Amicus Curiarum

VOLUME 35
ISSUE 2 FEBRUARY 2018

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

Attorney Discipline
Disbarment
Attorney Grievance v. Smith 3

Indefinite Suspension
Attorney Grievance v. Giannetti 4

Bar Admissions
Duty of Full Disclosure
Application of Phillips 5

Constitutional Law
Dormant Mineral Interests Act
Ellis v. McKenzie 7

Courts & Judicial Proceedings
Appealability of a Stay Order
Monarch Academy v. Baltimore City Bd. Of School Comm'rs.....10

Post-Judgment Interest Rate
Ben-Davies & Moore v. Blibaum & Associates.....13

Criminal Law
Confrontation Clause
Manchame-Guerra v. State.....16

Nolle Prosequi – Limitations on Use
State v. Simms 18

Relevance/Prejudicial Nature of Prior Conviction
Williams v. State.....19

Health – General
Maryland Health Claims Act
Davis v. Frostburg Facility Operations.....21

COURT OF SPECIAL APPEALS

Administrative Law
Maryland Tax Court
Comptroller v. Jalali.....23

Criminal Law
Jailhouse Tapes – Rule of Completeness
Lindsey v. State.....26

Protective Search of an Automobile
Goodwin v. State.....28

Shaken Baby Syndrome
Sissoko v. State.....30

Insurance Law
Uninsured Motorist Coverage
Duckett-Murray v. Encompass Insurance Company.....32

ATTORNEY DISCIPLINE.....34

JUDICIAL APPOINTMENTS.....36

UNREPORTED OPINIONS.....38

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Edward Smith, Jr., Misc. Docket AG Nos. 26 & 74, September Term 2016, filed January 19, 2018. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2018/26a16ag.pdf

ATTORNEY GRIEVANCE COMMISSION – DISCIPLINE – DISBARMENT

Facts:

Attorney failed to demonstrate competent representation, displayed a lack of diligence in handling his clients' matters, failed to communicate with his clients, failed to keep client funds in his trust account before they were earned, failed to create and maintain records of received and disbursed client funds, failed to properly terminate representation, he commingled funds, improperly used his trust account, and made misrepresentations to Bar Counsel and his clients. He committed these actions to varying degrees over the course of representation of three separate clients.

Held:

Attorney disbarred from the practice of law.

The Court concluded that Respondent violated the Maryland Lawyers' Rules of Professional Conduct 19-301.1, 19-301.2, 19-301.3, 19-301.4, 19-301.5, 19-301.15, 19-301.16, 19-305.3, 19-308.1, 19-308.4, 19-404, 19-407, 19-408, and 19-410. Considering the attorney's intentional dishonest conduct along with several other rule violations and aggravating factors, the Court held that disbarment was the only appropriate sanction. The decision to disbar the attorney was consistent with the Court's holding in *Attorney Grievance Comm'n v. Vanderlinde*, where the Court held that "[d]isbarment ordinarily should be the sanction for intentional dishonest conduct" because "[u]nlike matters relating to competency, diligence and the like, intentional dishonest conduct is closely entwined with the most important matters of basic character to such a degree as to make intentional dishonest conduct by a lawyer almost beyond excuse." 364 Md. 376, 418, 773 A.2d 463, 488 (2001).

Attorney Grievance Commission of Maryland v. John Alexander Giannetti, Jr., Misc. Docket AG No. 54, September Term 2016, filed December 15, 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/54a16ag.pdf

ATTORNEY GRIEVANCE COMMISSION – DISCIPLINE – INDEFINITE SUSPENSION

Facts:

Respondent failed to timely file both his federal and Maryland income tax returns starting on or about April 15, 2008 and continuing through April 15, 2015. Throughout that period of time, Respondent in some years requested and received extensions for filing his tax returns. In spite of receiving extensions, Respondent did not file a return. On some occasions, when Respondent untimely filed federal and Maryland tax returns, he did not include payment for the outstanding taxes he owed. Respondent did not keep accurate financial records of his income from the year 2008 through 2015. Respondent's total outstanding federal tax liability, including penalties and interest, owed was at least $38,000. Although the exact amount of Respondent's income tax obligation to the State of Maryland could not be determined by the hearing court, the State had a tax lien against Respondent in excess of $112,000.

Held:

Respondent indefinitely suspended from the practice of law with the right to reapply for reinstatement no sooner than one year after the date of filing of the Court's opinion.

The Court concluded that Respondent violated the Maryland Lawyers' Rules of Professional Conduct 8.4(a), (b), (c) and (d), which stemmed from his failure to file and satisfy his federal and state tax obligations over a seven-year period. As a condition of reinstatement, Respondent must provide documentation to Bar Counsel that he has rendered himself in good standing with respect to his federal and state tax obligations should Respondent file a petition for reinstatement.

In Re: the Application of Solon Phillips for Admission to the Bar of Maryland, Misc. No. 17, September Term 2017, filed December 20, 2017. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2017/17a17m.pdf

DENIAL OF BAR ADMISSION – DUTY OF FULL DISCLOSURE – CANDOR AND TRUTHFULNESS

Facts:

Mr. Solon Phillips ("Mr. Phillips") applied to the Bar of Maryland for the second time on August 24, 2016 after withdrawing his first application. After submitting his second application to the Maryland Bar, the Attorney Grievance Commission submitted a Petition for Disciplinary or Remedial action against Mr. Phillips' father, a barred attorney in Maryland. This Court ultimately found that Mr. Phillips' father assisted his son in the unauthorized practice of law. Specifically, this Court determined that Mr. Phillips filed articles of organization on behalf of a law firm in 2009. This Court further found that Mr. Phillips also created a law firm logo, reserved a domain name, created and ordered letterhead, and hired an answering service for that law firm. At a later date, Mr. Phillips prepared a cease and desist order on the law firm letterhead on behalf of an individual Mr. Phillips met on an internet support group. This Court determined that Mr. Phillips signed his father's name to the cease and desist letter and sent it on behalf of the individual, which constituted the unauthorized practice of law. This Court issued an opinion regarding this Attorney Grievance Commission matter on February 22, 2017, disbarring Mr. Phillips' father. *Attorney Grievance Comm'n of Maryland v. Phillips*, 451 Md. 653 (2017).

Held: Denied

Mr. Phillips failed to promptly disclose to the Character Committee and the State Board of Law Examiners information pertaining to his unauthorized practice of law. Specifically, Mr. Phillips chose not to immediately file a supplement to his Maryland Bar application; instead, Mr. Phillips decided to disclose this information during his interview with the Character Committee and at a hearing before the State Board of Law Examiners. Moreover, Mr. Phillips failed to promptly file a supplement to his Maryland Bar application at the time he applied to the Bar of Florida. Again, Mr. Phillips chose to wait to disclose this information during the interview with the Character Committee and the hearing before the State Board of Law Examiners. Even after the interview and hearing, Mr. Phillips submitted an application for a job opening, which included a resume that stated Mr. Phillips was admitted to the Maryland Bar. Moreover, Mr. Phillips indicated during a job interview that he was to be admitted to the Maryland Bar in December 2017 without any indication from the Character Committee, the State Board of Law Examiners, or this Court

that he was to be admitted. These conscious decisions on the part of Mr. Phillips reflect a pattern of failing to meet the standard of absolute candor. This pattern of selective candor, along with the underlying concern of Mr. Phillips' prior unauthorized practice of law, warrants denying his application for admission to the Bar of Maryland.

