Amicus Curiarum

VOLUME 33
ISSUE 8 AUGUST 2016

A Publication of the Office of the State Reporter

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In the Matter of the Application of Otion Gjini to the Bar of Maryland, Misc. No. 32, September Term 2015, filed July 7, 2016. Opinion by Battaglia, J.

Barbera, C.J., Adkins and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/32a15m.pdf

BAR ADMISSION – DUTY OF IMMEDIATE AND FULL DISCLOSURE

Facts:

Otion Gjini filed an application with the State Board of Law Examiners for admission to the Maryland Bar which asks for "a complete record of all criminal proceedings." Gjini reported, among a number of other offenses, that on August 7, 2013 he had been charged with "driving while impaired by alcohol" and had received a probation before judgment. He further answered "No" to the question asking whether there had been any "circumstances or unfavorable incidents" that might bear upon his character or fitness not already disclosed in his answers to other questions. Gjini also affixed his signature on the application immediately beneath the question that informs applicants of their continuing responsibility to disclose changes to the information sought by the application.

Gjini's Bar application was forwarded to a member of the Character Committee for the Seventh Appellate Circuit, and interviews took place on September 9, 2014 and October 23, 2014. The Character Committee member concluded that Gjini had failed to bear his burden of proving his character and moral fitness for the practice of law in Maryland because of his August 13, 2013 driving while impaired charge as well as his extensive driving record which included another alcohol related offense for which Gjini was not prosecuted. In addition, the member of the Character Committee was concerned about on-line comments he found that Gjini had written on internet message boards while in law school. After the Character Committee member's recommendation was forwarded to the Character Committee and before the Committee conducted a hearing, Gjini received a Petition to Violate Probation filed by his probation officer on December 30, 2014 alleging that Gjini had "failed to verify attending and successfully completing a local Health Department alcohol treatment program" with a corresponding Show Cause Order in which Gjini was required to appear on February 18, 2015 in the District Court for Montgomery County. Gjini's hearing was postponed as a result of weather, and Gjini appeared before a district court judge in Montgomery County on March 23, 2015, just a few days before

his Character Committee hearing. The district court judge determined that Gjini had not satisfied the alcohol education program requirement and gave him sixty days to complete another program at which time Gjini would need to reappear. Gjini failed to supplement his Bar Application with any of this information at any time.

Prior to the Character Committee Hearing on March 30, 2015, the Committee Chair discovered Gjini's Petition to Violate Probation on Case Search, and the Committee members questioned Gjini during the hearing about his omission of information related to the Petition to Violate Probation. Several months later, in a split decision, the Committee recommended Gjini's admission to the Bar, over the objection of the Chair and another member of the Committee.

The State Board of Law Examiners reviewed the Character Committee's Report and notified Gjini that a hearing would be held to afford him the opportunity to support his admission. That hearing was held on December 11, 2015, and was followed by the Board's unanimous vote to adopt the recommendation of the Character Committee that Gjini be admitted. In adopting the recommendation for admittance, the Board relied on the findings of the Character Committee to reach its decision, but none of the findings referenced Gjini's failure to disclose the Petition to Violate Probation, although in the hearings before the Character Committee and the Board Gjini's failure to disclose the Petition was explored.

Held: Denied.

The Court of Appeals held that Gjini's failure to disclose his Petition to Violate Probation on his Bar Application in the face of his recognized obligations to candidly, accurately and currently disclose impinged upon his character and fitness to practice law warranting the denial of his application for admission to the Bar of Maryland. Gjini never supplemented his Bar application with any of the information related to a process in which his probation before judgment was the subject of a Petition to Violate Probation and in which a hearing before a district court judge was held. Gjini's disregard of his obligation to disclose, whether because of ignorance or calculated error does not warrant his admission to the Bar of Maryland. The Court stressed that it has consistently stated that disclosure on the Bar application and supplementation is mandatory.

Terrance Jamal Grant v. State of Maryland, No. 65, September Term 2015, filed July 12, 2016. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2016/65a15.pdf

CRIMINAL JUSTICE – FOURTH AMENDMENT – SEARCH AND SEIZURE – TRAFFIC STOPS – AMBIGUOUS EVIDENCE

Facts:

Petitioner, Terrance Jamal Grant, was operating a vehicle stopped by Deputy First Class Chad Atkins ("Deputy Atkins") of the Frederick County Sheriff's Office, for a speeding violation. Petitioner was the sole occupant. Deputy Atkins approached the passenger side of Petitioner's vehicle, subsequent to Petitioner rolling down the window. During the suppression hearing, Deputy Atkins testified that upon initial contact with Petitioner, he detected the odor of marijuana emanating from the vehicle. He further testified that he could not recall when his head crossed the window's threshold while speaking with Petitioner, in proximity to detecting the odor of marijuana. Deputy Atkins also testified that the weather was windy and the odor of marijuana "quickly dissipated."

A few minutes after Deputy Atkins initiated the stop, he requested a nearby K-9 dog unit, which resulted in a positive alert from Petitioner's vehicle. A subsequent vehicle search by Deputy Atkins revealed a film canister containing 1.6 grams of marijuana, as well as a smoking device containing burnt marijuana residue in the center console. Petitioner was placed under arrest and later released with a criminal citation. Thereafter, Petitioner moved to suppress the evidence seized from his vehicle, asserting that Deputy Atkins conducted an unconstitutional search when he inserted his head into the passenger window and detected the odor of marijuana.

At the conclusion of Petitioner's suppression hearing, the circuit court ruled that the search was constitutional. The court observed that although it was "very possible" that Deputy Atkins' head crossed the window's threshold, "it was not clear" whether he detected the odor of marijuana before or after he inserted his head into the window. Thereafter, the court reasoned that the odor of marijuana created reasonable articulable suspicion to detain Petitioner for further investigation, which ultimately led to the discovery of the marijuana.

On appeal, the Court of Special Appeals relied upon the supplemental rule of interpretation to draw the inference that Deputy Atkins detected the odor of marijuana before his head crossed the window's threshold. The intermediate appellate court indicated that the circuit court's "not clear" statement "reflected the ambiguous nature of the evidence[,]" and, thus, interpreted the alleged ambiguity "to mean that Deputy Atkins detected the tell-tale odor of marijuana before he placed his head in the vehicle's window." In reliance on this inference, the court construed the evidence in the light most favorable to the State, and held that an unconstitutional search did not occur.

Held: Reversed

The Court of Appeals held that the circuit court erred in denying Petitioner's motion to suppress, because Deputy Atkins' search was only lawful if he detected the odor of marijuana before inserting his head into the passenger window of Petitioner's vehicle, and the evidence regarding the timing of Deputy Atkins' detection could not be determined. The ambiguity was paramount at the suppression hearing, and therefore, the State failed to meet its burden of showing that Deputy Atkins' warrantless search was lawful. The Court of Appeals further held that the Court of Special Appeals, in applying a supplemental rule of interpretation to resolve an alleged ambiguity, did not apply the appropriate standard of review because the inference made was inconsistent with Deputy Atkins' testimony and the failure of the circuit court to resolve the issue regarding the point at which the odor of marijuana was detected. Accordingly, the Court reversed the judgment of the Court of Special Appeals.

Gary Allmond v. Department of Health and Mental Hygiene, No. 34, September Term 2015, filed July 8, 2016. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2016/34a15.pdf

CONSTITUTIONAL LAW – DUE PROCESS – INVOLUNTARY MEDICATION OF MENTALLY ILL PRETRIAL DETAINEE

Facts:

The State mental health law allows for the involuntary medication of an individual committed to a mental health facility if certain procedures are followed and if a clinical review panel – three health care professionals, none of whom is the treating psychiatrist – finds that certain statutory criteria are satisfied and authorizes the involuntary medication. Such an authorization remains valid for 90 days, after which a panel must review again the relevant criteria to authorize continued medication.

The criteria for authorizing involuntary medication are set forth in Maryland Code, Health-General Article (HG), §10-708(g). Among the circumstances in which the statute permits an individual to be medicated against the individual's will are when: (1) the medication is prescribed by a psychiatrist for the purpose of treating the individual's mental disorder; (2) the administration of the medication is a reasonable exercise of professional judgment; and (3) the individual is at substantial risk of continued hospitalization because the individual will remain seriously mentally ill with no relief, or for a significantly longer time, from the symptoms that resulted in the individual's hospitalization.

Applying those criteria, a clinical review panel authorized the forced medication of Gary Allmond, a resident of a facility operated by Department of Health and Mental Hygiene (DHMH). That decision was affirmed by an administrative law judge when Mr. Allmond invoked his appeal rights under the statute. Mr. Allmond has pursued judicial review in the courts. Before the Court of Appeals, he contended that, on its face, HG §10-708(g) violates the substantive due process guarantee of the Maryland Declaration of Rights in permitting forced medication without a showing that he is dangerous to himself or others within the facility. He also argued that it violated the free speech guarantee of the Declaration of Rights.

Held:

The Court reviewed Supreme Court precedent concerning the limitations on involuntary medication imposed by the substantive due process guarantee of the federal Constitution on the premise that the State and federal constitutional provisions were identical in their reach. The Court concluded that the statute is not unconstitutional on its face. However, merely satisfying

the challenged provisions of HG §10-708(g) alone does not ensure compliance with the substantive due process requirement of the Declaration of Rights. The authorization for involuntary medication may only be constitutionally carried out when there exists an "overriding justification," such as a need to render a pretrial detainee competent for trial.

Additionally, the authorization for involuntary medication in this case expired long ago. As a consequence, that a clinical review panel must apply the statutory criteria in a constitutional manner if DHMH seeks again to medicate Mr. Allmond against his will.

The Court declined to address the free speech issue, as Mr. Allmond had raised it for the first time on appeal.

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Troy Robert Allen v. State of Maryland, No. 92, September Term 2015, filed July 12, 2016. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2016/92a15.pdf

CRIMINAL LAW – CONDITIONS OF PROBATION – REASONABLENESS

Facts:

Troy Robert Allen ("Petitioner") was convicted of, inter alia, sexually abusing his girlfriend's ten-year-old daughter ("B."), who was a member of his household at the time of the abuse. B. was the half-sister of the baby son between Petitioner and his girlfriend. The evidence at trial revealed that Petitioner had exposed his penis to B. and touched her chest on two occasions, and had also touched B.'s arm with his penis. In preparation for sentencing, a psychologist with the Department of Health and Mental Hygiene completed a Mental Health Assessment, which noted that Petitioner failed to recognize the inappropriate nature of his conduct, and that Petitioner's risk of reoffending was "almost twice that of other sex offenders."

After consideration of a pre-sentence report that included another pending case of child sexual abuse involving B. and another victim, the circuit court imposed forty-six years' incarceration (all but five years suspended), and five years' supervised probation. As a condition of probation, Petitioner was prohibited from having unsupervised contact with minors, including his son.

Petitioner appealed to the Court of Special Appeals, arguing that, "to the extent the no unsupervised contact condition relate[d] to [his] interaction with his own infant son, the condition constitute[d] an illegal sentence that must be vacated." Petitioner reasoned that there was no rational basis for the imposition of the no unsupervised contact condition, which… unreasonably infring[ed] on his fundamental [due process] right to parent his child." The Court of Special Appeals disagreed, and affirmed the judgments of the circuit court.

Held: Affirmed.

In reviewing the challenged condition of probation, the Court of Appeals declined to apply a heightened form of scrutiny. The no-unsupervised-contact condition was reasonably related to the protection of Petitioner's child, where Petitioner had taken advantage of his living arrangement to sexually abuse a minor, and had failed to appreciate the wrongfulness of his conduct. Although Petitioner's victim was not a blood relative of Petitioner, and was also a different gender than Petitioner's child, the circuit court was not required to limit the application of the no-unsupervised-contact condition to minors sharing the specific attributes of Petitioner's victim.

State of Maryland v. Juan Carlos Sanmartin Prado, No. 100, September Term 2015, filed July 11, 2016. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2016/100a15.pdf

PLEA OF NOT GUILTY BY WAY OF AN AGREED STATEMENT OF FACTS – IMMIGRATION CONSEQUENCES – DEPORTATION – *PADILLA V. KENTUCKY*, 559 U.S. 356 (2010) – INEFFECTIVE ASSISTANCE OF COUNSEL – CONSTITUTIONALLY DEFICIENT PERFORMANCE

Facts:

On June 8, 2010, Juan Carlos Sanmartin Prado ("Sanmartin Prado"), Respondent, a citizen of Ecuador and a legal permanent resident of the United States, was charged by criminal information filed in the Circuit Court for Baltimore County ("the circuit court") with first-degree child abuse causing severe physical injury, second-degree child abuse, and second-degree assault against his three-year-old daughter. On January 6, 2011, Sanmartin Prado pleaded not guilty by way of an agreed statement of facts to second-degree child abuse pursuant to an agreement with the State. At that time, Sanmartin Prado's trial counsel ("trial counsel") engaged in a waiver colloquy with Sanmartin Prado. During the colloquy, trial counsel confirmed with Sanmartin Prado that the two had "had discussions with respect to [his] immigration status[,]" that Sanmartin Prado had been a legal permanent resident for over twelve years, and that Sanmartin Prado was not under an active deportation order or immigration detainer. Trial counsel also stated: "And you understand that I'm not making any promises and the [circuit court] is not making any promises about what the federal government could possibly do in the future with respect to reviewing this conviction." Sanmartin Prado confirmed he understood and that he still wished to proceed. The State read into the record the agreed statement of facts. Afterward, the circuit court found Sanmartin Prado guilty of second-degree child abuse, and sentenced him to five years' imprisonment with all but two years suspended, followed by two years of supervised probation with the condition that Sanmartin Prado complete a physical offender treatment program and a parenting course offered by the Department of Social Services. The other two charges were nol prossed. Sanmartin Prado did not appeal the conviction.

