence that warranted a new trial. The circuit court denied appellant's petition. Initially, it rejected the State's argument that appellant's counsel could have discovered Mr. Kopera's duplicity, reasoning that Mr. Kopera had been an expert in a large number of cases in which his credentials were not exposed and that even the State was unaware of his perjury. Nonetheless, the court concluded that there was not a substantial or significant possibility that the result of the trial would have been different. Accordingly, it denied appellant's petition.

Held: Affirmed.

In denying the defendant's Petition for Writ of Actual Innocence, the circuit court did not abuse its discretion in concluding that evidence that the State's ballistics expert, Joseph Kopera, lied about his academic background could not have been discovered by due diligence on the part of defense counsel in time to move for a new trial because there were "no red flags" raised that would "require a competent defense attorney to question [Mr.] Kopera's credentials." That this Court previously affirmed the contrary conclusion in reviewing another case relating to the same issue is a reflection of the deferential abuse of discretion standard.

Even if the newly discovered evidence could not have been discovered with due diligence in time to move for a new trial, a Petition for Writ of Actual Innocence will be granted only if the newly discovered evidence creates a substantial or significant possibility that the result of the trial may have been different. The circuit court did not abuse its discretion in finding that the newly discovered evidence, which was merely impeaching evidence regarding Mr. Kopera's qualifications, did not merit the granting of a Petition for Writ of Actual Innocence because a correct statement of Mr. Kopera's qualifications would not have changed the result of the trial. Moreover, because there was other compelling evidence of appellant's guilt, there was not a substantial or significant possibility that the result of appellant's trial would have been different if the jury had known of Mr. Kopera's deceit and disregarded his testimony entirely.

Maryland State Board of Nursing v. Mabinty Sesay, No. 393, September Term 2014, filed August 27. 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/0393s14.pdf

HEALTH OCCUPATIONS – MARYLAND NURSE PRACTICE ACT

Facts:

Over the course of two nights in 2010, Mabinty Sesay, a licensed practical nurse, was discovered sleeping on her shift by the family that hired her to provided nursing services to a young man with quadriplegia. The patient's mother dismissed Ms. Sesay well before her shift ended on the second night because she was found sleeping on the job for the second time. Ms. Sesay, however, completed a form stating that she had finished her nursing shift, and it appeared that Ms. Sesay had signed the mother's name on the document. The mother filed complaints documenting Ms. Sesay's actions with the nursing agency and the Maryland Board of Nursing ("Board").

In 2011, the Board issued formal charges against Ms. Sesay, charging her with several violations of the Maryland Nurse Practice Act. The Board sent her a notice of agency action, via first-class and certified mail, to two known addresses, informing her of the charges and her right to an evidentiary hearing. Ms. Sesay responded to the notice and timely requested an evidentiary hearing. She provided the Board with her then-current address (different from the two above). In 2012, Ms. Sesay moved again, but failed to provide the Board with her new address, which, as a licensed nurse she was required to do by Md. Code (1981, 2014 Repl. Vol.), Health Occ. Art. ("HO") 8-312(e), within 60 days of her move.

In May 2013, the Board mailed Ms. Sesay the notice of her evidentiary hearing, via first-class and certified mail, to the address she had provided the Board. Both notices were returned as undeliverable. In July 2013, the Board held a hearing, in Ms. Sesay's absence, in which the patient's mother testified about Ms. Sesay's sleeping on the job and fraudulent documentation of her work. A Board investigator also testified regarding her investigation into Ms. Sesay's misfeasance.

In September 2013, Ms. Sesay provided the Board with her new address when she renewed her nursing license. In October 2013, the Board issued its final decision, finding that she violated several provisions of HO § 8-316(a), and mailed this decision to the new address Ms. Sesay provided in September. Ms. Sesay filed a petition for judicial review in the Circuit Court for Montgomery County. After a hearing, the circuit court found that the Board did not satisfy due process requirements of notice and opportunity for a fair hearing and vacated the Board's decision. The Board appealed to the Court of Special Appeals.

Held: Reversed

The Court of Special Appeals began by noting that the State has a significant interest in public health, protecting its citizens, and regulating the medical professions. The Court also noted that a nursing license is a constitutionally protected property interest that cannot be revoked, suspended, or sanctioned without due process.