James H. Ellis, et al. v. Olin L. McKenzie, et al., No. 16, September Term 2017, filed January 26, 2018. Opinion by Rodowsky, J.

http://www.mdcourts.gov/opinions/coa/2018/16a17.pdf

MARYLAND CONSTITUTIONAL LAW – DECLARATION OF RIGHTS, ARTICLE 24 AND CONSTITUTION, ARTICLE III, SEC. 10 – THE DORMANT MINERAL INTERESTS ACT

Facts:

Between 1884 and 1898, Sarah Wright conveyed hundreds of acres in Garrett County. The seven deeds by which she conveyed that realty reserved the mineral interests thereof. Upon her death in 1900, Ms. Wright's estate—including the reserved mineral interests—was devised in four equal shares. Petitioners are the successors to the reserved mineral interests so devised. Respondents are the successors to the fee simple interests in the surface tracts conveyed by Ms. Wright *inter vivos*.

Pursuant to the Dormant Mineral Interests Act ("DMIA"), Md. Code §§ 15-1201 through 15-1206 of the Environment Article ("En."), respondents filed a Petition for Termination of Dormant Mineral Interests ("petition for termination") on January 10, 2013. Petitioners were unaware of their severed mineral interests prior to the filing of that petition for termination. In April and June 2013, three of the petitioners filed Notices of Intent to Preserve Mineral Interests ("notices to preserve") pursuant to En. § 15-1204.

The circuit court found, *inter alia*, that the notices to preserve were void because they were filed after the commencement of the action to terminate mineral interests ("action to terminate") on January 10. Accordingly, the court terminated petitioners' mineral interests, merging them with respondents' surface estates. In an unreported opinion, the Court of Special Appeals affirmed, holding that (i) because the DMIA does not retrospectively abrogate rights, the DMIA is constitutional, and (ii) because the petition for termination was filed prior to the notices to preserve, the former precluded the effectuation of the latter.

Held: Affirmed.

The DMIA passes both State and federal constitutional muster. The Act is neither retrospective under the *Landgraf* test, 511 U.S. 244, 270, 114 S. Ct. 1483, 1499, 128 L. Ed. 2d 229, 255 (1994), nor was there a taking under modern due process principles.

The DMIA affords the owners of surface tracts the mineral interests of which have been severed the right to maintain an action to terminate *dormant* severed mineral interests. A severed mineral interest is "dormant" if (i) it "unused" for twenty years preceding the commencement of an

action to terminate and (ii) it is not the subject of a notice recorded during that twenty-year period. En. 15-1203(a)(2). A mineral interest owner "uses" his or her entire mineral interest where he or she performs certain actions pertaining to any part of that interest. En. 15-1203(c). These actions are: (i) conducting active mineral operations, (ii) paying certain taxes germane to the interest, (iii) recording an instrument evidencing a claim to the interest, and (iv) recording a judgment specifically referencing the interest. *Id*. A *dormant* severed mineral interest may be preserved if its owner records a notice to preserve the interest or part thereof prior to the surface owner's filing a petition for termination. En. 15-1204(a)(1). Even after a surface tract owner has filed a petition for termination, the DMIA affords mineral interest owners the right "to record a late notice of intent to preserve" if (i) the mineral interest has been dormant for fewer than forty years, and (ii) the mineral interest owner pays the surface estate owner's litigation expenses. En. § 15-1205(b) & (c).

Relying on the Court of Appeals's opinion in *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 30 A.3d 962 (2011), petitioners first contend that the DMIA retrospectively abrogates vested property rights in violation of Article 24 of the Maryland Declaration of Rights. The protections afforded by Article 24 are coextensive with those afforded by the Due Process Clause of the Fourteenth Amendment. In determining whether a statute impermissibly applies retrospectively, therefore, the Court of Appeals considers the Supreme Court's *Landgraf* factors—to wit, "'fair notice, reasonable reliance, and settled expectations.'" *Muskin*, 422 Md. at 558, 30 A.3d at 970.

The extinguishment provision of the Ground Rent Registry Statute ("GRRS") at issue in *Muskin* undermined the petitioners' "reasonable reliance" and "settled expectations" by desiccating a revenue stream the ground rent holders enjoyed and reasonably expected to continue to enjoy. The *dormant* mineral interests in this case, by contrast, are not, by definition, income-producing. Further, unlike the GRRS, the DMIA does not automatically terminate a property interest upon failure to register by the expiration of a grace period. The DMIA affords a dormant mineral interest holder the opportunity to preserve that interest even *after* the initiation of an action to terminate provided that the mineral interest has been dormant for fewer than forty years and that the mineral interest holder pays the surface estate owner's litigation costs. Accordingly, the DMIA neither frustrates Fourteenth Amendment due process nor Article 24 of the Declaration of Rights.

Again relying on *Muskin*, petitioners contend that the DMIA authorizes the taking of property without just compensation in violation of Article III, § 40 of the Maryland Constitution. Whereas the automatic termination of property interests aptly may be deemed a "taking," the failure of a dormant severed mineral interest holder to preserve that interest by "using" part thereof is tantamount to the *abandonment* of that property interest. *Texaco, Inc. v. Short*, 454 U.S. 516, 530, 102 S. Ct. 781, 792-93, 70 L. Ed. 2d 738, 751-52 (1982); *Safe Deposit & Trust Co. v. Marburg*, 110 Md. 410, 415-16, 72 A. 839, 841 (1909). A reversionary interest thus abandoned cannot be subjected to a "taking."

Finally, petitioners assert that because of fatal flaws in the original petition for termination—to wit, respondents' failure either to identify each interest holder or else to explain why such

interest holders are unknown—the April and June 2013 notices to preserve were effectuated *prior* to the initiation of an action to terminate. Given that one co-owner may file a notice to preserve for the benefit of all co-owners, petitioners contend, their mineral interests were preserved by the April and June 2013 filings of notices to preserve. Contrary to petitioners' contention, the circuit court properly found that respondents conducted a diligent search for all unknown or missing heirs. Further, nothing in the DMIA alters the standard rule whereby an action commences on the date the initial petition is filed.

Monarch Academy Baltimore Campus, Inc., et al. v. Baltimore City Board of School Commissioners, No. 7, September Term 2017, filed December 18, 2017. Opinion by Getty, J.

Greene, Watts and Hotten, JJ., concur and dissent.

http://mdcourts.gov/opinions/coa/2017/7a17.pdf

CIVIL PROCEDURE – APPEALABILITY OF A STAY ORDER – MARYLAND CODE, COURTS & JUDICIAL PROCEEDINGS ARTICLE § 12-301

APPEAL – ABUSE OF DISCRETION

ADMINISTATIVE LAW – PRIMARY JURISDICTION

Facts:

Petitioners, thirteen operators of charter schools in Baltimore City (the "Charter School Operators"), sought to obtain relief under Maryland Code, Education Article ("ED") § 9-109 which requires a local school board to provide the charter schools with funding that is "commensurate with the amount disbursed to other public schools in the local jurisdiction." Charter School Operators filed breach of contract complaints against the Respondent, the Baltimore City Board of School Commissioners (the "City Board"), directly in the Circuit Court for Baltimore City without first seeking review before the State Board of Education ("State Board"). The contracts at issue all contained a provision in which the City Board agreed to "allocate Commensurate Funding to the [Charter] School Operator," and to provide information about how it had reached a specific per-pupil commensurate funding figure for the charter school. The Charter School Operators contended that the City Board breached those contractual requirements by not providing information about the commensurate funding calculations and by failing to provide the correct amount of commensurate funding for the 2015-16 school year.