Over two years later, on October 21, 2013, Sanmartin Prado filed in the circuit court a petition for a writ of error coram nobis, contending that, as a result of the conviction, he was facing a significant collateral consequence, namely, "that he is automatically deportable from the United States[.]" Sanmartin Prado alleged that trial counsel had rendered ineffective assistance of counsel at the January 6, 2011 proceeding by failing to advise him that he was subject to automatic deportation as a result of the conviction, and by failing to specify what immigration consequences he could face as a result of conviction.

The circuit court conducted a hearing on the petition. At the hearing, trial counsel testified that he visited Sanmartin Prado in jail before the January 6, 2011 proceeding, at which time he "explained to him that the, there could and probably would be immigration consequences as a result of the plea but that the, the term of art that I usually use is that immigration is a moving target and that it was, I recall telling him that it was a deportable or a possibly deportable offense[.]" Trial counsel also testified that he told Sanmartin Prado "[t]hat it's a deportable offense and he could be deported if the Federal government chooses to deport him." Sanmartin Prado testified that trial counsel never advised him that he could be deported, but acknowledged that he and trial counsel had discussed his immigration status.

Following the hearing, the circuit court issued a Memorandum and Order denying the petition. The circuit court specifically found, as a fact, that trial counsel met with Sanmartin Prado at the detention center before trial "and explained the immigration consequences of a guilty verdict, including that this was a 'deportable offense' and [Sanmartin Prado] 'could be deported . . . if the federal government chose to initiate deportation proceedings,' and it was 'possible' that [Sanmartin Prado] would be deported."

Sanmartin Prado appealed and, in a reported opinion, the Court of Special Appeals reversed the judgment of the circuit court and remanded the case to the circuit court for further proceedings. *See Sanmartin Prado v. State*, 225 Md. App. 201, 214, 123 A.3d 652, 660 (2015). The State thereafter filed a petition for a writ of *certiorari*, which this Court granted. See *State v. Sanmartin Prado*, 446 Md. 291, 132 A.3d 193 (2016).

Held: Reversed.

The Court of Appeals held that, where the coram nobis court found that trial counsel advised Sanmartin Prado that "this was a 'deportable offense' and [Sanmartin Prado] 'could be deported . . . if the federal government chose to initiate deportation proceedings,' and it was 'possible' that [Sanmartin Prado] would be deported[,]" and where trial counsel testified that he also advised Sanmartin Prado that "there could and probably would be immigration consequences" and "that it was a deportable or a possibly deportable offense," and the advice was given before the plea of not guilty by way of an agreed statement of facts proceeding, such advice was not constitutionally deficient, but rather was "correct advice" about the "risk of deportation," as required by *Padilla v. Kentucky*, 559 U.S. 356, 369, 374 (2010).

The Court of Appeals concluded that, under the circumstances of the case, Sanmartin Prado's plea of not guilty by way of an agreed statement of facts was the functional equivalent of pleading guilty for purposes of advisement of immigration consequences. The Court of Appeals explained that, under the circumstances, where a conviction was almost a certainty given the State's recitation of the plea agreement and the waiver colloquy that followed, Sanmartin Prado's plea of not guilty by way of an agreed statement of facts was the functional equivalent of a guilty plea; and, as such, the standards for advisement of immigration consequences during a guilty plea are applicable.

The Court of Appeals explained that, in *Padilla*, 559 U.S. at 374, at bottom, the Supreme Court simply held "that counsel must inform [his or] her client whether his [or her] plea carries a risk of deportation." As to that holding, the Supreme Court instructed that, where "the deportation consequences of a particular plea are unclear or uncertain[,]" "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 369 (footnote omitted). On the other hand, where "the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear." *Id.*

The Court of Appeals concluded that trial counsel provided correct immigration advice to Sanmartin Prado. The circuit court expressly credited trial counsel's testimony at the coram nobis hearing, that trial counsel met with Sanmartin Prado and explained the immigration consequences of a conviction, including that the offense was a "deportable offense," that Sanmartin Prado "could be deported . . . if the federal government chose to initiate deportation proceedings," and thus that it was "possible" that Sanmartin Prado would be deported. This advice—that second-degree child abuse is a deportable offense—was correct advice. *See* 8 U.S.C. § 1227(a)(2)(E)(i) ("Any alien who at any time after admission is convicted of a crime of . . . child abuse . . . is deportable."). The Court of Appeals determined that, by advising Sanmartin Prado that the offense of second-degree child abuse was a deportable offense, trial counsel provided "correct advice" about the "risk of deportation[,]" as required by *Padilla*, 559 U.S. at 369, 374. Nothing more was required of trial counsel under *Padilla* and his performance was not constitutionally deficient. The Court of Appeals explained that *Padilla* does not require the use of specific magic words when advising a client of the risk of deportation, provided such advice is correct advice, nor does Padilla require that defense counsel advise a noncitizen client that a conviction for a deportable offense will absolutely, with certainty, or automatically, result in deportation.

The Court of Appeals determined that, aside from the circumstance that deportation is not an absolute certainty upon conviction of a deportable offense, from a practical standpoint, it would be unreasonable to require defense counsel, without qualification, to advise noncitizen clients about the risk of deportation such that defense counsel is placed in the position of having to provide detailed and specific information about the risk of deportation and to essentially become an immigration law specialist. The Court of Appeals concluded that it is unreasonable to require that defense counsel investigate and determine that the Federal government will, with certainty, actually deport a particular noncitizen defendant upon conviction of a deportable offense.

The Court of Appeals also held that trial counsel's advice fully complied with Maryland Rule 4-242(f)(1) because the Rule requires only that a noncitizen defendant be alerted that he or she may face immigration consequences, and the coram nobis court's findings supported the conclusion that trial counsel complied with those dictates.

The Court of Appeals held that trial counsel did not perform in a constitutionally deficient manner in advising Sanmartin Prado as to the immigration consequences attendant to a conviction for second-degree child abuse in the manner in which he did. The Court of Appeals thus concluded that Sanmartin Prado failed to satisfy the first prong of *Strickland v. Washington*,

466 U.S. 668 (1984), which requires that a "defendant must show that counsel's performance was deficient." *Taylor v. State*, 428 Md. 386, 399, 51 A.3d 655, 662 (2012) (quoting *Strickland*, 466 U.S. at 687). Accordingly, Sanmartin Prado had not demonstrated that he received ineffective assistance of counsel. And, in the absence of constitutionally deficient performance by counsel—*i.e.*, in the absence of ineffective assistance of counsel being rendered by trial counsel—the Court of Appeals concluded that the circuit court correctly denied Sanmartin Prado's petition for coram nobis relief.

Michelle L. Conover v. Brittany D. Conover, No. 79, September Term 2015, filed July 7, 2016. Opinion by Adkins, J.

Battaglia, Greene and Watts, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2016/79a15.pdf

FAMILY LAW – VISITATION AND CUSTODY – DE FACTO PARENT

Facts:

Michelle and Brittany Conover began a relationship in 2002. The parties discussed having a child and agreed that Brittany would be artificially inseminated from an anonymous donor arranged through a fertility clinic. The child was conceived in 2009. The couple gave birth to a son, Jaxon Conover, in April 2010. The birth certificate listed Brittany as Jaxon's mother, but no one was identified as the father. The parties married in the District of Columbia in September 2010 when Jaxon was about six months old. In September 2011, Michelle and Brittany separated. From the date of separation until July 2012, Michelle visited Jaxon and had overnight and weekend access. At some point in July 2012, Brittany prevented Michelle from continuing to visit Jaxon. In February 2013, Brittany filed a Complaint for Absolute Divorce, stating that there were no children shared by the couple from the marriage. Michelle filed an Answer later that month in which she requested visitation rights with respect to Jaxon. In March 2013, Michelle filed a Counter-Complaint for Absolute Divorce, in which she repeated her request for visitation rights. Michelle did not request custody. In April 2013, the parties appeared at a hearing in the Circuit Court to determine Michelle's standing to seek access to Jaxon. Brittany, appearing pro se, argued that Michelle did not have parental standing because she was not listed on the birth certificate as a parent of Jaxon, and that as a third party, she could not assert visitation rights. Michelle asserted that she had standing because she met the paternity factors for a "father" set forth in Md. Code § 1- 208(b).

In June 2013, the Circuit Court issued a written opinion concluding that Michelle did not have standing to contest custody or visitation. First, the court found that Michelle did not have parental standing. The court took note of the common law and statutory presumption that a child born during a marriage is presumed to be the child of both spouses, but concluded that the presumption was not applicable here as Jaxon was conceived and born prior to Brittany and Michelle's marriage. The court also found Michelle did not establish parental standing under ET § 1-208(b) because she was not Jaxon's "father."

Next, the court found that Michelle did not have "third party" standing to contest custody or visitation. Relying on Janice M., the court held that Michelle, as a "third party," had to show that Brittany was unfit or that exceptional circumstances existed to overcome the biological mother's constitutionally protected interest in the care and control of her child. Based on the testimony at the hearing, the court found Brittany to be a fit parent and that "[t]here [had] been

no showing of exceptional circumstances." The Circuit Court denied Michelle's request for custody or visitation based on lack of standing. After the divorce was granted, Michelle timely appealed the Circuit Court's order on visitation to the Court of Special Appeals. The Court of Special Appeals affirmed.

Held: Reversed.

In reversing the Court of Special Appeals, the Court held that de facto parenthood is a viable means to establish standing to contest custody or visitation and overturned its previous decision in *Janice M*. The Court emphasized the importance of *stare decisis* but explained that it was departing from *Janice M.* because that decision was clearly wrong and contrary to established principles and that *Janice M.* had been undermined by the passage of time. The Court then adopted the multi-part test first articulated by the Wisconsin Supreme Court for determining whether one is a *de facto* parent. The Court remanded the case to the Circuit Court for a determination of whether, applying this multi-part test, Michelle should be considered a *de facto* parent.

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Adam Santo v. Grace Santo, No. 89, September Term 2015, filed July 11, 2016. Opinion by Adkins, J.

Watts and Battaglia, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2016/89a15.pdf

FAMILY LAW – CHILD CUSTODY – JOINT LEGAL CUSTODY – TIE-BREAKING PROVISIONS

Facts:

Adam Santo ("Father") and Grace Santo ("Mother") married in 2000 and divorced in 2011. They have two sons, who were eight and five years old, respectively, at the time of the divorce. Following a 2011 order of joint legal custody, the Santos renewed the battle over their children by filing more motions. Custody was modified in 2013 to, among other things, facilitate joint custody through the use of a parenting coordinator. Several other motions are indicative of their ongoing struggle.

The precise motion that led to the question we review today was Father's 2014 motion to modify custody. Therein Father sought sole custody of his sons so that, he maintains, "the children will not remain in a combat zone forever." Following a three-day hearing, the Circuit Court for Montgomery County denied Father's motion and preserved a joint custody arrangement with tie-breaking authority to the parents over decision-making on different matters affecting their children. Father noted a timely appeal, and the Court of Special Appeals affirmed the Circuit Court's decision.

Held: Affirmed.

Father avers that the Circuit Court erred because it did not follow the "sine qua non for an award of joint legal custody" as established in *Taylor v. Taylor*, 306 Md. 290 (1986). In his view, an award of joint legal custody *requires* that the parents effectively communicate or will be capable of making parenting decisions together in the future. The record and the Circuit Court's findings, Father contends, reflect a tale of "parties [who] have been and remain at war with one another." He thus maintains that it was an abuse of discretion for the Circuit Court to have granted an award of joint custody to parents whom it knew could not communicate effectively.

In asking us to hold that joint legal custody "should be awarded *only if* a custody court" concludes that parents "are or likely will be capable of communicating and reaching joint (i.e., shared) parenting decisions," Father would have us impose an inflexible template on equity courts making child custody decisions. (Emphasis added.) But, as the *Taylor* Court recognized, "[f]ormula[s] or computer solutions in child custody matters are impossible because of the

unique character of each case, and the subjective nature of the evaluations and decisions that must be made." *Id*. at 303. To elevate effective parental communication so that it becomes a prerequisite to a joint custody award would undermine the trial court's complex and holistic task. Based on *Taylor*, and our review of other jurisdictions, we decline to hold as a matter of law that a court errs if it awards joint custody to parents who fail to communicate effectively with one another.

Father also argues that the tie-breaking provisions in the custody award are inconsistent with *Taylor* and Md. Code (1984, 2012 Repl. Vol.), § 5-203(d) of the Family Law Article ("FL"). FL § 5-203(d) provides that "a court may award custody of a minor child to either parent or joint custody to both parents." FL § 5-203(d). Reading this section of the statute literally, Father avers that Maryland courts have two options—award sole or joint custody—but no option to create "hybrids of the two."

The *Taylor* Court defined joint legal custody as "both parents hav[ing] an equal voice in making [long range] decisions [of major significance concerning the child's life and welfare], and neither parent's rights [being] superior to the other." 306 Md. at 296. In a joint legal custody arrangement with tie-breaking provisions, the parents are ordered to try to decide together matters affecting their children. When, and only when the parties are at an impasse after deliberating in good faith does the tie-breaking provision permit one parent to make the final call. Because this arrangement requires a genuine effort by both parties to communicate, it ensures each has a voice in the decision-making process.