The Court outlined the Board's mandatory statutory notice procedures, observing that the Board fulfilled these requirements in this case by mailing the notice of Ms. Sesay's hearing by certified mail. The Court then reviewed the Maryland Administrative Procedure Act's provision for constructive notice, according to which a license holder is deemed to have a reasonable opportunity to know of the fact of service if (1) the license holder is required by law to notify the agency of a change of address within a specified period of time; (2) the license holder failed to notify the agency in accordance with the law; (3) the agency or the Office mailed the notice to the address of record; and (4) the agency did not have actual notice of the change of address prior to service. The Court held that the Board complied with the aforementioned statutory requirements for proper notice by mailing were met. Not only did the Board send the notice by certified mail, as required by statute, but the Board send additional notice via first-class mail, which is not required by statute.

The Court then reviewed the due process notice requirements discussed in *Jones v. Flowers*, 547 U.S. 220 (2006) and *Griffin v. Bierman*, 403 Md. 186 (2008), instructing that notice is constitutionally sufficient if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones*, 547 U.S. at 226 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The Court first distinguished *Jones* and *Griffin* by observing that a constructive notice statute was not at work in either of those cases, and, unlike in *Jones*, here the Board sent notice via both certified mail and first-class mail. Second, the Court noted that in this case, Ms. Sesay was aware that there were charges pending against her and did not inform the Board of her change of address. Finally, the Court reiterated that health licensure is a domain in which the State has a significant interest in protecting its citizens from public health. The Court held that notice was reasonably calculated, under the circumstances, to apprise Ms. Sesay of the pendency of the action and afford her an opportunity to present her objections. The Court held that the circuit court erred in reversing the decision of the Board.

In turning to the substantial evidence issue, the Court observed that the Board heard testimony from both the patient's mother and the Board investigator detailing Ms. Sesay's actions, and this record evidence supported the Board's findings of Ms. Sesay's violations. The Court then held that substantial record evidence supported the Board's findings that, by falling asleep while caring for a quadriplegic patient and falsifying that patient's medical records to bill for time in which she was not working, Ms. Sesay violated the Maryland Nurse Practice Act.

Kona Properties, LLC v. W.D.B. Corp., Inc., No. 696, September Term 2014; *LienLogic REO F1, LLC v. N.B.S., Inc.*, No. 697, September Term 2014; and *2009 DRR-ETS, LLC v. S&S Partnership*, No. 698, September Term 2014, filed August 28, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/0696s14.pdf

PROPERTY TAXES – TAX SALES

Facts:

In each of the consolidated cases, the owner of a residential property failed to pay property taxes owed to Baltimore City. The City commenced a tax sale, and the winning bidder paid the delinquent taxes and fees and received a certificate of tax sale in exchange. The balance of the bid price, i.e. the bid surplus, remained on credit to be paid to the property owner. After the requisite statutory waiting period, the holder of each tax sale certificate petitioned the Circuit Court for Baltimore City to foreclose the property owners' right of redemption. The circuit court entered judgment foreclosing the right of redemption in each case.

Though these judgments were entered against them, the initial property owners or mortgage holders for each property, Appellees here, filed motions in the circuit court to enforce the judgments because they each wanted to receive the surplus of the bid purchase on their property. The motions to enforce the judgments were opposed by Appellants, the certificate holders. Appellants raised standing and jurisdictional issues, contending, that the court could not enforce the judgments that Appellants had obtained because Appellants had failed to perfect service upon certain Appellees. Appellants also argued that Appellees' motions to enforce the judgments should be denied because the General Assembly had made changes to the tax sale statute superseding *Hardisty v. Kay*, 268 Md. 202 (1973), which held, *inter alia*, that a property owner is entitled to obtain a money judgment to compel a certificate holder to pay the surplus bid. Ultimately, Appellants' arguments failed. The circuit court granted Appellees' motions to enforce the judgments and required the certificate holders to pay the bid surpluses to the respective property owners. The certificate holders appealed.

Held: Affirmed.

The Court of Special Appeals held that the tax sale certificate holder is not the proper party to raise issues concerning the service and notice provisions of the tax sale statute because the notice provisions were designed to protect the due process rights of the property owners. As such, tax sale certificate holders cannot assert defective service on behalf of the property owners as justification for vacating the judgment foreclosing the rights to redeem. Further, tax sale certificate holders could not dispute the validity of the judgments on jurisdictional grounds

where it is undisputed that property owners and mortgagees had actual notice of the actions to foreclose the right of redemption.