After the cases were consolidated before the circuit court, the City Board moved to dismiss the case or stay the proceedings on the grounds that the State Board had primary jurisdiction over commensurate funding determinations. After holding a hearing, Judge Julie Rubin concluded that the State Board had "provided sufficient guidance" regarding the meaning of commensurate funding so that the circuit court was "no longer obliged to punt the issue to the expertise of the administrative body." Therefore, Judge Rubin declined to invoke the primary jurisdiction doctrine and denied the motion to dismiss.

On the same day that it filed its motion to dismiss before the circuit court, the City Board also filed a petition for declaratory relief before the State Board, requesting that the State Board declare that its funding formula complied with ED § 9-109 and resulted in commensurate funding. After Judge Rubin's order, the State Board dismissed the petition, noting that the circuit

court had "asserted its jurisdiction." Thereafter, the City Board filed a counterclaim against the Charter School Operators before the circuit court. The Charter School Operators moved to dismiss the counterclaim, and a hearing on their motion to dismiss was scheduled before the circuit court. At that hearing, Judge Alfred Nance questioned counsel as to the procedural background of the case, instructing them to "[t]ell me what happened that causes you to rightfully be in my courtroom." After a brief recess and off-the-record discussion in chambers, counsel for the City Board made an oral motion to dismiss the Charter School Operators' complaints. Judge Nance, after hearing arguments for and against the motion, determined that "in lieu of" granting the motion he would issue an order staying proceedings ("Stay Order") in the circuit court "pending administrative review of the parties' dispute by the State Board of Education."

After the Stay Order ruling, the parties moved to proceed on separate procedural tracks. The Charter School Operators appealed from the circuit court's Stay Order to the Court of Special Appeals, while the City Board once again filed a petition for declaratory relief before the State Board. The State Board once again dismissed the City Board's petition, stating that "the case remain[ed] within the jurisdictional purview of the courts." Subsequently, in a reported opinion, the Court of Special Appeals dismissed the Charter

School Operators' appeal after concluding that the circuit court's Stay Order was not an appealable order. *Monarch Acad. Balt. Campus, Inc. v. Balt. City Bd. of Sch. Commissioners*, 231 Md. App. 594, 619 (2017). The Charter School Operators filed a petition for writ of certiorari from that dismissal, which the Court of Appeals granted on April 4, 2017. *Monarch Acad. Balt. Campus v. Balt. City Bd. of Sch. Comm'rs*, 452 Md. 523 (2017).

Before the Court of Appeals, the Charter School Operators argued that the circuit court's Stay Order was a final and appealable judgment, and therefore urged the Court to hold that the Court of Special Appeals erred in dismissing the appeal. The Charter School Operators further asserted that the State Board did not have primary jurisdiction over the breach of contract claims, and thus, the circuit court erred in entering the Stay Order.

Held: Reversed and remanded.

The Court of Appeals determined that the Stay Order suspended all claims before the circuit court and failed to specify what conditions the Charter School Operators must complete in order for their breach of contract claims to resume before the circuit court. Under these limited circumstances, the Court of Appeals held that the Stay Order effectively put the operators of charter schools out of court and was an appealable final judgment. Additionally, the Stay Order was an appealable final judgment because there was no indication that the circuit court judge reviewed or considered either the prior proceedings or the prior decision of another circuit court judge. Because the Stay Order was devoid of necessary detail, the circuit court judge abused his discretion in issuing the Stay Order.

Under the doctrine of primary jurisdiction, a court must determine whether an issue or issues in a case must first be resolved by an agency "which, under a regulatory scheme, have been placed within the special competence of an administrative body[.]" *Arroyo v. Bd. of Educ. of Howard Cty.*, 381 Md. 646, 658 (2004) (quoting *United States v. Western Pacific R.R. Co*., 352 U.S. 59, 63-64 (1956)). The Court of Appeals determined that a central issue underlying the Charter School Operators' breach of contract claims was whether they had received "an amount of county, State, and federal money for elementary, middle, and secondary students that is commensurate with the amount disbursed to other public schools in the local jurisdiction[,]" as mandated in ED § 9-109. The Court of Appeals held that because the State Board has not provided a formal rule or regulation interpreting the charter school "commensurate" funding requirement suitable for application by courts, disputes involving charter school commensurate funding generally remain within the special competence of the State Board. Therefore, the Court of Appeals concluded that the State Board had primary jurisdiction over the commensurate funding issues underlying Charter School Operators' breach of contract action, and that on remand the circuit court would be within its discretion to enter a more definite order staying proceedings to permit the parties to obtain a ruling from the State Board as to the commensurate funding issues in dispute.

Amber Ben-Davies v. Blibaum & Associates, P.A.; Bryione K. Moore v. Blibaum & Associates, P.A., Misc. No. 4, September Term 2017, filed January 19, 2018. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2018/4a17m.pdf

POST-JUDGMENT INTEREST RATE – MD. CODE ANN., CTS. & JUD. PROC. (1974, 2013 REPL. VOL.) § 11-107(a), (b) – MONEY JUDGMENT FOR RENT OF RESIDENTIAL PREMISES

Facts:

In separate matters, Amber Ben-Davies and Bryione K. Moore (together, "Appellants") failed to pay rent. After Appellants vacated their apartments, their respective landlords initiated separate actions for breach of contract. The District Court of Maryland, sitting in Baltimore County ("the District Court"), entered judgments in the landlords' favor against Appellants. The judgments did not delineate the portions thereof that were comprised of unpaid rent, as opposed to other expenses. Ben-Davies's landlord had sought the cost of replacing carpet in her apartment, and Moore's landlord had sought the costs of utilities, changing the apartment's lock, trash disposal, cleaning stained carpet, advertising, and various fees.

Lawyers of Blibaum & Associates, P.A. ("Appellee"), a licensed debt collector, represented the landlords in the actions for breach of contract. After the District Court entered the judgments, Appellee engaged in collections activity on the landlords' behalf.

Appellee sent Ben-Davies a letter stating that she owed her landlord a certain amount. Appellee obtained a writ of garnishment of Moore's wages, and sent her a Judgment Creditor's Monthly Report. In both the letter that was sent to Ben-Davies, and the Judgment Creditor's Monthly Report that was sent to Moore, Appellee indicated that the applicable post-judgment interest rate was 10%. In other words, Appellee sought to apply the post-judgment interest rate of 10% under Md. Code Ann., Cts. & Jud. Proc. (1974, 2013 Repl. Vol.) ("CJ") § 11-107(a), which applies to all judgments unless provided otherwise.