A delegation of final authority over a sphere of decisions to one parent has the real consequence of tilting power to the one granted such authority. But such an award is still consonant with the core concept of joint custody because the parents must try to work together to decide issues affecting their children. We require that the tie-breaker parent cannot make the final call until *after* weighing in good faith the ideas the other parent has expressed regarding their children. Because this arrangement requires both parties to attempt to make decisions together, it is a form of joint custody.

Father nevertheless attacks the award of joint custody with tie-breaking provisions as illegal, on grounds that it violates FL § 5-203 as a custody award that is neither single nor joint, but a hybrid of the two—an option not set forth in the statute. The fallacy in Father's argument is that it presumes that the court's authority to award custody is derived strictly from statute. We said in *Taylor* that "[o]ur inquiry [] is not whether the [the General Assembly] has granted a power, but whether it has attempted to *limit* a power that exists as a part of the inherent authority of the court." 306 Md. at 298 (emphasis added). When FL § 5-203 was re-enacted and took effect shortly after *Taylor*, the "bill codifie[d] existing case law" that approved of the authority of courts to award joint custody. Summ. of Comm. Rep., S. Judicial Proceedings Comm. H.B. 810 (1986) (citing *Kerns v. Kerns*, 59 Md. App. 87 (1984)). The General Assembly's decision to codify case law in FL § 5-203 established no limitation upon a trial court's equity powers to fashion custody awards.

In sum, because we consider joint custody with tie-breaking provisions to be a form of joint custody, and because FL § 5-203(d) expressly authorizes joint custody without any limitations thereto, we hold that nothing in the statute precludes this award.

Father argues that the Circuit Court abused its discretion because it awarded joint custody to two parents whom the court found to be utterly incapable of communicating. A review of the record, however, reveals a thoughtful, painstaking consideration of the relevant issues affecting the parties' custody dispute. Before announcing its decision during its oral opinion, the court expressed that it had "considered a variety of options, none of which is especially satisfactory." The court candidly and repeatedly acknowledged that the parents were unable to communicate or cooperate well, but was concerned about the children's need to stay involved with both parents. It determined that "the only way both of these parents can stay involved with their children's lives is with [a] strict set of rules about who does what and when." Such rules included provisions granting tie-breaking authority on education, religion, and medical issues to Father, and selection of therapist to Mother. Testimony at the hearing provided a basis for the Circuit Court to award one parent decision-making authority over the other as it did.

Father instead pins the basis for the court's decision to award joint custody on its statement that "the reason for [the parties to continue to have joint legal custody] is so that both of them have access to information about the children." The Circuit Court's statement is better understood, in context, as reflecting its concern that Father was "dictatorial," and that his actions deprived Mother of information about her children.

The Circuit Court's determination—predicated on its thorough review of the *Taylor* factors, deliberation over custody award options, sober appreciation of the difficulties before it, and use of strict rules including tie-breaking provisions to account for the parties' inability to communicate—was rational and guided by established principles of Maryland law. No abuse of discretion occurred in this case. We thus affirm the judgment of the Court of Special Appeals.

Wicomico County Department of Social Services v. B.A., No. 46, September Term 2014, filed July 11, 2016. Opinion by McDonald, J.

Adkins, Watts and Harrell, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/46a14.pdf

CHILD ABUSE AND NEGLECT – SEXUAL ABUSE – TEMPORARY CARE OR CUSTODY OR RESPONSIBILITY FOR THE SUPERVISION OF A CHILD

Facts:

Under the State's Child Abuse and Neglect Law, local departments of social services are charged, along with law enforcement, with investigating allegations of child abuse. At the conclusion of an investigation, the department is to determine whether child abuse is "indicated," "ruled out," or "unsubstantiated." The department may make a finding of indicated child sexual abuse if, among other things, an individual commits an act of sexual exploitation or molestation against the child while the individual has "temporary care or custody or responsibility for the supervision of the child."

In this case, the Respondent, a martial arts instructor, engaged in sexually explicit communications by email and telephone with a 15-year old student who regularly attended his class. All of this inappropriate behavior occurred outside of class while the instructor and student were in separate locations, usually their respective homes. Petitioner Wicomico County Department of Social Services found that the instructor had engaged in "indicated" child sexual abuse under the statute. Following a hearing, an administrative law judge (ALJ) concluded that this finding should be modified to "ruled out" because the instructor did not have "care or custody or responsibility for the supervision of" the student when she was not in his class and there was no evidence of inappropriate behavior on the instructor's part while the student was in the instructor's presence – a decision that the Circuit Court for Wicomico County and Court of Special Appeals affirmed on judicial review.

Held: Affirmed.

There was substantial evidence to support the decision of the ALJ and the lower courts.

The instructor did not have temporary care or custody or responsibility for the supervision of the student when she was at home. "Temporary care or custody" refers to *in loco parentis* status, which he did not have. "Responsibility for supervision" depends on mutual consent between the parents and the one who is to supervise, and the implied consent from the parents was terminated when she left the martial arts studio and returned home.

Likewise, there was substantial evidence support the ALJ's conclusion that the instructor did not engage in any acts involving sexual exploitation during class. There was no evidence that the instructor engaged in any acts whose content and context satisfied the "sexual" element, nor any evidence that the instructor received a benefit that would satisfy the "exploitation" element. There was no evidence that the instructor performed any acts specifically in order to facilitate sexual exploitation in the future, which might constitute "grooming" behavior that would be covered by the statute.

The instructor's out-of-class behavior was clearly inappropriate and may have violated some other statute, but it did not constitute child sexual abuse under the current statutory definition.

Henry Immanuel v. Comptroller of Maryland, No. 87, September Term 2015, filed July 12, 2016. Opinion by Raker, J.

http://www.mdcourts.gov/opinions/coa/2016/87a15.pdf

MARYLAND PUBLIC INFORMATION ACT – RECORDS – FINANCIAL INFORMATION EXEMPTION

Facts:

On November 3, 2011, Henry Immanuel submitted a written request for information under the Maryland Public Information Act (hereinafter "MPIA"), Maryland Code (2014), § 4-101 *et seq.* of the General Provisions Article ("GP"), related to the value of unclaimed property accounts in the custody of the Comptroller of Maryland. He requested a list of the names and addresses of individuals with the 5,000 largest accounts of unclaimed property, ordered from the largest value to the smallest. Based upon the Comptroller's interpretation of the statute that the requested information was prohibited under the MPIA exemption for individual financial information, the Comptroller denied the request on the grounds that the records contained "information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness." GP § 4-336(b).

Mr. Immanuel filed a petition for judicial review in the Circuit Court for Wicomico County. The Circuit Court ordered the Comptroller to disclose the requested records in value order as petitioner requested, and the Comptroller appealed to the Court of Special Appeals. The Court of Special Appeals affirmed in part, and reversed in part, holding that Mr. Immanuel was entitled to a list of claims, but not sorted by value, indicating that he should emerge on remand with a list of claims that tracks the Comptroller's disclosure obligations under the Abandoned Property Act, Maryland Code (1990), § 17-301, *et. seq*. of the Commercial Law Article, but that is not sorted by dollar value. *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 85 A.3d 878 (2014).

On remand, the Circuit Court ordered petitioner to submit a modified MPIA request limited to accounts received by the Comptroller within 365 days with a value of $100 or greater, without any sorting by value or other financial information. Mr. Immanuel appealed to the Court of Special Appeals, which affirmed, holding that the Circuit Court did not err or abuse the discretion delegated to it, as its order properly tracked the Comptroller's disclosure obligations under the Abandoned Property Act. *Immanuel v. Comptroller of Treasury*, 225 Md. App. 581, 126 A.3d 196 (2015).

Mr. Immanuel petitioned for *certiorari* primarily as to whether the prohibition against providing financial information in response to his request for public records prohibits disclosure of information concerning comparative values of abandoned property accounts.

Held: Affirmed.

The Court of Appeals, affirming the reasoning of the Court of Special Appeals, held that the Comptroller is to disclose only the information he is required to publish under the Abandoned Property Act.

Although the MPIA provides a general right to information, with a strong presumption in favor of disclosure, the Court made clear that the purpose of the Act is not complete *carte blanche*, unrestricted disclosure of all public records. The legislative purpose underpinning the MPIA is that citizens be accorded wide-ranging access to public information concerning the operation of their government, but it should not serve to reveal information from beyond where State activity ends and private activity begins, even if the government has acquired records on those private individual matters.

The Court reasoned that the prohibition against disclosing personal financial information, *in a vacuum*, would prohibit the Comptroller from disclosing any information about individual abandoned property accounts that are in his guardianship, except that the Comptroller is required to publish the names associated with accounts in alphabetical order and last known addresses, if any, of persons entitled to notice. CL § 17-311(b)(1). Mr. Immanuel is not entitled to information from the Comptroller's database beyond that which the Comptroller must publish per CL § 17-311.

The Court of Appeals affirmed the reasoning of the Court of Special Appeals that ordering a list of accounts based on value, even with the actual value removed, adds information about the relative value of each individual account, and that doing so would contradict the exemption in the MPIA and contravene the plain language of the Abandoned Property Act by disclosing information beyond that which the Act specifies.

Manal Kiriakos v. Brandon Phillips, No. 20, September Term, 2015; *Nancy Dankos, et al. v. Linda Stapf*, No. 55, September Term 2015, filed July 5, 2016. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2016/20a15.pdf

NEGLIGENCE – STATUTE OR ORDINANCE RULE – ADULT RESPONSIBILITY FOR UNDERAGE CONSUMPTION OF ALCOHOL

NEGLIGENCE – COMMON LAW DUTY – INJURIES TO A THIRD PARTY FROM UNDERAGE CONSUMPTION OF ALCOHOL ON AN ADULT'S PROPERTY

NEGLIGENCE – PROXIMATE CAUSE – UNDERAGE DRINKER'S DECISION TO DRINK ON AN ADULT'S PROPERTY

Facts:

Case No. 55: Dankos

17-year-old Steven Dankos became intoxicated during a party at Linda Stapf's house on the evening of November 28, 2009. When Steven left early the next morning, still intoxicated, he rode in the bed of David Erdman's pickup truck. Erdman, another intoxicated partygoer who was 22 years old, crashed the truck shortly after leaving, and Steven was killed.

When Stapf first came home during the party, she found a large crowd at her house. Stapf told her son Kevin that some people would have to leave, but she permitted him and some others to continue partying in the garage. Although Stapf knew some (like Kevin) were under 21 and some under 18, she allowed them to keep drinking. When Kelsey Erdman approached Stapf in the kitchen to express her concerns about her brother driving while intoxicated, Stapf did nothing. Stapf did not tell Kelsey to drive Erdman home, nor call Erdman's parents, nor even check on his condition. Stapf also did not attempt to prevent any intoxicated guests from driving off her premises. Erdman crashed shortly after leaving the party.

In May 2013, Nancy Dankos, Steven's mother, filed an amended complaint, alleging various claims against Stapf that sounded in negligence. Stapf filed a motion to dismiss for failure to state a claim, arguing principally that Dankos had failed to allege the breach of a legally cognizable duty. The Circuit Court for Howard County granted the motion in substantial part. The Court of Special Appeals affirmed.

Case No. 20: Kiriakos

Manal Kiriakos was walking her dogs on the sidewalk one morning when 18-year-old Shetmiyah Robinson, driving a large sport utility vehicle, hit Kiriakos, causing her life-threatening injuries.

The prior afternoon and evening, Robinson had been working with Brandon Phillips and another man at Phillips's house. They began drinking a bottle of vodka and some champagne around 10:00 p.m. Phillips himself mixed the vodka in Robinson's drink with orange juice. Phillips, age 26, knew that Robinson was 18, that Robinson had driven to Phillips's house and would have to drive to leave, and that Robinson had too much to drink.

Because of the quantity Robinson consumed, Phillips told Robinson to "watch what he's drinking." Phillips also offered to let Robinson sleep at his place, but said that Robinson could leave "whenever he was ready" if he "was sure that he was going to be able to drive." Robinson decided to wait for the effects of the alcohol to wear off, and left around 4:00 or 5:00 a.m. Robinson struck Kiriakos about one hour later. The officer who arrived at the scene detected "a strong odor" of alcohol on Robinson's breath. This officer also noticed that Robinson's eyes were bloodshot and that vomit was on his sweatshirt. Robinson consented to a preliminary breath test, which measured a BAC of .088. Based on the sobriety test, among other things, the officer placed Robinson under arrest.

Kiriakos filed an amended complaint against multiple defendants, including Phillips. The sole count against Phillips sounded in negligence. Phillips filed a motion for summary judgment. After a hearing, the Circuit Court for Baltimore County granted Phillips's motion, refusing to find that Phillips owed Kiriakos a legal duty. The Court of Special Appeals affirmed.

Held: Reversed

With respect to both cases, we hold that there exists a limited form of social host liability sounding in negligence—based on the strong public policy reflected in CR § 10-117(b), but that it only exists when the adults in question act knowingly and willfully, as required by the statute. As we explain, *infra*, this knowing and willful requirement removes any issue of contributory negligence on the part of the underage drinker vis-à-vis his claim against the adult, even though the cause of action otherwise sounds in negligence.

Case No. 55: Dankos

Dankos contends that CR § 10-117(b) creates a legal duty for Stapf, a homeowner, to prevent Steven, a minor, from consuming alcohol on her premises. CR § 10-117(b), which contains exceptions not pertinent to the cases before us, states that "an adult may not knowingly and willfully allow an individual under the age of 21 years actually to possess or consume an alcoholic beverage at a residence, or within the curtilage of a residence that the adult owns or leases and in which the adult resides."