The Court also held that the circuit court did not abuse its discretion in not finding good cause to strike the judgments foreclosing the right of redemption where movants did not specify "good cause" to strike the judgments, i.e., they did not provide the court with evidence of anything more than the threshold requirement for striking the judgments—that the certificate holders had not made payment to the collector within 90 days.

Finally, reaching the crux of its analysis, the Court held that changes to the tax sale statute adding protections for the due process and redemption rights of owners and other interested parties had not superseded the holding in *Hardisty v. Kay*, 268 Md. 202 (1973), allowing property owners to enforce the judgment foreclosing the right of redemption against tax sale certificate holders to obtain the surplus bid. The merger of law and equity that occurred upon the adoption of Maryland Rule 2-301 also did not alter the validity of the holding of *Hardisty*, allowing property owners to enforce the judgment foreclosing the right of redemption against tax sale certificate holders to obtain the surplus bid.

Nancy Davis, et al. v. Linda Stapf, et al., No. 2533, September Term 2013, filed August 26, 2015. Opinion by Graeff, J.

Nazarian, J., concurs.

http://www.mdcourts.gov/opinions/cosa/2015/2533s13.pdf

NEGLIGENCE – CL § 10-117 – STATUTORY DUTY – PROXIMATE CAUSE – STATUTE AND ORDINANCE RULE – SOCIAL HOST LIABILITY – SPECIAL RELATIONSHIP – ASSUMPTION OF DUTY

Facts:

On November 28, 2009, 17-year-old Steven Dankos was drinking at a party held at the house of Linda Stapf, who the complaint alleged was willing to "permit and condone underage drinking." Steven was killed when the truck in which he was riding, driven by another intoxicated partygoer, crashed. Nancy Davis, individually, as Mother and Next Friend of Steven Dankos, decedent, and as Personal Representative of the Estate of Steven Dankos, appellants (collectively "Ms. Davis"), filed suit against Ms. Stapf in the Circuit Court for Howard County. Ms. Stapf filed a motion to dismiss the complaint, arguing that she owed no duty of care to Steven under Maryland law, and therefore, the complaint failed to state a claim upon which relief could be granted. After a hearing, the court granted Ms. Stapf's motion to dismiss.

Held: Affirmed.

Although Ms. Stapf had a duty to Steven, precedent from the Court of Appeals precludes a conclusion that Ms. Davis stated a cause of action against Ms. Stapf for negligence. The circuit court properly granted Ms. Stapf's motion to dismiss the complaint.

Md. Code (2014 Supp.) § 10-117(b) of the Criminal Law Article ("CL") makes it a criminal offense for an adult to knowingly or willfully allow an unrelated person under the age of 21 to consume alcohol for nonreligious purposes at a residence the adult owns or leases. Seventeen-year-old Steven Davis, who was intoxicated, was killed after attending a party at Ms. Stapf's home when the truck in which he was riding, driven by another intoxicated person, crashed into a tree. Because Steven was a member of the class of persons sought to be protected by CL § 10-117, the harm suffered was the kind the drafters of the statute intended to prevent, and the complaint alleged that Ms. Stapf knew that Steven and other unrelated minors were drinking at her house for non-religious reasons, Ms. Davis properly alleged that Ms. Stapf had a duty under CL § 10-117(b) to exercise reasonable care to stop the underage drinking and protect those minors.

Although CL § 117(b) imposed a duty on Ms. Stapf, and the complaint sufficiently alleged a violation of this duty, the principle that a violation of a statute is evidence of negligence is a rule of evidence, not the creation of a substantive cause of action. The Court of Appeals has held, as a matter of law, that "the man who drank the liquor is liable" and the act of providing it is "too remote to be a proximate cause of an injury." Because the Court of Appeals has held that there is no cause of action for social host liability, the Court of Special Appeals could not conclude that Ms. Davis has stated a cause of action. The circuit court properly granted Ms. Stapf's motion to dismiss the complaint.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated August 31, 2015, the following attorney has been indefinitely suspended:

TAKISHA VERA BROWN

*

By an Order of the Court of Appeals dated September 17, 2015, the following attorney has been indefinitely suspended by consent:

ALEXANDER DJORDJEVICH

*

By an Order of the Court of Appeals dated September 17, 2015 the following attorney has been suspended:

RONALD JAMES GROSS

*

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

DON FRANKLIN LINDNER

*

By a Per Curiam Order of the Court of Appeals dated September 29, 2015, the following attorney has been disbarred:

MICHAEL B. MITCHELL, JR.