In the United States District Court for the District of Maryland ("the U.S. District Court"), Appellants filed separate complaints against Appellee. In the complaints, Appellants contended that, contrary to Appellee's position, the applicable post-judgment interest rate was 6% pursuant to CJ § 11-107(b), not 10%. Appellants argued that CJ § 11-107(b) applied because the judgments against them constituted "money judgment[s] for rent of residential premises[.]" Appellants asserted that, by seeking to apply a post-judgment interest rate of 10%, Appellee violated the federal Fair Debt Collection Practices Act, the Maryland Consumer Debt Collection Act, and the Maryland Consumer Protection Act.

Ultimately, in each case, the parties filed a "Joint Motion to Certify a Question of Law to the Maryland Court of Appeals," requesting that the U.S. District Court certify to the Court of Appeals a question of law regarding the applicable post-judgment interest rate. The U.S. District Court granted the joint motions to certify.

Held: Certified question of law answered.

The Court of Appeals held that the applicable post-judgment interest rate is 6%. CJ § 11-107(b)'s plain language dictates that it applies where a judgment is comprised of unpaid rent and other expenses that are due under a residential lease. CJ § 11-107(b) unequivocally states that it applies to "a money judgment for rent of residential premises[.]" Nothing in CJ § 11-107(b) limits its applicability to money judgments that are entirely comprised solely of unpaid rent—as opposed to being comprised partially of unpaid rent, and partially of other expenses, such as late fees or the costs of repairs to the residence, which may be due as the result of renting residential premises. CJ § 11-107(b) does not contain language that "a money judgment for rent of residential premises" is strictly, or only, for unpaid rent. The Court declined to add words to CJ § 11-107(b) to render it applicable only to money judgments that are comprised solely of unpaid rent.

The Court explained that, in contending that, as used in CJ § 11-107(b), the word "rent" refers only to money that a tenant owes a landlord for a period when the tenant occupied the premises, Appellee focused on the word "rent" in isolation. The Court agreed with the position of Civil Justice, Inc., the Maryland Volunteer Lawyers Service, and the Public Justice Center, amici, that the phrase "a money judgment for rent of residential premises" indicates that CJ § 11-107(b) applies to money judgments that are related to rentals of residential premises. In the context of the phrase "a money judgment **for rent of residential premises**[,]" the word "rent" does not refer to a monetary sum, but instead unambiguously refers to the act of renting residential premises. In short, as used in CJ § 11-107(b), the word "rent" is synonymous with the act of renting and not the monetary sum that a tenant owes each month.

The Court determined that, similarly, CJ § 11-107(b)'s plain language belied Appellee's contention that CJ § 11-107(b) does not apply to actions for breach of contract, and instead applies only to actions in which a landlord seeks possession of the premises. If the General Assembly had intended for CJ § 11-107(b) to apply only to actions in which a landlord seeks possession of the premises—namely, actions for distress for rent, summary ejectment actions, tenant holding over actions, and actions for breach of lease—the General Assembly easily could have stated as much. In 1974—six years before the General Assembly enacted CJ § 11-107(b) in 1980—the General Assembly enacted, within Title 8 (Landlord and Tenant) of the Real Property Article ("RP"), the statutes that govern actions for distress for rent (now RP §§ 8-301 to 8-332), summary ejectment actions (now RP § 8-401), and tenant holding over actions (now RP § 8-402). Four years later, in 1978—two years before the General Assembly enacted CJ § 11-107(b)—the General Assembly enacted the statute that governs actions for breach of lease (now RP § 8-402.1). Had the General Assembly intended for CJ § 11-107(b) to apply only to actions

in which landlords seek possession of the premises, and not to actions for breach of contract, the General Assembly could have specified that CJ § 11-107(b) applied only to the legal rate of interest on a money judgment in an action pursuant to RP §§ 8-301 to 8-332, 8-401, 8-402, or 8-402.1. Alternatively, the General Assembly could have specified that CJ § 11-107(b) applied only in an action for distress for rent, a summary ejectment action, a tenant holding over action, or an action for breach of lease. The General Assembly did not do so.

The Court stated that, although CJ § 11-107(b)'s plain language is unambiguous with respect to its applicability to "money judgment[s] for rent of residential premises[,]" the Court would review its legislative history as a confirmatory process. Before the General Assembly enacted CJ § 11-107, the post-judgment interest rate for all judgments was 6%. By enacting CJ § 11-107, the General Assembly raised the default post-judgment interest rate to 10%, but retained the existing post-judgment interest rate of 6% for "money judgment[s] for rent of residential premises[.]" Nothing in the bill file of House Bill 1683—through which the General Assembly enacted CJ § 11-107—expressly explains why the General Assembly did not raise the post-judgment interest rate for money judgments for rent of residential premises.

That said, the Court determined that CJ § 11-107(b)'s obvious purpose was to protect tenants by not subjecting them to an increased post-judgment interest rate on money judgments for rent of residential premises. It is evident that the General Assembly carved out an exception to the default post-judgment interest rate of 10% for the benefit of residential tenants. Needless to say, the new default post-judgment interest rate of 10% would have been more burdensome on residential tenants than the existing post-judgment interest rate of 6%. It is entirely logical for the General Assembly to have imposed a lower post-judgment interest rate on residential tenants, given that, if the District Court enters a money judgment for rent of residential premises, a tenant is likely to already be experiencing financial difficulties, which a higher post-judgment interest rate would only exacerbate. CJ § 11-107(b)'s obvious purpose of protecting residential tenants supported the conclusion that CJ § 11-107(b) applies where a money judgment is comprised of unpaid rent and other expenses that are due under a residential lease.

Rudy Ismael Manchame-Guerra v. State of Maryland, No. 14, September Term 2017, filed January 23, 2018. Opinion by Barbera, C.J.

http://mdcourts.gov/opinions/coa/2018/14a17.pdf

CRIMINAL LAW – CONFRONTATION CLAUSE – MARYLAND RULE 5 616(a)(4) – PENDING CHARGES – FACTUAL PROFFER REQUIRED FOR INQUIRY

Facts:

On the evening of July 14, 2012, a man was fatally shot outside an apartment in Langley Park in Prince George's County, Maryland. Rudy Ismael Manchame-Guerra, Petitioner, was later arrested on suspicion of that murder. Petitioner was charged with first-degree murder and related offenses and in April 2015 was tried before a jury in the Circuit Court for Prince George's County. The victim's friend, Edi Felipe, was the only eyewitness to the killing. He testified for the State that he left the apartment first, turned around and saw the victim and Petitioner walk out of the apartment, and then saw the victim turn to face Petitioner, who shot the victim once in the head at close range.

At the time he offered that testimony, Edi Felipe was facing pending charges of first-degree burglary and related crimes arising out of an unrelated 2013 crime in Prince George's County. Petitioner sought to cross-examine Mr. Felipe under Maryland Rule 5-616(a)(4) as to whether, in return for his testimony, he expected or hoped for a benefit from the State in connection with his pending criminal charges. Defense counsel proffered that the detective who first spoke with Mr. Felipe about Petitioner's case knew about Mr. Felipe's pending charges, the first conversation happened roughly a year and a half after the murder in this case, and Mr. Felipe's charges remained pending at the time of Petitioner's trial eighteen months after Mr. Felipe's indictment. The trial court did not permit Petitioner to pursue the proposed line of questioning.