We have often explained that a statute or ordinance can prescribe a duty and that "'violation of the statute or ordinance is itself evidence of negligence.'" *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 111 (2014) (quoting *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 78 (2003)). Under this rule ("the Statute or Ordinance Rule"), Dankos must meet two prerequisites to establish a prima facie case in negligence: (1) show "the violation of a statute or ordinance designed to

protect a specific class of persons [], and [(2)] that the violation proximately caused the injury complained of." *Id.* at 112 (citations and internal quotation marks omitted). CR § 10-117, Dankos avers, is designed to protect a specific class of persons: people under 21 who are unrelated to the homeowner and who are not consuming alcohol for religious purposes.

The law holds adults criminally responsible for underage drinking under specific circumstances. Like the regulation in *Blackburn*, 438 Md. at 125–26, CR § 10-117(b) identifies a specific class that the General Assembly sought to protect: underage people exposed to alcohol. The text of the statute makes clear to us the General Assembly's concern for this specific class. *See also Allen v. Dackman*, 413 Md. 132, 156–57 (2010) (determining that the Housing Code was intended to protect "occupants of dwellings" because the code said so). Other courts have determined that underage persons constituted a protected class in statutes similar to CR § 10-117(b). *See, e.g., Newsome v. Haffner*, 710 So. 2d 184, 185–86 (Fla. Dist. Ct. App. 1998) (concluding that a duty of care on adult social hosts arose out of a criminal statute because the law was "clearly designed to protect minors from the harm that could result from the consumption of alcohol"). We hold that CR § 10-117(b) does protect a particular class of persons, that is, persons under 21.

Dankos also contends that Steven, a minor, is a member of the class that CR § 10-117(b) seeks to protect, and that he suffered the harm this statute is designed to prevent. That harm, in her view, is the risk or danger to which alcohol exposes underage persons.

The statute seeks to prevent harm to underage persons as a result of their consumption of alcohol, as is repeatedly expressed in the legislative history for this statute. Those in support of the bill that became CR § 10-117(b) evinced a deep concern for the protection of underage people from alcohol and the risks alcohol poses to them and the loss of judgment that leads to risky behavior—like getting into a car with a fellow partygoer who is too impaired to drive. Other jurisdictions have discerned that harm to underage persons exposed to alcohol is the harm that similar statutes have sought to prevent. *See, e.g., Longstreth v. Gensel*, 377 N.W.2d 804, 813 (Mich. 1985) ("[The statute] was meant to protect against . . . . the dangerous effects of intoxication of those under twenty-one years of age."). In essence, Dankos alleges that Stapf allowed Steven to get so intoxicated that he might put himself in danger—the very harm that CR § 10-117(b) seeks to prevent. We conclude that Dankos has adequately pled the second prong, and thus, that she has adequately pled the duty and breach elements of negligence using the Statute or Ordinance Rule.

We now consider whether she can survive the defense motion to dismiss on the issue of proximate cause. Stapf contends that, under *State for Use of Joyce v. Hatfield*, 197 Md. 249 (1951), "Maryland law is clear that the proximate cause of injury is the actor's decision to drink."

The Court in *Hatfield* stated that "[h]uman beings, drunk or sober, are responsible for their own torts. The law (*apart from statute*) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor." *Hatfield*, 197 Md. at 254 (emphasis added). We recognize that the intoxicated person in *Hatfield* was, as Steven was, a

minor. *See Hatfield*, 197 Md. at 251. But *Hatfield* was decided before the enactment of CR § 10-117(b). At the time of *Hatfield*, there was no law similar to CR § 10-117(b), which prohibits adults from allowing underage persons to drink alcohol on their property. The enactment of CR § 10-117(b) reflects a determination by the General Assembly that more protection of youths from alcohol was needed.

We view CR § 10-117(b) as a recognition by the General Assembly, based on convincing evidence, that children under 21 are often less able to make responsible decisions regarding the consumption of alcohol and, as a result, are more susceptible to harming themselves or others when presented with the opportunity to drink in excess in a social, peer-pressured setting. It therefore carved out that specific class for special protection against adult social hosts who knowingly and willfully allow consumption of alcoholic beverages on their property.

At least two conclusions relevant to the cases before us flow from that legislative recognition and determination. First, upon a finding that the social host defendant **knowingly and willfully** allowed a member of the protected class to consume alcohol on the host's premises in violation of the statute, in an action against the social host brought by or on behalf of the minor or, as in the Kiriakos case, by an injured third party, such conduct—if it substantially contributed to a diminution of the underaged person's ability to act in a reasonable manner, and thereby caused injury—can be found to be a substantial factor in bringing about the harm to the underage person himself or to a third party. *See Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 208–09 (1992) (enunciating substantial-factor causation rule). This conclusion partakes both of the duty and proximate cause components of an action based on negligence. Second, contributory negligence is not a defense in an action by a protected class member against a social host defendant.

We view CR § 10-117(b) as a substantial development in the law from the days of *Hatfield*. Guided by the statute, we conclude that Steven's decision to drink did not render the nexus between Stapf's conduct and his death too remote to preclude Stapf's conduct, as a matter of law, from being considered a proximate cause of his death. Accordingly, the common law rule in *Hatfield* poses no bar to a claim of social host liability predicated on CR § 10-117(b) for injuries to a minor intoxicated on the adult's property.

A defendant's negligence is the proximate cause of a plaintiff's injury when the negligence is "(1) a cause in fact, and (2) a legally cognizable cause." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 428–29 (2012) (quoting *Pittway Corp. v. Collins*, 409 Md. 218, 243–46 (2009)). In the causation-in-fact step, we apply the substantial factor test that we adopted from the Restatement (Second) of Torts. *See Eagle-Picher Indus., Inc.*, 326 Md. at 208–09. A jury, if it found the alleged facts, could reasonably determine that Stapf, "created a force or series of forces which [we]re in continuous and active operation up to the time of the harm" to Steven. *Pittway Corp.*, 409 Md. at 245 (quoting Section 433 of the Restatement (Second) of Torts).

In the legal causation step, we examine "whether the actual harm to a litigant falls within a general field that the actor should have anticipated or expected." *Id.* In focusing on whether an actor should have anticipated or expected a harm, we concern ourselves primarily with whether the harm was foreseeable as a consequence of the actor's negligence. *Id.* at 246. Taking the

facts as Dankos has alleged them, we easily conclude that Erdman's act of driving drunk, and injuring Steven, both guests at Stapf's house, was foreseeable.

In sum, Dankos may maintain her negligence claim arising out of CR § 10-117(b) against Stapf past the motion to dismiss stage.

Case No. 20: Kiriakos

Kiriakos sues in common law negligence, asking us to apply "traditional negligence principles," and engage in an ordinary duty of care analysis. Phillips, however, views our reasoning in *Warr v. JMGM Group, LLC*, 433 Md. 170 (2013) as foreclosing Kiriakos's cause of action. Relying on two decisions by the Court of Special Appeals[1], he also proclaims Maryland social host liability cases are dispositive in his favor.

What critically distinguishes Kiriakos's claim from the plaintiffs' in *Warr*, however, is Robinson's age and the venue of his intoxication, both reflected in the strong public policy underlying CR § 10-117(b). This statute, which prohibits adults from allowing underage drinking on their property, represents the General Assembly's determination that underage persons have a diminished ability to handle alcohol and adults should not facilitate minors' consumption in the adult's homes, save the narrow exceptions in the statute. Because we rely heavily on the public policy set forth in CR § 10-117(b), we view this knowing and willful standard as a predicate for the limited social host cause of action we evaluate today. Admittedly, the terms "knowing" and "willful" are not usually paired with negligence. But nothing prevents us from superimposing this requirement on a cause of action for social host liability sounding in negligence where an integral statute on which the negligence depends makes knowledge and willfulness pivotal for culpability.

The doctrine of negligent entrustment, advanced by Kiriakos, is instructive as to whether Phillips owes Kiriakos, a third party, a duty when he enabled an underage person to consume alcohol on his property, drive away under the influence, and ultimately injure Kiriakos near a public motorway. We first applied the theory of negligent entrustment in *Rounds v. Phillips*, 166 Md. 151, 160–61 (1934). *Rounds* illustrates that negligent entrustment involves a duty to a third person—someone injured by the reckless driver. Other courts have recognized a similarity between negligent entrustment of a car to a youth, as in Rounds, and the alleged circumstances before us, that is, allowing an underage person, who is likely to drive, to consume alcohol. *See Estate of Hernandez by Hernandez-Wheeler v. Ariz. Bd. of Regents*, 866 P.2d 1330, 1340 (Ariz. 1994) ("**We perceive little difference in principle between liability for giving a car to an intoxicated youth and liability for giving drinks to a youth with a car**.") (emphasis added).

The doctrinal underpinnings of negligent entrustment are also subsumed within a broader tort theory that is set forth in the Restatement (Third) of Torts § 19. Section 19 of the Restatement (Third) of Torts instructs that "[t]he conduct of a defendant can lack reasonable care insofar as it

[1] *Hebb v. Walker,* 73 Md.App. 655, 661 (1988) and *Wright v. Sue & Charles, Inc.*, 131 Md.App. 466, 478 (2000).

foreseeably combines with or permits the improper conduct of the plaintiff or a third party." Restatement (Third) of Torts § 19 (2010). The illustrations in Section 19 include a classic example of negligent entrustment. Enabling an underage person to drink alcohol under these circumstances increases the risk of harm, which undergirds the tort of negligent entrustment. *See Estate of Hernandez by Hernandez-Wheeler*, 866 P.2d at 1340–41 ("If the recipient is known to be incompetent to receive the dangerous instrument, it is irrelevant whether it is a loaded gun, a car, or alcohol."). For the reasons stated above, we conclude that Kiriakos can maintain a limited social host cause of action against Phillips through common law tort principles, like negligent entrustment, based on the strong public policy evident in CR § 10-117(b). To the extent that the Court of Special Appeals decisions in *Hebb* or *Wright* are inconsistent with this conclusion, we overrule them.

Our decision is consonant with the classic factors we use to decide questions of duty under the common law.

(i) Foreseeability of Harm

Based on the allegations, and the universally understood risk of harm that underage drunk driving poses to the traveling public, Kiriakos's injuries were foreseeable.

(ii) Degree of Certainty that the Plaintiff Suffered the Injury

Robinson pleaded guilty to "causing life-threatening injuries to" Kiriakos because he drove under the influence, and he reiterated in his deposition that his actions caused her injuries. This factor favors civil liability.

(iii) Closeness of the Connection Between Defendant's Conduct and the Injury Suffered

Considering the legislative recognition in Maryland that underage people have a diminished ability to handle alcohol and may expose themselves and others to harm, there is a sufficient connection between Phillips's conduct and the harm to Kiriakos such that we will not foreclose liability.

(iv) Moral Blame Attached to the Defendant's Conduct

Here, the General Assembly has created law to hold *adults responsible* for underage drinking on their property because of the risks associated with underage drinking. *See* CR § 10-117(b). Because Phillips allegedly not only permitted but facilitated Robinson's drinking on his property to the point of intoxication, we conclude that the general public would consider Phillips's conduct blameworthy. Again, this factor favors liability.

(v) The Policy of Preventing Future Harm

The General Assembly's decision to punish adults who furnish alcohol to underage persons or otherwise tolerate it, occurred in the wake of a report to combat drunk driving, and statistics attesting to the pervasive dangers of drunk driving. It is transparent that this legislative action

and the impetus for it provide a "strong incentive to prevent the occurrence of the harm" that befell a victim like Kiriakos. *See Matthews v. Amberwood Assocs. Ltd. P'ship, Inc.*, 351 Md. 544, 570 (1998); *cf.* CR § 10-121(b). Consideration of this policy thus favors liability.

(vi) Extent of the Burden on the Defendant and Consequences to the Community of Imposing a Duty

When an underage person such as Robinson steps foot on Phillips's property, reasonable minds cannot differ as to what Phillips must do in light of CR § 10-117. Phillips cannot allow Robinson, a person he knew to be underage, to drink on his property. This prohibition serves as a bright line. The burden on Phillips was not great—he could have easily conformed his conduct to the law by refraining from furnishing alcohol to Robinson. This factor also favors imposition of liability.

We turn now to the causation-in-fact prong of the proximate cause inquiry. As we earlier discussed, when an injury arises from "two or more independent negligent acts," as it does here, we apply the substantial factor test. *Pittway*, 409 at 244. Under the facts, if proven, a jury could conclude that "it is 'more likely than not'" that Phillips's conduct was a substantial factor in producing Kiriakos's injuries. *Id.*

Under the second prong, legal causation, we are primarily concerned with whether the harm to Kiriakos was foreseeable by Phillips. *Id.* at 246. If the evidence supported the allegations, a reasonable jury could conclude: (1) Kiriakos's injuries were a result of Robinson's drunk driving; (2) Phillips could have anticipated Robinson's negligent act because both Robinson's substantial consumption of alcohol and the likelihood of his driving were apparent to Phillips; and (3) the accident occurred within an hour after Robinson left Phillips's house. These conclusions, if made by the jury, would render Phillips's conduct a legal cause of Kiriakos's injuries.

Although the reasoning differs in the two cases, the public policy underlying CR § 10-117(b) applies to both cases. That is, underage persons are not solely responsible for drinking alcohol on an adult's property *because* they are not competent to handle the effects of this potentially dangerous substance. Because of the public policy evident in CR § 10-117(b), Stapf and Phillips cannot avail themselves of the adage in *Hatfield* that a person's decision to drink is the sole cause of injuries arising from his intoxication. *See Hatfield*, 197 Md. at 254.