*

By an Order of the Court of Appeals dated August 31, 2015, the following attorney has been indefinitely suspended by consent, effective September 30, 2015:

RICHARD MARK PAVLICK

*

RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Eighty-Seventh Report of the Standing Committee on Rules of Practice and Procedure was filed on September 17, 2015.

http://mdcourts.gov/rules/rodocs/187thro.pdf

UNREPORTED OPINIONS

	Case No.	Decided
A.		
Abdula, Rahimaisa v. Sheriff Department	0695 *	August 25, 2015
Aboke, Charles v. State	1476 ††	September 9, 2015
Al-Azzawi, Kais v. State	0861 *	September 3, 2015
Alexander, Larry v. State	2953 †	August 31, 2015
Audige, Steve v. State	1422 *	August 25, 2015
B.		
Berk, Susan v. Suntrust Mortgage	2236 **	August 31, 2015
Broaddus, William v. Amir	0951 *	September 16, 2015
Brothers, Luther L. v. State	1105 *	September 18, 2015
Brueckmann, William R. v. State	1202 *	September 22, 2015
Brunson, Stanley v. State	0983 **	September 25, 2015
Butler, Johnny v. State	2074 †	September 4, 2015
C.		
Carter, Davon Michael v. State	2624 **	August 25, 2015
Cassell, Jacqueline F. v. Mash	1484 *	September 23, 2015
Cheek, Keith v. Lash	0938 *	September 17, 2015
Citizens of Linganore v. Frederick Co.	0738 *	August 25, 2015
Coates, Bruce Dewayne v. State	0115 *	August 31, 2015
Collick, James v. State	1171 *	September 23, 2015
Conners, Troy Curtis v. State	0619 *	August 25, 2015
D.		
David A. Bramble, Inc. v. State Highway Admin.	1568 *	September 25, 2015
Davis, Timothy v. State	1798 *	September 23, 2015
Dennis, Charles v. State	0413 *	September 29, 2015
Devine, James M. v. DLLR	2053 *	September 24, 2015
E.		

September Term 2015
* September Term 2014
** September Term 2013
*** September Term 2012
† September Term 2011
†† September Term 2010

Eid, Dustin Joseph v. State	2478 *	September 23, 2015
F.		
Ferris, Jason David v. State	2777 ***	September 16, 2015
Friz, Peter L. v. Friz	1828 *	September 4, 2015
Fusha, Liri v. Leonard	0757 *	September 24, 2015
G.		
Gaines, Devonta Desean v. State	2168 *	September 22, 2015
George, Ryzele v. Jones	1197 *	September 16, 2015
Givens, Dominic v. State	0699 **	September 22, 2015
Gray, Darren Keon v. State	2302 **	September 24, 2015
Gray, Jane v. Howard Co. Bd. Of Elections	1627 *	September 24, 2015
Green Charles Edward v. State	0119 *	September 4, 2015
Greenberg, Howard v. Circuit Court for Harford Co.	0917 *	September 2, 2015
Grindstone Capital v. Atkinson	1579 *	September 23, 2015
H.		
Harrington, Selwyn v. State	0653 *	September 4, 2015
Harris, Robert v. State	2738 †	September 2, 2015
Haselden, Timothy, Jr. v. State	0957 *	September 17, 2015
Henderson, James v. State	2797 **	September 24, 2015
Highlands of Green Village v. JEC, Inc.	0732 *	September 18, 2015
Highlands of Green Village v. JEC, Inc.	0733 *	September 18, 2015
Hocker, Kevin Wade v. State	2230 *	September 24, 2015
Hughes, Raoul Emmanuel v. State	0453 *	September 2, 2015
Hughes, Raoul Emmanuel v. State	1145 *	September 2, 2015
Hurt, Jerry Lee, Jr. v. State	0620 *	September 4, 2015
I.		
In re: Adoption/G'ship of Adalia R., et al.	2532 *	September 4, 2015
In re: Damir M.	1972 **	August 31, 2015
In re: Daniel B., Nathaniel B., and Kiaya B.	2740 *	September 8, 2015
In re: Joseph J.	0561 *	September 17, 2015
In re: Joseph J.	1503 *	September 17, 2015