The jury returned a verdict of "guilty" as to second-degree murder and "guilty" as to use of a handgun in the commission of a felony. Petitioner appealed to the Court of Special Appeals, which affirmed the judgment of the circuit court in an unreported opinion. *Manchame-Guerra v. State*, No. 899, 2017 WL 193159 (Md. Ct. Spec. App. Jan. 18, 2017). The Court of Special Appeals, in addressing the Rule 5-616(a)(4) issue, relied on this Court's prior statement that "the existence of pending charges alone is not a sufficient predicate for [a question under Rule 5-616(a)(4)]." *Id*. at *5 (quoting *Peterson v. State*, 444 Md. 105, 135 (2015)). The Court of Special Appeals thus held that the proffer in this case did not meet the "factual foundation" necessary as proffers had in other cases where, for example, a witness had in fact already received a benefit. *Id*. at *5–6. The Court of Special Appeals therefore concluded that the trial court had not abused its discretion in precluding the inquiry into Mr. Felipe's potential bias. *Id*. at *6. Petitioner appealed the Rule 5-616(a)(4) issue to the Court of Appeals.

Held: Reversed.

The Court first reinforced the principle that the constitutional right of confrontation and Maryland Rule 5-616(a)(4) require that a defendant be afforded a threshold level of inquiry as to a State's witness's motive to testify falsely. Defense counsel must be given "wide latitude to cross-examine a witness as to bias or prejudices" in order to ensure the constitutional threshold is met. *Martinez v. State*, 416 Md. 418, 428 (2010). The Court emphasized, though, that defense counsel must proffer a sufficient factual foundation to permit inquiry into a witness's motive to testify falsely. The factual foundation for inquiry under Rule 5-616(a)(4) will often consist of circumstantial evidence of the witness's subjective hope for a benefit as to the witness's own pending criminal charges.

The Court held that the factual foundation required was not altered by the most recent case on this issue, *Peterson v. State*, 444 Md. 105 (2015). Defense counsel must proffer evidence that the witness subjectively could have expected or hoped for a benefit in return for testimony favorable for the prosecution. This evidence must be more than the mere proffer of the words "pending charges," without explanation or clarity as to the rationale for the proposed inquiry.

The Court further held that the proffer in this case met the requisite factual foundation for inquiry under Rule 5-616(a)(4). The proffer included Mr. Felipe's specific pending charges in the same county as defendant's trial, the investigating detective's awareness of Mr. Felipe's pending charges during the investigation of the underlying crime, and the fact that Mr. Felipe's charges, long after indictment, remained pending at the time of his testimony. Because this proffer met the threshold level of inquiry required to allow questioning under Rule 5-616(a)(4), the court erred in denying Petitioner the requested cross-examination as to whether Mr. Felipe had a motive to testify falsely. Petitioner was therefore entitled to have the judgment of conviction vacated and the case remanded for a new trial.

Return to ToC

State of Maryland v. Leonard Lee Simms, No. 3, September Term 2017, filed December 18, 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/3a17.pdf

CRIMINAL PROCEDURE – PRETRIAL PROCEDURES – NOLLE PROSEQUI – LIMITATIONS ON USE

Facts:

Mr. Simms was convicted and sentenced for conspiracy to distribute methlenedioxymethamphetamine, a Schedule I Controlled Dangerous Substance, in the Circuit Court for Anne Arundel County. Mr. Simms appealed his conviction and sentence to the Court of Special Appeals. While his appeal was pending, the State entered a *nolle prosequi* in the trial court, and the trial judge agreed to the entry of a *nol pros* of the charge underlying the conviction and sentence. In the Court of Special Appeals, subsequently, the State moved to dismiss the appeal as moot in the Court of Special Appeals prior to oral arguments. The Court of Special Appeals did not dismiss the case. The Court of Special Appeals held that the State did not have the authority to enter a *nol pros* after Mr. Simms was convicted and sentenced. The Court of Special Appeals then reversed the judgment of the Circuit Court, holding that the evidence presented to the Circuit Court was insufficient to convict and sentence Mr. Simms.

Held: Affirmed.

The Court of Appeals held that, although the State has wide discretion to *nol pros* charges, the State has no authority to *nol pros* a final judgment. The defendant had a statutory right to appeal his conviction, and as we held in *Friend v. State*, 175 Md. 352, 2 A.2d 430 (1938), the State did not have the authority to undermine that right by attempting to expand its *nol pros* authority to abandon the prosecution of the underlying charge(s) that led to the conviction and sentence. Final judgment constitutes the boundary of the State's discretion to enter a *nolle prosequi*. Therefore, the State lacked the authority to abandon the prosecution of Mr. Simms after the Circuit Court convicted and sentenced him.

Harold Eugene Williams v. State of Maryland, No. 25, September Term 2017, filed January 19, 2018. Opinion by Hotten, J.

Watts, J., joins in judgment only.

https://mdcourts.gov/data/opinions/coa/2018/25a17.pdf

CRIMINAL LAW – EVIDENCE – RELEVANCY OF PRIOR CONVICTION
CRIMINAL LAW – EVIDENCE – PREJUDICIAL NATURE OF PRIOR CONVICTION

Facts:

Harold Eugene Williams, and his previous girlfriend, Angela Swan were in an intimate relationship from 2012 until October of 2015. In the last few months of the relationship, they frequently quarreled. On October 23, 2015, Swan spent the night at Williams' home. The next morning, Williams picked up Swan's phone, and saw text messages from multiple other men. An altercation ensued when Williams confronted Swan. According to Swan, Williams shoved her against the wall, assaulted her, and held a gun to her head. After the altercation, Swan left.

Swan drove to a nearby convenience store to call 911 and report the assault to police. Following the incident, Swan went to the hospital for treatment.

Williams was charged and later tried on seven counts, including first-degree assault, second-degree assault, reckless endangerment, three weapons-related offenses, and posting revenge pornography in violation of Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 3-809 of the Criminal Law Article. Williams was convicted solely of second-degree assault.

Williams testified in his own defense. He denied owning a gun, and denied assaulting Swan or threatening her with a gun. Williams explained that he confronted her and asked her to leave.

At trial, Williams' attorney and the trial judge explained to Williams that the State could use a prior conviction to impeach him. Williams called Arkina Taylor, his neighbor to testify as a character witness. Taylor has known Williams for ten years, and testified that Williams had a peaceful reputation in the community. On cross-examination, Taylor indicated she was not aware that Williams was convicted for battery in 1990 ("the 1990 battery conviction"). When asked whether knowledge of the battery conviction would change her opinion of Williams' peaceful character, she indicated it would not. Dana Webb, Williams' former girlfriend, and Kamran Jones, Williams' family friend and co-worker, also testified on Williams' behalf. Webb had known Williams for six years, and testified that Williams has a reputation in the community for peacefulness. Jones had known Williams for fifteen years and also testified that Williams had a peaceful reputation in the community. When Webb and Jones were asked whether they were aware that Williams was previously convicted for battery, each indicated they were not. When

asked whether knowledge of the 1990 battery conviction would change their opinion of Williams, each indicated it would not.

Held: Affirmed.