Donald B. Spangler, et al. v. Peggy McQuitty, et vir., No. 69, September Term 2015, filed July 12, 2016. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2016/69a15.pdf

WRONGFUL DEATH – LIMITATIONS – BENEFICIARIES RIGHT TO SUE – STATUTORY INTERPRETATION

WRONGFUL DEATH – LIMITATIONS – EFFECT OF RELEASE ON JOINT TORT-FEASORS

Facts:

The case of *McQuitty v. Spangler* has been previously addressed by the Court of Appeals in *McQuitty v. Spangler*, 410 Md. 1, 976 A.2d 1020 (2009) ("*McQuitty I*"), and *McQuitty v. Spangler*, 424 Md. 527, 36 A.3d 928 (2012) ("*McQuitty II*"). On behalf of their now deceased minor child, Dylan, Respondents, Peggy and Gary McQuitty ("the McQuittys"), successfully sued Ms. McQuitty's obstetrician and primary care physician, Donald Spangler ("Dr. Spangler"), along with his practice group, Glowacki, Elberfeld & Spangler, P.A. (collectively "Petitioners"), for failing to secure Ms. McQuitty's informed consent for treatment during her pregnancy. The original complaint also included co-defendants, Franklin Square Hospital, where Dylan was born, and Dr. Spangler's partner, Harrold Elberfeld ("Dr. Elberfeld"), who settled with the McQuittys prior to trial. As a result of Dr. Spangler's treatment, Ms. McQuitty suffered complete placental abruption, which caused severe injuries to Dylan during his birth and led to a severe condition of cerebral palsy. In September 2009, Dylan died as a result of his condition, and thereafter, the McQuittys were named as personal representatives of the Estate.

In May 2012, Respondents filed a wrongful death action against Petitioners, under the Maryland wrongful death statute, Cts. & Jud. Proc. § 3-901 *et seq.*, to recover damages under the lack of informed consent claim asserted in the initial complaint. The Circuit Court for Baltimore County granted Petitioners' Motion to Dismiss Respondents' complaint, and concluded that Respondents' wrongful death action was precluded by the judgment in Dylan's favor "because Dylan no longer had a right to bring another claim" against Petitioners at the time of his death.

The Court of Special Appeals reversed, holding, in relevant part, that a claim under Maryland's wrongful death statute created a new and independent cause of action for a decedent's beneficiaries, and thus, a successful judgment in Dylan's personal injury action did not bar a subsequent wrongful death action by Respondents.

Held: Affirmed

The Court of Appeals similarly held that Maryland's wrongful death statute created a new and independent cause of action for a decedent's beneficiaries, and thus, a judgment on the merits in Dylan's personal injury action during his lifetime did not bar a subsequent wrongful death action by Respondents based on the same underlying facts. The Court reasoned that: Maryland has historically adhered to the minority view that the wrongful death statute created an independent cause of action, distinguishable from a decedent's own personal injury action during his or her lifetime; interpreting a wrongful death action under § 3-901(e) as derivative of a decedent's personal injury claim would lead to a result that was inconsistent with the purpose of the statute; Respondents' wrongful death action was not barred by *res judicata* because Dylan possessed a viable claim against Petitioners from the outset of his personal injury action, unlike other defenses that bar a subsequent wrongful death action; and that duplicative recovery is generally not at risk because the damages recovered in a wrongful death action compensate for losses incurred by Respondents as beneficiaries, *only after* death ensued, which is distinguishable from damages recovered by Dylan in his personal injury action. To the extent that duplicative damages existed in the case at bar, the Court concluded that the circuit court should assess and properly allocate such damages on remand.

The Court further held that the release executed between Dylan and Dr. Elberfeld unambiguously revealed an intent to release only Dr. Elberfeld, which did not preclude Respondents' wrongful death action against Petitioners. Accordingly, the Court affirmed the judgment of the Court of Special Appeals.

Carville A. Hollingsworth, et al. v. Severstal Sparrows Point, LLC, et al., No. 95, September Term 2015, filed July 11, 2016. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2016/95a15.pdf

WORKERS' COMPENSATION ACT – PERMANENT TOTAL DISABILITY – SURVIVAL OF BENEFITS – MD. CODE (1991, 2008 REPL. VOL.), § 9-640 OF THE LABOR & EMPLOYMENT ARTICLE

Facts:

In 2010, Hollingsworth sustained an accidental injury in the course of his employment. The body parts involved in the 2010 injury included Hollingsworth's neck, right shoulder, back, and right hand. In November 2013, the Workers' Compensation Commission issued an award of compensation after determining that, as the result of the combined effects of the accidental injury and his preexisting conditions, Hollingsworth was permanently totally disabled. The Commission found that Hollingsworth had a 65% permanent disability due to the 2010 accidental injury. The Commission then found that the balance of his permanent disability, 35%, was due to his preexisting conditions, for which the Subsequent Injury Fund was responsible for paying compensation.

In accordance with these findings, the Commission directed the employer and insurer to pay Hollingsworth compensation at the rate of $798.00 weekly beginning February 7, 2013, not to exceed the sum of $345,534.00 allowable under the "Other cases" provision of the Maryland Workers' Compensation Act, LE § 9-627(k). The Commission also ordered the Subsequent Injury Fund to begin making payments to Hollingsworth at the end of the compensation to be paid by employer and insurer. The Commission ruled that these payments by the Fund would be made for as long as Hollingsworth continued to be permanently totally disabled.

Hollingsworth died in July 2014 from causes unrelated to the accidental injury. Up to the time of his death, employer and insurer made compensation payments pursuant to the Commission's award amounting to $52,166.54. Subsequently, Hollingsworth's daughter filed issues with the Commission seeking continued payment of the benefits provided in the November 2013 award.

Following an October 2014 hearing, the Commission issued an order in which it determined that employer and insurer were not obligated to make further payments under the award of compensation to Hollingsworth's daughter because LE § 9-640 caps the survival of benefits at $45,000.00 and employer and insurer had already paid more than this amount to Hollingsworth at the time of his death.

Held: Affirmed.

When the Workers' Compensation Commission finds a claimant permanently totally disabled, § 9-640 of the Workers' Compensation Act governs survival of benefits regardless of whether the claimant's permanent total disability is due solely to accidental injury or a combination of accidental injury and preexisting conditions.

COURT OF SPECIAL APPEALS

Steven Kougl, et al. v. The Board of Liquor License Commissioners for Baltimore City, No. 935, September Term 2015, filed June 2, 2016. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2016/0935s15.pdf

RULES OF THE BOARD OF LIQUOR LICENSE COMMISSIONERS – STRICT LIABILITY – SUFFER, PERMIT, AND ALLOW – ACTUAL OR CONSTRUCTIVE KNOWLEDGE

Facts:

Appellant, Steven Kougl, owns Club Harem, a Baltimore tavern and adult entertainment business, and holds a liquor license for that location issued by appellee, the Board of Liquor License Commissioners for Baltimore City ("the Liquor Board"). The Liquor Board charged Kougl with violating three Liquor Board Rules related to solicitation of prostitution, indecent exposure, and violation of public morals, all occurring at Club Harem, when an employee exposed herself to an undercover police officer and then solicited sexual intercourse from the same officer. The Liquor Board found Kougl guilty of all three violations and ordered that his liquor license be suspended for one month. Kougl filed for judicial review in the Circuit Court for Baltimore City, which affirmed the decision of the Liquor Board.

Held: Reversed and remanded.

The Court of Special Appeals held that the Liquor Board erred in interpreting the words "suffer," "permit," and "allow" in Rules 4.17 and 4.18 to impose a strict liability standard on licensees, because the plain meaning of the subject terms necessarily require that some level of knowledge by the licensee must be established by the evidence.

The Court also held that the knowledge requirement implicit in the terms "suffer," "permit," and "allow" can be satisfied by proof of either actual or constructive knowledge on the part of the licensee. Actual knowledge is, actual awareness of the prohibited activity, as well as "deliberate ignorance" or "willful blindness." Constructive knowledge, however, implies knowledge where a licensee should have known of the prohibited activity if reasonable care and diligence had been exercised. Here, there was simply no evidence of Kougl's actual or constructive knowledge of the violations.

James P. Ireton, Jr. v. Lore Chambers, No. 1038, September Term 2015, filed July 28, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/1038s15.pdf

IMMUNITIES FROM CIVIL LIABILITY – OFFICIALS OF MUNICIPAL CORPORATIONS

Facts:

Dr. Lore L. Chambers, a former city employee of Salisbury, Maryland, was fired after an incident with James P. Ireton, Jr., then Mayor of Salisbury. Chambers then sued Ireton for assault in the Circuit Court of Wicomico County. As a defense, Ireton claimed that, under Md. Code (1974, 2013 Repl. Vol.), § 5-507(a)(1) of the Courts and Judicial Proceedings Article ("CJP"), he was "immune as an official or individual from any civil liability" for his actions because he acted "without malice."

The jury determined that Ireton had assaulted Chambers, but that he had not acted with actual malice. The jury did not reach the damages questions. Neither party challenged the jury's verdict.

On December 19, 2014, the circuit court clerk docketed a judgment against Ireton for $0.00. A series of back-and-forth motions saw the judgment revised and re-revised, but ultimately the zero-dollar judgment was left intact. Ireton appealed.

Held: Reversed.

In what could be accurately described as "a case about nothing," the Court of Special Appeals held that the circuit court erred in entering judgment against Ireton for zero dollars, and that the court should have instead entered judgment in his favor.

In doing so, the Court settled a dispute over the interpretation of the phrase "immunity from any civil liability" in CJP § 5-507(a)(1). Ireton contended that immunity from civil liability means immunity from *any civil judgment*, including one for zero dollars, while Chambers claimed that it merely means immunity from a judgment for *damages*. The Court rejected Chambers' interpretation for several reasons.

First, despite the statute's ambiguous language, a plaintiff is clearly not entitled to judgment in his favor absent a finding of malice, whether malice is an element or lack of malice is an affirmative defense. If the plaintiff failed to introduce sufficient evidence to show malice as an element, the court would be obligated to enter judgment against her. Likewise, if the defendant

established lack of malice as an affirmative defense, the court would be obligated to enter judgment against the plaintiff even if she had proven all of the elements of her case.

In previous decisions, the Court of Special Appeals has affirmed summary judgment against plaintiffs who failed to provide sufficient evidence that an official acted with malice. The court reasoned that if Ireton had prevailed on a motion for summary judgment—or on a motion for judgment during the trial—by showing that Chambers failed to provide sufficient evidence for a finding of malice, the circuit court would have directed judgment in Ireton's favor. The court would not have entered judgment against Ireton for zero dollars or allowed the case to proceed. It followed that the court could not enter judgment against Ireton, even for zero dollars, after the jury had affirmatively found that he did not act with malice.

Second, the Court rejected Chambers' interpretation of "civil liability" because it would provide immunity only to liability for damages; it would not extend to liability for equitable relief, such as injunctions. The Court found it improbable that the General Assembly intended to create an immunity from "civil liability" that excludes an entire category of civil remedies.

Finally, the Court reasoned that the legislature has demonstrated its ability to distinguish immunity from damages from immunity from "civil liability." CJP § 5-507(a)(2), the next subparagraph of the statute, declines to grant immunity for damages arising from the operation of a motor vehicle, up to the limits of insurance coverage. A number of other statutes under the Courts and Judicial Proceedings Article grant immunity only from an award for damages, and not from "civil liability." The Court declined to equate the two.

Steven Berg v. Susan Berg, No. 624, September Term 2015, filed June 2, 2016. Opinion by Salmon, J.

http://www.mdcourts.gov/opinions/cosa/2016/0624s15.pdf

MARYLAND CONSTITUTIONAL LAW, ARTICLE 4, SECTION 22 – RIGHT TO FILE AN *IN BANC* APPEAL.

Facts:

In 2005, Steven Berg and his then wife, Susan Berg, commenced a divorce action. In the early part of June 2007, a merits trial was held to address, among other things, the issue of whether Mrs. Berg was entitled to a monetary award. The circuit court decided that Mrs. Berg was entitled to a monetary award in the amount of $450,000. Thereafter, Mr. Berg made irregular payments on the monetary award judgment, but never paid the award in full.

In August 2012, Mrs. Berg brought a garnishment action against Mr. Berg in which she sought to seize some of her ex-husband's personal property. She later attached an interest worksheet setting forth the method she had used in applying payments made on the judgment. According to her worksheet, Mr. Berg, as of September 27, 2012, had paid $371,562.51 towards the judgment but, because interest had accrued at the rate of 10%, still owed $225,575.62. In that worksheet, Mrs. Berg allocated all of the payments received to principal and none to interest.

On March 27, 2014, Mrs. Berg brought another garnishment action, this time attempting to attach Mr. Berg's wages. She again attached an interest worksheet. That worksheet showed that she applied the payments first to interest and then to principal. According to the worksheet, Mr. Berg, since September 27, 2012, had made an additional payment of $10,000.00 but he still owed $248,746.65. .

Mr. Berg objected to the method his ex-spouse had utilized in applying payments. He contended that Mrs. Berg should have applied his payments first to principal.