September Term 2015
* September Term 2014
** September Term 2013
*** September Term 2012
† September Term 2011
†† September Term 2010

Case	No.	Date
In re: Keyaira A.	1421 **	September 14, 2015
In re: Malik L.	1500 *	September 1, 2015
In re: Najee P.	1731 *	September 16, 2015
K.		
Kenwood Gardens Condo. v. Whalen Properties	2602 **	September 16, 2015
Kivitz, Murray A. v. Erie Insurance	1581 *	September 4, 2015
Knox, Kyle v. State	1797 **	September 1, 2015
Koegel, Joseph William, Jr. v. Koegel	1132 **	September 10, 2015
M.		
McCoy, Walter v. State	1704 *	September 14, 2015
McGhee, Richard v. McClain	0750 *	September 17, 2015
Miles, Arnold v. State	1456 *	September 15, 2015
Mitchell, James v. State	0443 *	September 3, 2015
Mitchell, Marc v. State	0821 *	September 2, 2015
Mixter, Mark T. v. M. E. Burton, LLC	1744 *	September 15, 2015
N.		
Nolan-El, Joseph v. State	0605 ***	August 31, 2015
O.		
Oseroff, Gary v. Brown	0693 *	August 25, 2015
P.		
Prepetit-Foster, Martine C. v. Foster	0372 *	September 10, 2015
Price, Kevin v. State Farm Insurance	1662 *	September 14, 2015
Prince George's Co. Council v. Bardon, Inc.	1695 *	September 18, 2015
Q.		
Quintanilla, David v. State	2402 *	September 14, 2015
R.		
Ragland, Ronald v. State	0686 **	September 24, 2015
Ramos, Jarrod W. v. Hartley	2281 **	September 17, 2015

September Term 2015
* September Term 2014
** September Term 2013
*** September Term 2012
† September Term 2011
†† September Term 2010

Reed, Roger Lynn v. Reed	1569 *	September 22, 2015
Reyes-Mendoza, Marvin v. State	0604 *	September 29, 2015
Ricks, Keion v. State	2559 *	September 15, 2015
Robinson, Anthony E. v. State	0848 *	September 14, 2015
Rosewood Commons v. JEC, Inc.	0729 *	September 18, 2015
S.		
Satterfield, William E. v. State	1444 *	September 4, 2015
Schaffer, Tina Marie v. State	1364 *	September 23, 2015
Shaool, Mansoor v. JEC, Inc.	0730 *	September 18, 2015
Shaool, Mansoor v. JEC, Inc.	0731 *	September 18, 2015
Silberman, Allen v. State	0819 *	September 3, 2015
Smith, Gary Lee, Jr. v. State	2229 *	September 3, 2015
State v. Demery, Jeffrey A.	2678 *	September 29, 2015
Stone, Donald v. State	1774 *	September 3, 2015
Stringer, David Carnell v. State	2201 *	September 22, 2015
U.		
Underwood, Eric v. Meyers Construction	1740 *	September 24, 2015
V.		
Valentine, Tyray Lamar v. State	2143 *	September 2, 2015
Van Dusen, Dennis Alan v. Malova	0042 *	September 10, 2015
Veasey, Bennie Lavar v. State	1928 **	September 29, 2015
W.		
Walsh, Cindy v. Mack	1664 *	September 16, 2015
Washco Development v. JEC, Inc.	0740 *	September 18, 2015
Waters, Adrian Kmar v. State	0613 *	September 4, 2015
Whitehead, Dockery v. State	1379 *	September 1, 2015
Willemain, David G. v. Toyota Motor Sales	2272 **	September 4, 2015
Williams, Maria Del Pilar v. Williams	2248 *	September 9, 2015
Wilmot, Darius Levon v. State	2630 ***	September 22, 2015
Wilson, Dreck Spurlock v. Burns	0186 *	September 23, 2015
Wilson, Thomas Lee v. State	0576 *	September 18, 2015

September Term 2015
* September Term 2014
** September Term 2013
*** September Term 2012
† September Term 2011
†† September Term 2010