The Court of Appeals held that the 1990 battery conviction was not so remote in time that it became irrelevant as a matter of law. Williams' character for peacefulness was placed at issue when he called three character witnesses to testify regarding his peaceful nature. Once Williams' counsel began that line of questioning, the door was opened for the State to cross-examine Williams' witnesses on that issue. *See* Md. Rule 5-404. The 1990 battery conviction was not so old that it failed to meet the low bar of making "any fact that is of consequence to the determination of the action more probable or less probable[.]" Md. Rule 5-401. Evidence of a violent character, as a matter of law, had some bearing on the action at issue, an assault.

The Court of Appeals held that evidence of the 1990 battery conviction was not so substantially outweighed by the danger of unfair prejudice that its admission was an abuse of discretion. All evidence, by its nature, is prejudicial. A defendant, however, must establish unfair prejudice to merit exclusion of the evidence under Maryland Rule 5-403. The 1990 battery conviction had some probative value because previously committing a battery directly pertains to an individual's peaceful nature, which was at issue in Williams' case. Given the probative nature of the evidence, it was reasonable to allow the jury to consider and weigh it appropriately.

Shelia Davis et al. v. Frostburg Facility Operations, LLC d/b/a/ Frostburg Village, No. 12, September Term 2017, filed January 19, 2018. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/coa/2018/12a17.pdf

HEALTH – MARYLAND HEALTH CLAIMS ACT – CONDITIONS PRECEDENT

Facts:

Shelia Davis and her husband Mark Davis (collectively "Davis"), filed a Complaint against Frostburg Facility Operations, LLC ("Frostburg") after injuries Ms. Davis sustained while recovering from back surgery at Frostburg's nursing care facility. Davis alleged that her injuries were caused by two falls while at Frostburg. As Davis slept, she fell from her bed to the floor after her mattress inexplicably detached from the bedframe. When a nurse attempted to use a mechanical lift to return her to the bed, the nurse triggered the lift to release prematurely, which caused Davis to fall to floor once again.

Nearly three years after her injuries, Davis filed a six-count Complaint in the Circuit Court for Allegany County, alleging (1) negligence, (2) negligence, (3) negligence *respondeat superior*, (4) breach of contract, (5) "false advertising/consumer protection", and (6) loss of consortium. Frostburg moved to dismiss the Complaint because Davis failed to first file her medical claims in the Maryland Health Care Alternative Dispute Resolution Office ("ADR Office") as required by Md. Code, Courts and Judicial Proceedings ("CJP") §§ 3-2A-01, et seq., also known as the Maryland Health Claims Act ("HCA"). The Circuit Court dismissed Davis's complaint.

Davis appealed to the Court of Special Appeals. In an unreported decision, the intermediate appellate court affirmed dismissal of her Complaint because Davis had alleged medical injuries within the HCA. *Davis v. Frostburg Facility Operations, LLC*, No. 540, 2017 WL 383454 (Md. Ct. Spec. App. Jan. 27, 2017). It determined that because Davis's Complaint alleged medical injuries, she was first required to submit her claims to the ADR Office.

Held: Affirmed in part and reversed in part.

First, the Court of Appeals explained the nature of the HCA, and its requirement that claims for a "medical injury" must be submitted to the ADR Office for non-binding arbitration before filing an action in circuit court. The cases to interpret the scope of the HCA, in sum, instruct that for the HCA to apply, a plaintiff must allege a breach of a professional duty of care during the rendering of medical care. *See, e.g., Afamefune v. Suburban Hosp., Inc.*, 385 Md. 677, 679–80 (2005).

Turning to the facts of Davis's appeal, the Court concluded that Davis's claims relating to her first fall—the fall from the bed as she slept—were for mere ordinary negligence because those

claims did not allege the breach of a professional standard of care. Her claims relating to the fall from the mechanical lift depended on a determination of whether the nurse properly operated the lift. This required a detailed examination of a medical standard of care and medical procedures, which brought her claims within the scope of the HCA.

Accordingly, the Court held the Circuit Court properly dismissed the medical claims due to Davis's failure to file in the ADR Office. The Court also agreed with the Court of Special Appeals and its conclusion that, generally, claims closely related to those subject to the HCA should also be filed in the ADR Office to avoid piecemeal litigation. But Davis could no longer file her medical claims in the ADR Office because the statute of limitations for such a filing had run. See CJP § 5-109(a). Because there was no danger of Davis maintaining an action in both the ADR Office and the Circuit Court, the Court of Appeals held that her remaining claims for nonmedical injuries should not have been dismissed.

COURT OF SPECIAL APPEALS

Comptroller of the Treasury v. Wais Jalali, et al., No. 1671, September Term 2016, filed January 31, 2018. Opinion by Kenney, J.

https://mdcourts.gov/data/opinions/cosa/2018/1671s16.pdf

ADMINISTRATIVE LAW – STANDARD OF REVIEW – SUBSTANTIAL EVIDENCE – MARYLAND TAX COURT

ADMINISTRATIVE LAW – STANDARD OF REVIEW – MIXED QUESTION OF LAW AND FACT – "DEBT-EQUITY" QUESTION

INTERNAL REVENUE CODE – NATURE AND EXISTENCE OF DEBT

ADMINISTRATIVE LAW – PRESERVATION OF QUESTIONS BEFORE ADMINISTRATIVE AGENCY

Facts:

The appellant is the Comptroller. The appellees, Wais Jalali and Mena Jalali ("the Jalalis"), are Maryland taxpayers, who filed amended joint tax returns seeking refunds for unreimbursed business expenses related to monetary advances that Mr. Jalali made to businesses that he owned or in which he had an ownership interest. The Comptroller denied the refunds.

Mr. Jalali and the involved companies were in the business of the sales, manufacture, and installation of large commercial heating, ventilation, and air conditioning systems ("HVAC"). In 2008, PEPTEC, a HVAC sales company in which Mr. Jalali was CEO, won three bids worth $30 million to provide HVAC systems to businesses and government entities. The three projects resulted in the perfect storm that caused major cash flow problems. It was to meet the delivery demands that Mr. Jalali contends that he made eighteen monetary advances to M&I between January 2009 and December 2009 totaling $1,799,000 and one advance to WDJ in December 2009 in the amount of $2,000,000. WDJ was a holding company, in which Mr. Jalali was an 86% shareholder; PEPTEC was one of several companies held by WDJ. Mr. Jalali was the sole shareholder in M&I, a HVAC manufacturing company. Each of the advances were documented by a written promissory note and stated interest and repayment terms that were mostly not adhered to. Although the three projects were completed, the companies went out of business in 2009 and 2010.

In 2010, the Jalalis filed amended joint tax returns with the Maryland Revenue Administration Division and the Internal Revenue Service (IRS). Claiming the unpaid advances as unreimbursed business expenses, the amended returns sought a carried-back net operating loss (NOL) of $3,799,000 and requested refunds of $141,211 for tax year 2008 and $67,132 for tax year 2009. The Comptroller denied the refunds, in part, because the Comptroller concluded that the advances were not bona fide loans.

Following an appeal to and a hearing before it, the Tax Court reversed the Comptroller's determination and granted the refunds. The Circuit Court of Anne Arundel County affirmed.

Held: Affirmed.

The federal appellate courts are divided whether the "debt-equity" question is one of fact or law, and Maryland appellate courts have not yet weighed in on the issue. The Court held that the "debt-equity" question—whether advances to a business constitute debt or equity—before the Maryland Tax Court is a mixed question of law and fact that the Court reviews for substantial evidence.