On October 1, 2014, the circuit court held an evidentiary hearing concerning Mr. Berg's objection to the garnishment worksheet. The purpose of the hearing was to determine the outstanding balance Mr. Berg owed on the judgment. At the hearing, exhibits were introduced and the court heard testimony from Mrs. Berg. On December 17, 2014, the court entered a written order stating that all payments made on the judgment prior to August 7, 2012, should have been exclusively applied to principal and all payments made thereafter should be applied to the payment of interest first and principal second. Mrs. Berg thereafter noted an in banc appeal. A hearing before a panel of three Montgomery County circuit court judges was held in May 2015. At the hearing, Mr. Berg argued, as he does in this appeal, that the in banc panel had no jurisdiction to entertain the appeal because the issue the panel was asked to decide did not "stem from a merits trial." The panel disagreed as to the jurisdictional issue and ruled that all payments

on the $450,000.00 judgment should be credited "first to interest and then to principal." Mr. Berg noted an appeal to the Maryland Court of Special Appeals in which he did not claim that the in banc panel was incorrect in its ruling concerning the allocation of payments. Instead, the sole issue he presented was whether the in banc panel had jurisdiction to consider the allocation of payments issue. On appeal, the parties focused on the meaning of the language set forth in Article IV, Section 22 of the Maryland Constitution, which presently reads as follows:

> *Where any trial is conducted by less than three Circuit Judges*, upon the decision or determination of any point, or question, by the Court, it shall be competent to the party, against whom the ruling or decision is made, upon motion, to have the point, or question reserved for the consideration of three Judges of the Circuit, who shall constitute a court in banc for such purpose; and the motion for such reservation shall be entered of record, during the sitting at which such decision may be made; and the procedure for appeals to the Circuit Court in banc shall be as provided by the Maryland Rules. The decision of the said Court in banc shall be the effective decision in the premises, and conclusive, as against the party at whose motion said points, or questions were reserved; but such decision in banc shall not preclude the right of Appeal by an adverse party who did not seek in banc review, in those cases, civil or criminal, in which appeal to the Court of Special Appeals may be allowed by Law. The right of having questions reserved shall not, however, apply to trials of Appeals from judgments of the District Court, nor to criminal cases below the grade of felony, except when the punishment is confinement in the Penitentiary; and this Section shall be subject to such provisions as may hereafter be made by Law.

(Emphasis added.)

Mr. Berg contended that the word "trial" as used in section 22 has a very narrow meaning. More specifically, he contended that the hearing held on October 1, 2014 did not constitute a "trial" within the meaning of section 22. And, appellant argued, that if no trial was held, then there was no right to file an *in banc* appeal.

Held: Affirmed

Judgment of the *in banc* panel affirmed. In affirming the judgment, the Court of Special Appeals held that the meaning of "trial" as used in section 22, meant "that step in an action by which issues or questions of fact are decided." That was the common law meaning of the term in 1867 when section 22 originally went into effect – and remained the intended meaning. Therefore, because the issue decided by the *in banc* panel related to what had been decided at a trial, (i.e., the one held on October 1, 2014) the *in banc* panel had jurisdiction to decide the issue.

Because the issue was not directly presented, the Court declined to decide whether an *in banc* panel would have jurisdiction to decide cases where a circuit court judge decided a question or issue when no trial had ever been held, *e.g.*, when a circuit court judge grants summary judgment

or grants a motion to dismiss a complaint for failure to state a cause of action upon which relief may be granted.

Robin Vera Colbert v. State of Maryland, No. 2332, September Term 2014, filed July 28, 2016. Opinion by Friedman, J.

http://www.mdcourts.gov/opinions/cosa/2016/2332s14.pdf

FOURTH AMENDMENT – WARRANTLESS SEARCHES – EXCEPTIONS

Facts:

Appellant Robin Vera Colbert was driving a grey Nissan along Route 50 when she took an exit ramp toward Ritchie Highway but missed and ended up on the Baltimore & Annapolis ("B&A") Bicycle Trail instead. There she struck two cyclists from behind. Both cyclists were transported to Shock Trauma by helicopter.

When Officer Eric Trumbauer of the Anne Arundel County Police Department arrived at the scene, Colbert identified herself as the driver of the grey Nissan. Officer Trumbauer smelled alcohol from Colbert, noted that she was slurring her speech and was unable to keep her balance. Officer Trumbauer performed a field sobriety test on Colbert, which she failed. Officer Trumbauer then instructed another officer to take Colbert to the Eastern District Police Station for a breath test, which resulted in a reading of .15 blood alcohol content, well above the legal limit of .08.

Colbert was charged with eleven criminal counts related to the incident. Colbert moved to suppress the breath test results because they had been obtained without a warrant. After the Circuit Court for Anne Arundel County denied that motion, Colbert proceeded by way of a Not Guilty Agreed Statement of Facts as to two of the counts. She was found guilty of those two counts and the State *nolle prossed* the remaining counts. The two counts on which Colbert was convicted were merged for sentencing and the trial court sentenced Colbert to three years incarceration with all but eighteen months suspended and five years of supervised probation. This appeal followed.

Held: Affirmed.

Warrantless breath tests conducted under TR § 16 205.1(c) are constitutional.

The Court evaluated the constitutionality of §16-205.1(c) of the Transportation ("TR") Article of the Maryland Code under the Fourth Amendment. Section 16 205.1(c) creates a *per se* exigency exception to the Fourth Amendment prohibition against warrantless searches. Specifically, §16-205.1(c) allows for a warrantless breath or blood alcohol test of a driver who is (1) "involved in a motor vehicle accident"; that (2) results in "death … or a life threatening injury"; and (3) that law enforcement has "reasonable grounds to believe" that the driver is under the influence of drugs or alcohol.

The Court began its review of TR §16-205.1(c) noting that compelled breath and blood alcohol tests are searches and are thus subject to a Fourth Amendment analysis. From there, the Court concluded that Justice Kennedy's controlling concurrence in *Missouri v. McNeeley*, 569 U.S. ----, 133 S.Ct. 1552 (2013), affords states and local governments the right to develop appropriate *per se* rules to help law enforcement decide when warrants will be required to test for alcohol in a suspected drunk drivers. *McNeeley*, 569 U.S. at ----, 133 S.Ct. at 1568-69 (Kennedy, J., concurring).

The Court determined that TR §16-205.1(c) is precisely the type of *per se* rule that Justice Kennedy was contemplating in his *McNeely* concurrence. By utilizing a three-part test, TR §16-205.1(c), helps law enforcement identify a category of cases in which it is particularly reasonable to dispense with the warrant requirement. All three conditions of TR §16-205.1(c) were satisfied in this case: there had been a motor vehicle accident, the victim had suffered a life threatening injury, and Officer Trumbauer had reasonable grounds to believe that Colbert was under the influence of alcohol. Colbert's conviction was accordingly affirmed.

The Court took no position on the constitutionality of the administration of a blood alcohol test pursuant to TR §16-205.1(c).

Return to ToC

Kurt Kratz, by and through his guardian, Carole Kratz-Spera v. MedSource Community Services, Inc., No. 126, September Term 2015, filed June 29, 2016. Opinion by Sharer, J.

http://www.mdcourts.gov/opinions/cosa/2016/0126s15.pdf

COURTS AND JUDICIAL PROCEEDINGS ARTICLE – SECTION 5-201 – STATUTE OF LIMITATIONS – REMOVAL OF DISABILITY

Facts:

Appellant was adjudicated mentally incompetent on July 18, 2008, on which date two guardians were appointed. On June 18, 2013, and June 6, 2014, appellant, by his guardian, filed complaints against appellee, the organization responsible for the group home in which he lived, for injuries arising from incidents that occurred on March 22, 2006, and November 24, 2009. The circuit court dismissed the complaints on limitations grounds.

Held:

1. The tolling exception in section 5-201 of the Courts and Judicial Proceedings Article preserves the legal rights of a mentally incompetent individual until a guardian is appointed; once a guardian is appointed, and gains the requisite knowledge to file a claim on the individual's behalf, the statute begins to run. A guardian is granted the "powers necessary to provide for the demonstrated need of the disabled person" by section 13-708(a)(1) of the Estates and Trusts Article, and operates as the competent party responsible for the mentally incompetent adult's needs; the guardian is therefore subject to the statute of limitations once knowledge is gained that those needs may have been jeopardized by a tortfeasor.

2. Although the guardianship statute allows the court to grant the guardian "[t]he same rights, powers, and duties that a parent has with respect to an unemancipated minor child," the comparison does not extend to the application of the statute of limitations. A guardian has a right to bring suit on behalf of a mentally incompetent individual, as does a parent on behalf of a minor child, but imposing the statute of limitations on a guardian does not threaten the mentally incompetent adult's rights as it would those of a child.

3. In view of legislative modernization of guardianship proceedings, the rule of *Funk v. Wingert*, 134 Md. 523 (1919), is no longer sustainable.

In re: D.M.. No. 2712, September Term 2014, filed June 29, 2016. Opinion by Sharer, J.

http://www.mdcourts.gov/opinions/cosa/2016/2712s14.pdf

COURTS AND JUDICIAL PROCEEDINGS ARTICLE – SECTION 3-8A-02 – JUVENILE CAUSES – DUE PROCESS RIGHTS – SHACKLING

Facts:

Appellant appeared at multiple hearings in juvenile court for delinquency proceedings (related to the theft of a cell phone) in leg and wrist restraints. His counsel requested the removal of the restraints, and excepted when the magistrate denied this request. The circuit court, sitting as a juvenile court, accepted the magistrate's findings and denied appellant's exception, finding that his appearance in shackles was not prejudicial.

Held:

1. The analysis of whether a particular procedural right is guaranteed to juveniles under the Due Process Clause centers on whether granting that right would help achieve or serve to hinder the goals of the juvenile system.

2. To achieve the enumerated goals and objectives of the Juvenile Causes Act, including character development, protection and treatment of the child, and wholesome mental and physical development, juveniles should not be shackled while appearing at juvenile court hearings, unless and until there has been a finding on the record that the juvenile poses a security concern or threat that would disrupt those particular proceedings, or involve danger to the juvenile or others. Juveniles' cases often involve witnesses whose perceptions may be swayed by the sight of a child in physical restraints. Indiscriminate shackling also physically and, at times, psychologically inhibits the juvenile respondent's right to assist counsel and participate in his or her own defense.

3. To effect uniformity and to eliminate disparities in practice from courtroom to courtroom, juveniles should not be shackled while appearing at hearings in juvenile court, unless and until there has been a finding on the record that the juvenile poses a security concern or threat that would disrupt the proceedings or involve danger to the juvenile or others.

Michael Anthony Johnson v. State of Maryland, No. 1410, September Term 2013, filed May 31, 2016. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2016/1410s13.pdf

CRIMINAL LAW – EMAIL HARASSMENT – VIOLATION OF PROTECTIVE ORDER – NO MERGER OF SEVENTY-THREE CONVICTIONS

Facts:

In the summer of 2012, appellant placed advertisements on various websites falsely claiming that his ex-wife would perform many different types of sex acts, including submitting to rape, for any man who would come to her house. Beginning on June 21, 2012, men began coming to the victim's house every day in response to the ads. The victim reported the matter to the police, obtained a protective order against appellant, and contacted the websites in an attempt to have the ads removed, all to no avail. From June 21, 2012 to July 22, 2012, over 400 men went to the victim's house in response to the ads placed by appellant.

In addition, after the entry of the protective order, the victim began receiving emails from an individual whom she believed to be appellant. The emails pressured the victim to meet the writer at a hotel. When the victim refused, the writer stated that the ad for sex would be placed on the website of the school attended by the victim's children. The emails also contained threats to kill the victim and a suggestion that the men coming to the victim's house would rape her daughters. Some of the emails used the nickname appellant had for the victim, and one was even signed with appellant's first name. The victim received no more emails after the execution of a search warrant on appellant's house on August 1, 2012, and appellant's subsequent arrest.

After a jury trial, appellant was convicted of one count of stalking, two counts of harassment, ten counts of harassment by electronic mail, ten counts of reckless endangerment, and fifty counts of violating a ten counts protective order. Appellant was sentenced to a total of eighty-five years and ninety days' incarceration.

Held: Affirmed.

Appellant claimed that his ten convictions for email harassment were part of a single course of conduct, and thus should merge into one conviction. Appellant pointed to the addition of the language "a course of conduct" to the email harassment statute in 2012, and asserted that such amendment changed the unit of prosecution from each email to a "course of conduct." The Court of Special Appeals rejected appellant's argument and held that, because each of appellant's ten email harassment convictions corresponded to each day that appellant sent a

series of emails to the victim, each conviction constituted a separate course of conduct on each such day.

Appellant also argued that, because of an ambiguity in the jury instructions and verdict sheet, his fifty convictions for violating a protective order must merge for sentencing purposes into nine, one for each day on which a violation was found to have occurred. The Court of Special Appeals rejected appellant's argument, concluding that there was no ambiguity. The Court stated that the verdict sheet, coupled with the trial court's instructions regarding the verdict sheet and the prosecutor's closing argument, made clear that each violation of the protective order corresponded to each email sent by appellant to the victim.

Regarding his two reckless endangerment convictions related to posting information on Craigslist about the victim, appellant asserted that those convictions should merge, because the relevant entries on the verdict sheet, counts 11 and 20, were ambiguous. Appellant pointed to the lack of specificity regarding the ads, as well as a lack of any clarifying jury instruction. The Court of Special Appeals rejected appellant's argument. The Court pointed to (1) the charging document clearly delineating two separate counts associated with two distinct Craigslist ads, (2) the jury instruction emphasizing that each count corresponded to a distinct act, and (3) the evidentiary basis, explained by the prosecutor to the jury, that the victim testified that she was shown one Craigslist ad on June 20, 2012, inviting men to go to her house and have sex with her and was shown a different ad on June 21, 2012, describing the victim's alleged rape fantasy. The Court concluded that the two counts were based on conduct related to two different Craigslist ads, and thus appellant's two convictions were not ambiguous.