We review the Tax Court's findings of fact to determine whether there is substantial evidence in the record as a whole to support its findings, and if "a reasoning mind reasonably could have reached the factual conclusion that the [Tax Court] reached," the factual finding must be upheld. As the agency charged with interpreting and applying the Maryland tax code, the Tax Court's decision on a mixed question of law and fact is entitled to deference.

To establish that bona fide debt qualifies for bad debt deductions under 26 U.S.C. § 166(a), a taxpayer must prove a genuine intention to create debt, with reasonable expectation of repayment, that is consistent with the economic reality of creating a debtor-creditor relationship. Case law has developed several analytical approaches involving some overlapping factors to guide a trier of fact in answering the "debt-equity" question. Here, the Tax Court had applied correct legal principles, evaluated the applicable factors in light of the circumstances, and reached a conclusion that "a reasoning mind reasonably could have reached" in its determination that Mr. Jalali's advances were bona fide loans.

The Comptroller contends that even if Mr. Jalali's advances are properly determined to be debt, it is non-business bad debt and therefore non-deductible under § 166(d). This issue was neither raised nor addressed in the Tax Court, and for that reason, the Comptroller's argument for a remand on the "business" nature of Mr. Jalali's advances was not preserved. Ordinarily, a court reviewing the decision of an administrative agency may not pass upon issues presented to it for the first time on judicial review. Under the circumstances, a remand to the Tax Court to consider this issue would be unfair.

Classifying a debt as business or non-business involves determining whether the debt has a proximate relationship to the taxpayer's trade or business. The Supreme Court has held that in determining whether bad debt has a proximate relationship, the protection of the taxpayer's

employment must be the "dominant motivation." There was sufficient evidence on the record to support a finding that Mr. Jalali's dominant motivation for making the loans was to protect his employment in the HVAC business, had the Tax Court been asked to make such a determination.

Marcus Jamal Lindsey v. State of Maryland, No. 2704, September Term 2016, filed January 2, 2018. Opinion by Shaw Geter, J.

https://mdcourts.gov/data/opinions/cosa/2018/2704s16.pdf

HUMAN TRAFFICKING – SUFFICIENCY OF THE EVIDENCE

RULE OF COMPLETENESS – JAILHOUSE TAPES

Facts:

On March 3, 2016, a housekeeper at the Radisson hotel in Rockville, MD heard an argument between a man and a woman [hereinafter S.S] from inside Room 201. She recorded the exchange on her cell phone. Subsequently, S.S. informed an employee at the front desk that "someone had hurt her" and "was trying to make her have sex with someone." As the employee dialed 911, the man, later identified as Lindsey, began to approach them. S.S. then stated "oh my god…there he is," and Lindsey left.

A police officer arrived shortly thereafter and observed that S.S. had a swollen, bruised right eye and redness on the left side of her face. The hotel room was then searched by detectives and they discovered boxes of condoms, condom wrappers, a large piece of braided hair on the floor, a cell phone in a box, a sheet of paper with phone numbers listed, and a Verizon phone bill addressed to Lindsey's mother. S.S. directed law enforcement to the website "Backpage.com," and showed them an escort advertisement for S.S., using the same phone number used to check into the hotel. S.S. later stated to police that Lindsey "never forces me to do anything."

Several weeks later, Lindsey was arrested and charged with second-degree assault and two counts of human trafficking in the Circuit Court for Montgomery County. At trial, Lindsey acknowledged that he stayed in the Radisson with S.S., as well as ten other hotels in the Washington, D.C. and Baltimore areas in the weeks leading up to the incident, for one or two nights average and that his email address was used to post the Backpage ad. However, Lindsey claimed he was homeless and S.S., his girlfriend, was engaging in prostitution against his wishes. The jury convicted Lindsey of all charges and he brought a timely appeal.

Held: Affirmed.

The Court of Special Appeals held the evidence was sufficient to convict Lindsey of human trafficking by "knowingly harboring, taking, placing or causing another to be placed in any place for prostitution." C.L. § 11-303(a)(1)(ii). In their reasoning, they pointed to the following evidence admitted at trial: Lindsey's own testimony that he "brought [S.S.]" to the hotel "for his reason"; the housekeeper's testimony that she heard a woman screaming from Room 201 "leave me alone, get away from me," and the response, "you deserve it, who are you going to talk to?";

S.S.'s statements to the front desk employee immediately afterwards, as well as her "visibly shaken" demeanor; documentary evidence showing the phone number used to check in was the same used in the Backpage ad; Lindsey's testimony acknowledging his email address was used for the ad and that he was aware the ad was posted. The Court of Special Appeals stated "it is apparent that the jury did not credit appellant's testimony."

Lindsey also argued that the circuit court abused its discretion by refusing to allow him to play excerpts from recorded jail telephone calls in response to evidence of such recordings introduced by the State. Lindsey contended that the rule of completeness requires that he be permitted to play the excerpts because they were "part of one, ongoing conversation" that were "necessary to provide the proper context" for the State's recordings. Maryland Rule 5-106.

In rejecting Lindsey's argument, the Court of Special Appeals found that portions of the phone calls "consisted of unrelated, subsequent conversations that did not explain or correct any of appellant's earlier statements in the calls introduced by the State." The court perceived no abuse of discretion in the circuit court's determination that statements in the calls by S.S., in which she professed her love for appellant, were not admissible as prior inconsistent statements for purposes of impeachment, explaining they were "not necessarily inconsistent with her earlier statement to [the front desk employee] that [Lindsey] had tried to force her to have sex with someone."

Patrick A. Goodwin v. State of Maryland, No. 2436, September Term 2016, filed December 21, 2017. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2017/2436s16.pdf

REASONABLE SUSPICION – PROTECTIVE SEARCH – AUTOMOBILE – FLOOR MAT

Facts:

On June 24, 2016, officers were conducting surveillance of the Windsor Gardens apartments, an area known for drugs and gang activity. The officers observed appellant parked outside of the apartments, while another individual, Craig Walker, walked back and forth from the vehicle to one of the apartment buildings. Although the officers did not observe any direct hand-to-hand exchange of drugs, the actions gave officers the impression that Walker was a middleman in brokering a drug transaction. After Walker entered the vehicle, and it exited the apartment complex, the officers followed the vehicle and recognized Walker from the department's outstanding warrant list.

The officers activated the patrol car's emergency lights to pull the car over to effectuate the arrest of Walker. Appellant initially slowed down, but he did not immediately stop the car, giving officers the impression that appellant was attempting to buy time. Appellant bent down near the floorboard of the vehicle, completely disappearing from the officers' view. Based on appellant's furtive movements, the officers suspected that there was a weapon inside the vehicle. They approached appellant and asked him to exit and stand near the vehicle. Officers performed a protective search of the driver's side area, including lifting the floor mat. A syringe was found under the floor mat, and appellant was placed under arrest and searched. The circuit court denied appellant's motion to suppress the evidence.

Held: Affirmed.

The Supreme Court in *Michigan v. Long*, 463 U.S. 1032, 1049 (1983), held that the police may conduct a protective search of "the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden," if the police possess a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons."

The police had reasonable, articulable suspicion that appellant was armed and dangerous when they initially saw appellant in a high crime area, engaging in activity suggesting a drug transaction, and when they stopped his vehicle, he acted suspiciously and displayed furtive movements.