Sadie M. Castruccio v. The Estate of Peter Adalbert Castruccio, et. al., No. 1665, September Term 2014, filed July 28, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/1665s14.pdf

WILLS – ATTESTATION CLAUSE AND PRESUMPTION OF DUE EXECUTION

EVIDENCE – SPOLIATION

Facts:

Dr. Peter Castruccio died on February 19, 2013. His wife of sixty years, Sadie Castruccio, survived him. The couple had no children.

Dr. Castruccio's attorney petitioned the register of wills to probate Dr. Castruccio's six-page will, dated September 29, 2010. The will was admitted to probate in the orphans' court.

Dr. Castruccio's September 2010 will consists of six pages that are not physically attached to one another by a staple or paperclip or other means of physical connection. The six pages are consecutively numbered as pages 1 of 6, 2 of 6, etc…, through 6 of 6. Dr. Castruccio's signature appears on page 5 of 6. A few spaces below the signature, the following words appear: "SIGNED, SEALED, PUBLISHED AND DECLARE [sic], BY PETER ADALBERT CASTRUCCIO." Farther down, the last lines of page 5 of 6 read: "The above named individual, does declare for his Last Will and Testament this instrument, have hereunto subscribe[d] to have witness[ed] on the date last mentioned above, and at the location, and [. . .]." Page 6 appears to consist of a continuation of the language of page 5, reading "I do hereby attest that the testator to be [sic] of sound mind, fully able to understand this instrument, and the testator voluntarily and freely did sign same." Below these words are the printed names of three witnesses, with signatures for each on a line under the word "WITNESS."

The will leaves cash bequests to three people, including Darlene Barclay, a longtime employee of Dr. Castruccio. The will leaves the "rest and remainder" of the estate to Mrs. Castruccio, provided that she survives Dr. Castruccio, and that "she has made and executed a will prior to [Dr. Castruccio's] death." The will states that if Mrs. Castruccio "does not have a valid will filed with the Register of Wills of Anne Arundel County prior to" Dr. Castruccio's death, then "all the rest and residue of" the estate shall go to Darlene Barclay. Mrs. Castruccio had not filed a valid will with the register of wills by the time of Dr. Castruccio's death. Under the terms of will, therefore, the residue of his estate would pass to Darlene Barclay.

When the will was admitted to probate, Mrs. Castruccio successfully petitioned to transmit seven issues to the Anne Arundel Circuit Court for trial. The Estate moved for summary judgment. Ms. Barclay intervened as a co-defendant. Mrs. Castruccio opposed the Estate's motion, and

filed a cross-motion for summary judgment as to one of the seven issues: whether the will was actually attested and signed by credible witnesses in the testator's presence.

For this issue, Mrs. Castruccio relied on *Shane v. Wooley*, 138 Md. 75 (1921), which had upheld the invalidation of a one-page will because the witnesses' signatures did not appear on the will itself or on a document that was physically attached to it. Specifically, Mrs. Castruccio argued that the attestation was invalid because (1) the witnesses did not sign on the same page as Dr. Castruccio, and (2) the page containing the witnesses' signatures was not "physically connected" to the page on which Dr. Castruccio had signed his name.

The Estate argued that there was no proof that the pages were not connected at the time of signing. In the alternative, the Estate contended that mechanical attachment was not required under Maryland law and that the pages could be sufficiently connected where there is evidence that they were intended to be internally connected as a single instrument.

In addition, Mrs. Castruccio raised the issue of spoliation of evidence by pointing out that Ms. Barclay had destroyed a flash drive which "might" have contained a file related to the will. Mrs. Castrucio moved for sanctions against Ms. Barclay. She argued that Ms. Barclay's actions warranted an adverse inference sufficient for the denial of the Estate's summary judgment motion.

On September 23, 2014, the circuit court denied Mrs. Castruccio's cross-motion for summary judgment regarding the single issue of attestation, and granted the Estate's motion for summary judgment on the same issue. The court assumed, for the sake of argument, that the pages of the will were not physically attached to one another at the time of signing, but the court concluded that the pages were nevertheless intended by the testator to comprise a single document.

The circuit court also granted the Estate's motion for summary judgment on the remaining six issues, concluding that the Estate had established that the document had been validly executed. The court rejected Mrs. Castruccio's contention that Ms. Barclay's destruction of the flash drive supplied a clear and convincing basis upon which the trier of fact could overturn the will's presumed validity. The court declined to hold an evidentiary hearing to consider sanctions for Ms. Barclay.

Mrs. Castruccio appealed.

Held: Affirmed.

The Court of Special Appeals affirmed the order granting summary judgment to the Estate for all seven issues raised by Mrs. Castruccio.

First, the circuit court properly rejected Mrs. Castruccio's broad reading of *Shane v. Wooley*, 138 Md. 75 (1921). Mrs. Castruccio argued that a will is invalid under *Shane* if the testator and the witnesses sign on different pages of the will and if those pages are not physically connected to

each other at the time of signing. *Shane* governs cases in which a witness signs a document other than the will itself. In those circumstances, *Shane* holds that the will is invalid unless the separate document was, in some way, physically connected to the will at the time of signing. *Shane*'s physical-connection rule does not apply when the witnesses and the testator sign different pages of an internally-cohesive, multi-page will.

In Dr. Castruccio's will, the witnesses' signatures appear on the last of six consecutively-numbered pages in a document that, based on its pagination and topic itemization, was unmistakably intended to contain six and only six pages. Given these circumstances, the circuit court correctly construed the will as an internally-cohesive document, whose pages were "tacked together in the mind of the testator."

Next, Mrs. Castruccio failed to meet the burden of producing evidence sufficient for a reasonable trier of fact to conclude that Dr. Castruccio's will had not been validly executed. Indeed, she faced the heightened hurdle of the "presumption of due execution," which attaches to any will that includes both the testator's signature and an attestation clause signed by the witnesses. The circuit court properly recognized that the presumption of due execution should attach to Dr. Castruccio's will. The evidence that Mrs. Castruccio presented was insufficient to overcome the presumption.

Finally, the circuit court's decision not to hold an evidentiary hearing on Mrs. Castruccio's motion for sanctions based on spoliation of evidence was also proper. The court had no obligation to conduct a hearing on the motion for sanctions because, under Rule 2-311(f), the court was only required to hold a hearing if it rendered a decision that was dispositive of a claim or defense. Trial courts have broad discretion to fashion remedies for spoliation. Even if the trial court found that Ms. Barclay's actions created an adverse inference, it was still within the court's discretion to decide that the inference could not overcome the presumption of execution.

Terrence Rogers v. Home Equity USA, Inc., No. 164, September Term 2015, filed July 26, 2016. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2016/0164s15.pdf

LEAD PAINT NEGLIGENCE TORTS – *PRIMA FACIE* BURDEN – CAUSATION

Facts:

This appeal arises out of a complaint filed by Terrence Rogers alleging that he suffered damages from exposure to lead paint while living at 3738 Towanda Avenue, in Baltimore, Maryland. In 1996-97, following his residence at 6149 Chinquapin, Mr. Rogers moved to the subject property, which was built in 1920. He lived there for approximately six months.

To demonstrate the existence of lead paint in the subject property, Mr. Rogers admitted evidence that, in 1976, 20 years prior to his residency, the Baltimore City Health Department required a lead abatement of the subject property. Although Mr. Rogers conducted testing of the exterior of the property after living there, he did not test the interior of the dwelling. Mr. Rogers did, however, submit evidence that there was flaking paint on the interior surfaces of the property and that he was seen mouthing the windows sills. Mr. Rogers also submitted results from several blood tests, which showed that his blood lead levels were 14 µg/dL several months before moving into the subject property, and his blood lead levels tested 21 µg/dL during his residency at the property and subsequently declined.

Held: Affirmed.

To establish causation in a lead paint poisoning case, the plaintiff must "connect the dots" by establishing two separate inferences: (1) that the property contained lead-based paint, and (2) that the lead-based paint at the subject property was a substantial contributor to the victim's exposure to lead. The Court of Appeals has conceptualized the causation element as a series of links: (1) the link between the defendant's property and the plaintiff's exposure to lead; (2) the link between specific exposure to lead and the elevated blood lead levels; and (3) the link between those blood lead levels and the injuries allegedly suffered by the plaintiff. It is the plaintiff's burden to show that "there is a fair likelihood that the subject property contained lead-based paint and was a source of the lead exposure."

Here, although there was evidence that the subject property contained lead paint in 1976, no tests were conducted to show that lead paint existed in the interior at the time Mr. Rogers lived there in 1996-97. Evidence of lead paint in a house 20 years before the plaintiff resided there is not direct evidence of lead paint in the property during the plaintiff's residency, and it is not sufficient to satisfy plaintiff's burden and get the case to the jury. Although it may establish a

"possibility" of causation, it does not satisfy plaintiff's burden to show that the subject property was a "reasonable probable source" of the plaintiff's lead exposure.

Mr. Rogers contends that other evidence supported a finding that lead paint remained in the home during his residence. Even assuming, *arguendo*, that other evidence was sufficient to create an inference that the property contained lead-based paint in 1996-97, the circuit court properly granted summary judgment on the ground that Mr. Rogers had not adequately demonstrated that the property was the source of both lead exposure and the elevated levels measured in 1997. Blood tests show that Mr. Rogers' blood lead levels were elevated before he moved into the subject property. Although Mr. Rogers' blood lead levels tested the highest while living in the subject property, his own medical expert testified that no blood tests were administered in the approximately seven months prior to his moving there, and the blood test indicating his highest blood lead level could reflect a *decrease* in his blood lead levels from what it was *before* he moved into the subject property. Although Mr. Rogers' factual allegations supported a *possibility* that he was exposed to lead there, he did not show a reasonable probability that Home Equity's property was a substantial contributor to his elevated blood lead levels.

Michael Hansberger v. Bradley Smith, et al., No. 378, September Term 2015, filed July 27, 2016. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2016/0378s15.pdf

NEGLIGENCE – EXISTENCE OF DUTY – STATUTORY OR ORDINANCE RULE – SOCIAL HOST LIABILITY

NEGLIGENCE – PREMISES LIABILITY – EXISTENCE OF DUTY

Facts:

On the night of July 8, 2008, appellant Michael Hansberger, and his friend, Ronald Lewis, attended two "field parties" in Frederick County where underage drinking occurred. At the second party, a brawl ensued, and Lewis threw a piece of concrete, striking Hansberger in the head and causing permanent injury. At each party, the parents either were not home or were unaware that the party was taking place. In 2011, Hansberger filed a complaint in the Circuit Court for Frederick County alleging, among other things, numerous counts of negligence against Lewis, the underage organizers of the parties, and their parents and family members—the owners of the farms at which the parties were held—Claudia Riley, Thomas Riley, Thomas Riley, Jr. and Travis Riley, (the Rileys), Charles Smith, Jane Smith, Wayne Smith, Catherine Smith, Bradley Smith (the Smiths), and Jefferson Valley, LLC, Marvin E. Ausherman, Ausherman Holding Corporation, and Ausherman Development Corporation II (the Smith property owners) (collectively, the appellees). In his complaint and during discovery, Hansberger did not allege or produce facts showing that the owners knowingly allowed underage drinking on their property. Hansberger also did not allege or produce facts that the owners were aware of any prior "brawls" at previous parties.

The Rileys filed a motion to dismiss the suit, or in the alternative, a motion for summary judgment. The Smiths and Jefferson Valley filed a motion for summary judgment, and the Smith property owners filed a motion to dismiss on the basis of limitations, or in the alternative, motion for summary judgment. After a hearing, the court granted the Rileys' motion to dismiss, concluding that Hansberger had failed to articulate a breach of a duty under his theory of social host liability based on Md. Code (2002, 2012 Repl. Vol., 2014 Supp.), Criminal Law Art. ("CR") § 10-117 and failed to sustain his theory of premises liability. The court granted summary judgment for the Smiths and Jefferson Valley, finding no dispute of material fact, and no duty for the same reasons. Finally, the court dismissed the Smith property owners and Catherine Smith because Hansberger added them after the statute of limitations had run. The case proceeded against Ronald Lewis, and Hansberger obtained a $12 million judgment against Lewis on April 22, 2015.

On appeal, Hansberger argued that the Rileys, the Smiths, and the owners of the Smith property were negligent due to their breach of a general duty of care created by the General Assembly's

enactment of CR § 10-117. Regarding premises liability, Hansberger argued that the appellees breached their duty to keep the property safe and warn about known dangers, i.e., the rubble strewn about the Smith farm. He also argued that court erred in dismissing his complaint against the Smith property owners and Catherine Smith based on limitations.

Held: Affirmed.

After this case had been briefed and argued before the Court of Special Appeals, the Court of Appeals issued its opinion in *Kiriakos v. Phillips*, ___ Md. ___, No. 20, Sept. Term, 2015 (July 5, 2016), recognizing a limited form of social host liability based on a violation of CR § 10-117(b), which prohibits an adult from knowingly and willfully allowing a minor to possess or consume an alcohol at a residence that he or she owns or leases and in which he or she resides. The Court of Appeals determined that, in accordance with the statute on which liability was based, in order to establish a cause of action in negligence, a plaintiff must allege that an adult "knowingly and willfully allow[ed] an individual under the age of 21 years actually to possess or consume an alcoholic beverage at a residence, or within the curtilage of a residence that the adult owns or leases and in which the adult resides."

Applying the Court of Appeals's analysis in *Kiriakos v. Phillips*, the Court of Special Appeals concluded that, unlike in *Kiriakos*, Hansberger failed to show the breach of a duty of care owed to him because the he did not allege or produce facts that showed that the adults knowingly and willfully allowed the consumption of alcohol at their residences. Regarding premises liability, the injury was not caused by the inherent danger posed by rubble on the property, but instead by Lewis's criminal action. In order to show the existence of a duty of care on the basis of a third party's criminal act on the property, a plaintiff must allege or produce facts that show that the property owner was aware that prior, similar criminal acts had occurred before. The intermediate appellate court held that Hansberger failed to show that appellees were aware that similar brawls had taken place on the property. The Court also held that, because Hansberger was aware of the nature of his injury in 2008, he could not properly add new defendants in 2013, two years after the statute of limitations expired.

FutureCare NorthPoint, LLC v. Valerie Peeler, No. 2602, September Term 2014, filed July 28, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/2602s14.pdf

WRONGFUL DEATH – ARBITRATION OF WRONGFUL DEATH CLAIMS

FINAL JUDGMENT RULE – PETITION TO COMPEL ARBITRATION

Facts:

Mrs. Phyllis Butz signed an arbitration agreement when she was admitted at the FutureCare NorthPoint skilled nursing facility. She agreed to resolve potential claims against FutureCare by binding arbitration pursuant to the Maryland Uniform Arbitration Act (MUAA). The agreement purported to include "any survival action or wrongful death claim," and it stated it would "bind" the parties' respective heirs and those whose claims derived through the parties, including survival or wrongful death claimants.

Mrs. Butz died while she was a resident receiving medical care from FutureCare. Her surviving daughter, Ms. Valerie Peeler, brought an action against FutureCare for wrongful death as a result of alleged medical malpractice. FutureCare commenced a separate action against Ms. Peeler under the MUAA, seeking to compel her to arbitrate the wrongful death claim. The circuit court consolidated the two actions on its own motion, but the court maintained separate files for the two actions.

The court denied FutureCare's petition to compel arbitration, concluding that Ms. Peeler was not bound by her mother's arbitration promise. The court issued an order denying FutureCare's petition, stating that the MUAA action was no longer consolidated with the underlying wrongful death action, and stating that the order would constitute a final appealable order under Md. Rule 2-602(b).

FutureCare appealed from the order denying its petition to compel arbitration. On its own motion, the Court of Special Appeals ordered the parties to show cause why the appeal should not be dismissed as an interlocutory appeal and whether the court's order complied with Rule 2-602(b).

Held: Affirmed.

The Court of Special Appeals held that: (1) an order denying an independent, freestanding petition to compel arbitration may be an appealable, final judgment; and (2) a decedent's arbitration agreement ordinarily does not bind the decedent's family members to arbitrate a claim under the Maryland wrongful death statute.

Under the MUAA, a party can seek to compel another party to arbitrate either by filing a motion in an existing action or by commencing a separate action through a freestanding petition to compel arbitration. In a series of cases culminating with *American Bank Holdings, Inc. v. Kavanagh*, 436 Md. 457 (2013), the Court of Appeals held that an order denying a motion to compel arbitration filed in an existing action is not appealable as a final judgment or under any of the exceptions to the final judgment rule. *Kavanagh* unmistakably signaled that the denial of a petition to compel arbitration is an appealable final judgment if the petition is brought as a separate action. The order here denying the freestanding petition to compel arbitration was an appealable final judgment under CJP § 12-301.

Although the order purported to grant a final judgment "pursuant to Rule 2-602(b)," that rule was inapplicable. A different rule, Rule 2-503(b), governs separate judgments for consolidated actions. Unless the trial court clearly intends to enter a joint judgment for both actions, a judgment disposing of one entire action is immediately appealable despite the pendency of claims in another action with which it was consolidated. The order here denying the MUAA petition was appealable despite the pendency of the claims in the separate wrongful death action.

On the merits, the Court of Special Appeals concluded that the circuit court properly refused to compel the decedent's surviving daughter to arbitrate the wrongful death claim arising from the decedent's death.

In general, an arbitration agreement cannot impose obligations on persons who are not a party to it and do not agree to its terms. A third party may be required to arbitrate if that third party is acting in a representative capacity on behalf of a party to the arbitration agreement. Thus, the personal representative of a decedent's estate brining a survival action on behalf of the decedent may be compelled to arbitrate based on the decedent's arbitration agreement. By contrast, an action under Maryland's wrongful death statute remains separate, distinct, and independent from a survival action even when the actions arise out of a common tortious act.

Neither the language of the Maryland wrongful death statute nor the cases construing that language support the conclusion that decedents may contractually obligate their statutory beneficiaries to arbitrate wrongful death claims. Maryland's wrongful death statute creates a cause of action against a person whose "wrongful act" caused the death of another. The statute defines a "wrongful act" as an act "that would have entitled the party injured to maintain an action and recover damages if death had not ensued." This definition of wrongful act is satisfied even if the decedent herself has agreed to pursue any action for recovery of damages in arbitration rather than in court. The statute does not require that a wrongful death claim must be pursued in the same forum and manner as an action that could have been brought by the decedent.

As a consequence of the statute's wrongful act requirement, certain defenses that would bar a decedent's injury claim (such as contributory negligence or assumption of risk) will also preclude a wrongful death claim by the decedent's relatives. Under those circumstances, the decedent does not have a viable claim from the outset. It is incorrect, however, to say that all

defenses applicable to a decedent's claim necessarily preclude the statutory beneficiaries from maintaining a wrongful death claim after the decedent's death.

Over a century ago, the Court of Appeals also held that the pre-death release of a personal injury claim by the decedent can bar a subsequent wrongful death action. In that situation, the decedent's affirmative and purposeful conduct in releasing the claim for consideration extinguishes the underlying claim. It does not follow from that holding that a decedent's contractual promises are binding on the statutory beneficiaries.

Among other jurisdictions that have addressed the issue, states where wrongful death actions are recognized as independent causes of action are more likely to hold that beneficiaries are not bound by a decedent's promise to arbitrate. Courts in states where wrongful death actions are wholly derivative in nature usually hold that beneficiaries are bound by the decedent's agreement. The cases from states that emphasize the "independent" nature of a wrongful death claim are more persuasive for construing the Maryland statute than are the cases that emphasize the more "derivative" nature of such a claim.

Various other Maryland statutory provisions regarding the treatment of wrongful death claims do not diminish the independent nature of a wrongful death claim. Wrongful death claims are aggregated with survival claims for the purpose of the Local Government Tort Claims Act damage cap, but that statute does not alter the longstanding principle that those actions remain separate and distinct. The Workers' Compensation Act precludes certain wrongful death actions by dictating one exclusive method of recovery for certain work-related injuries, but there is no overarching requirement that all wrongful death beneficiaries are subject to the same constraints that apply to the decedent. Finally, the Health Care Malpractice Claims Act limits the total noneconomic damages from wrongful death actions and survival actions, but it does not require beneficiaries to pursue their wrongful death claims in the same action or in the same forum as a survival claim. None of these statutory provisions vest decedents with the power to control the future litigation rights of wrongful death beneficiaries.

Electrical General Corp., et al v. Michael L. Labonte, No. 718, September Term 2015, filed July 27, 2016. Opinion by Reed, J.

http://www.mdcourts.gov/opinions/cosa/2016/0718s15.pdf

WORKERS' COMPENSATION – INJURIES FOR WHICH COMPENSATION MAY BE HAD – NATURE AND CHARACTER OF PHYSICAL HARM – AGGRAVATION OF PREVIOUSLY IMPAIRED CONDITION – AGGRAVATION OF PRIOR, WORK-RELATED INJURY OR DISEASE – IN GENERAL

Facts:

On September 2, 2004, electrician Michael Labonte sustained an accidental work injury to his back while trying to stop a forty-foot ladder from falling. He filed a claim with the Workers' Compensation Commission on September 27, 2004. On June 22, 2005, after having conducted a hearing on Labonte's claim, the Commission found that Labonte had a persisting back injury that was the result of a work injury and, therefore, authorized medical treatment and out-of-work benefits. Three more hearings were conducted over the next year and a half, each resulting in the authorization of continued treatment and benefits.

On December 31, 2006, Labonte was involved in an altercation with a police officer during which, in the course of a traffic stop, he was slammed against the hood of a police car by the officer. The altercation caused Labonte to experience increased pain in his back. Therefore, in early 2007, Labonte filed another temporary total disability claim. This time he requested payment of medical treatment from January 4 to March 9, 2007. The Commission found, however, that Labonte's need for lumbar epidural injections was not causally related to his work injury because of the subsequent intervening altercation with the police officer. Later in 2007, Labonte filed for permanent partial disability benefits for the first time. By Order dated October 15, 2007, the Commission found that Labonte "[h]as overall 30% industrial disability to the body due to an injury to the back; 20% is due to this accidental injury, and 10% is causally connected to pre-existing and subsequent condition[.]" Thus, the Commission authorized Labonte to receive permanent partial disability benefits at a rate of $247.00 per week for 100 weeks. However, in the same Order, the Commission once again denied Labonte's requests for payment of medical expenses incurred from January 15 to March 5, 2007.

On October 10, 2012, Labonte filed a petition to reopen his workers' compensation claim, alleging that his permanent back injury had worsened since the Commission issued its last Order. However, the Commission ultimately determined that any worsening of Labonte's back condition was, because of the subsequent intervening event involving the police officer, not causally related to his accidental work injury. Labonte filed a petition for judicial review of this determination in the Circuit Court for Anne Arundel County. At the conclusion of Labonte's trial, the jury returned a verdict that Labonte's back condition both is causally related to his

accidental work injury and had worsened one hundred percent since the Commission's October 15, 2007, Order. Labonte's employer, Electrical General Corp., subsequently noted an appeal.

On appeal, the employer first argued that Labonte's subsequent intervening accident with the police officer should have, *per se*, precluded it from further liability for the 2004 work injury. Second, the employer argued that the doctrine of collateral estoppel should have prevented the jury from considering whether the worsening of Labonte's back condition was the result of the work injury because the Commission's early- and mid-2007 Orders, which denied the treatment requested from January to March of that year, constituted unimpeached final judgments on that issue. Third, the employer argued that the trial court impermissibly shifted the burden of proof away from Labonte where it submitted the following specific jury question, which contains no reference to the subsequent intervening event: "Is Mr. Labonte's current back condition causally related to the September 2, 2004, work injury?" Finally, the employer argued that the jury should not have been allowed to consider the worsening of Labonte's permanent partial disability, or the reasonableness and necessity of the medical treatment and expenses he requested, because neither of these issues had been previously addressed by the Commission.

Held: Affirmed.

The subsequent intervening accident involving the police officer did not, *per se*, preclude liability on the part of Labonte's employer for the worsening of his permanent partial disability. In *Martin v. Allegany Cnty. Bd. of Cnty. Comm'rs*, 73 Md. App. 695 (1988), we held that in the context of *temporary* disability benefits, an intervening work accident sustained during subsequent employment completely shifts liability from the previous employer to the current employer. We reasoned that because "benefits are to be awarded for a *temporary disability* without regard to pre-existing disease or infirmity[,] . . . it is the final accident contributing to the disability which is to serve as the basis for liability." *Id.* at 700 (citation omitted) (emphasis added). However, *permanent partial* disability benefits can be apportioned between a work injury and a subsequent intervening accident. *See* Maryland Civil Pattern Jury Instruction 30:30. Therefore, a permanent partial disability may deteriorate *independent of and despite* a subsequent injury.

Collateral estoppel does not apply because the 2007 Orders only determined the causal relationship between Labonte's work injury and his need for epidural injections in the months immediately after he was slammed against the hood of a police car. Those Orders did not determine that Labonte's back condition could only be the result of the subsequent intervening event from that point forward. This is evidenced by the fact that on October 15, 2007, even after it had twice denied the treatment requested from January to March of that year, the Commission determined that Labonte had an overall 30% disability, 20% of which was *causally connected to his work accident*.

The trial court did not impermissibly shift the burden of proof away from Labonte where it submitted the following jury question: "Is Mr. Labonte's current back condition causally related

to the September 2, 2004, work injury?" The employer was not prejudiced by fact that this question contains no reference to Labonte's subsequent intervening accident. Aside from the abundance of testimony regarding the altercation with the police officer, the employer's closing argument centered on how that intervening event broke the causal connection between Labonte's back condition and his work injury.

Finally, the employer's argument that the jury should not have been allowed to consider the worsening of Labonte's permanent partial disability or the reasonableness and necessity of the medical treatment and expenses he requested is without merit. The Commission expressly decided both of these issues in its January 24, 2013, Order. Therefore, they were ripe for consideration by the jury.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated July 18, 2016, the following attorney has been indefinitely suspended by consent:

ERICA S. WHITE

*

By an Order of the Court of Appeals dated July 19, 2016 the following attorney has been suspended for thirty (30) days by consent:

KENNETH H. ROSENAU

*

By an Order of the Court of Appeals dated July 28, 2016, the following attorney has been reprimanded by consent:

CYNTHIA GROOMES KATZ

*

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JUDICIAL APPOINTMENTS

*

On June 13, 2016, the Governor announced the appointment of **DINO ERNESTO FLORES** to the District Court of Maryland – Frederick County. Judge Flores was sworn in on July 29, 2016 and fills the vacancy created by the retirement of the Hon. Janice R. Ambrose.

*

On July 1, 2016, the Governor announced the appointment of **MATTHEW ALLEN MACIARELLO** to the Circuit Court for Wicomico County. Judge Maciarello was sworn in on July 22, 2016 and fills the vacancy created by the retirement of the Hon. W. Newton Jackson, III.

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UNREPORTED OPINIONS

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