The search did not exceed the permissible scope of a protective search to ensure officer safety. When the police have reasonable, articulable suspicion that a weapon may be found on the floor of a vehicle, a protective search to ensure that no weapon is hidden there may include lifting the floor mat.

Moussa Sissoko v. State of Maryland, No. 613, September Term 2016, filed January 31, 2018. Opinion by Eyler, Deborah S., J.

https://mdcourts.gov/data/opinions/cosa/2018/0613s16.pdf

ADMISSION OF EXPERT MEDICAL TESTIMONY – FRYE-REED GENERAL ACCEPTANCE TEST – RULE 5-702(3) RELIABILITY OF METHODOLOGY – OVERLAP OF *FRYE-REED* AND RULE 5-702(3) – SHAKEN BABY SYNDROME/ABUSIVE HEAD TRAUMA – REVIEW UNDER *FRYE-REED* STANDARD.

Facts:

In 2002, the appellant was convicted of first degree premeditated murder, child abuse, and child abuse resulting in death in the death of his 11-week old son Shane. The State theorized that the appellant killed Shane by shaking him, slamming him against a soft surface, or both. The appellant later was granted a new trial as post-conviction relief, upon a finding that his trial counsel had been ineffective for failing to introduce expert testimony to rebut the State's shaken baby syndrome expert testimony. Before his new trial, he moved to preclude the State from introducing expert medical evidence about shaken baby syndrome, by now called abusive head trauma, on the ground that it no longer was a generally accepted diagnosis in the absence of evidence of external injuries. The court held a *Frye-Reed* hearing and denied the motion, ruling that abusive head trauma is a generally accepted medical diagnosis and the State's experts could testify about it and that it was the cause of Shane's death. The court also ruled that the State's experts' testimony was admissible under Rule 5-702.

The appellant chose a bench trial. Both sides called experts about abusive head trauma. The evidence showed that, according to the appellant, Shane was fine on the morning of September 15, 2001, and was just sleeping on the appellant's bed when he suddenly started bleeding from his nose, stopped breathing, and became comatose. The appellant did not claim that any accident had occurred. 911 was called and Shane was rushed to the hospital. CT scans and MRIs showed subdural hematomas, retinal hemorrhages, and brain swelling that increased to the point that the cerebellum was herniating into the brain stem. Shane never regained consciousness and on day ten in the hospital was removed from life support and died. The State's experts opined that Shane suffered catastrophic brain injuries due to trauma that was inflicted on him, *i.e.*, abusive head trauma, even though there were no external injuries, because the medical evidence supported inflicted injuries, possible medical causes for his brain injuries were ruled out, and there was no evidence of an accidental cause for the injuries. The defense experts opined that Shane's brain injuries could have had medical causes, such as bleeding into a chronic subdural hematoma or a coagulation disorder.

The evidence also showed that the appellant was the only person with Shane when he suffered his catastrophic injuries; that the appellant had had to drop out of college due to his girlfriend's pregnancy with Shane; that he had purchased a $750,000 life insurance policy on Shane's life in

the weeks before Shane's death; that he had not told Shane's mother about that and had lied to her and her mother about facts surrounding the acquisition of that policy; that he had paid the premium on the policy the day before Shane's catastrophic injuries; and that based on what the insurance agent had told him, he would have thought the policy went into effect when that first payment was made.

The court found the appellant guilty of first degree premeditated murder, child abuse, and child abuse resulting in death. The appellant noted an appeal in which he challenged the court's *Frye-Reed* ruling but not its Rule 5-702 ruling, and also argued that the evidence was legally insufficient to support his convictions.

Held: Affirmed.

The Court rejected the State's argument that whether the State's experts on abusive head trauma could testify at trial was solely a Rule 5-702 issue, not a *Frye-Reed* issue, and because the appellant only challenged the trial court's Rule 5-702 ruling on appeal, his appeal must fail. The *Frye-Reed* general acceptance test for scientific evidence has evolved so that, like the federal *Daubert* standard, it requires scientific methodologies and the scientific conclusions based on them to be generally accepted. In other words, there must not be an "analytical gap" between the basis for the scientific opinion and the opinion itself. As the Court of Appeals has recognized, this evolution has resulted in an overlap between the *Frye-Reed* general acceptance test and the reliable methodology prong of Rule 5-702(3). The admissibility of the State's expert witness opinions about abusive head trauma concerns reliable methodology and therefore falls within this overlap. Because the thrust of the appellant's argument is general, that is, not merely whether expert testimony about abusive head trauma is appropriate in this case but whether it ever is appropriate, the Court approached the issue as one under *Frye-Reed*, using a de novo standard of review.

The Court distinguished this case from *Clemons v. State*, in which the Court of Appeals held that a once generally accepted scientific methodology no longer was generally accepted, and from *Blackwell v. Wyeth* and the two *Chesson v. Montgomery Mutual* cases, in which the Court of Appeals held inadmissible expert opinions that were based on scientifically accepted methods, or methods usually accepted, but that did not bridge the analytical gap between those methods and the conclusions reached. Based on a review of the reliable scientific literature and the differential diagnosis method used by the State's experts to make the diagnosis of abusive head trauma, the Court held that abusive head trauma can be diagnosed in the absence of external injuries and the trial court did not err by admitting the State's expert medical opinion testimony. The Court further held that the evidence was legally sufficient to support all the convictions.

Lashawn Duckett-Murray v. Encompass Insurance Company of America, No. 1812, September Term 2016, filed January 31, 2018. Opinion by Eyler, Deborah S., J.

https://mdcourts.gov/data/opinions/cosa/2018/1812s16.pdf

PRIVATE PASSENGER MOTOR VEHICLE INSURANCE – UNINSURED MOTORIST (UM) COVERAGE – STATUTORY REQUIREMENT OF EQUALITY OF LIABILITY AND UM COVERAGE – INSURANCE ARTICLE SECTIONS 19-509(e)(2) AND 19-510(b)(1) – MATERIAL CHANGES IN POLICY UPON RENEWAL THAT ARE TANTAMOUNT TO NEW POLICY

Facts:

In 2014, insured under private passenger automobile policy ("policy") was injured in an accident caused by an uninsured motorist. The policy originally was issued in 1987 to her grandfather, grandmother, and aunt.

In 1992, the General Assembly amended the Insurance Article to require that, for private passenger automobiles, UM limits must equal liability limits, unless the named insured waives equality of coverage in writing. Uncodified section 2 of the 1992 equality of coverage law provided that it "shall apply only to motor vehicle insurance policies issued or delivered on or after" October 1, 1992.

In the more than twenty years after the policy first was issued, it was renewed annually with many changes, including that insureds were removed, as they died, and others insureds, including the insured in this case and her mother, were added. The named insured changed over the years, and insured vehicles were added and removed.

After the insured's insurance company ("company") declined her demand for payment of damages in excess of her $75,000 stated UM limits, up to her $300,000 liability limits, she sued the uninsured driver for negligence and the company for breach of contract. Partial summary judgment was granted in favor of the company, on the ground that because the policy merely was renewed from year to year, it was not a policy "issued or delivered" after October 1, 1992, within the meaning of uncodified section 2, and therefore was not controlled by the 1992 equality of coverage law. The negligence case against the uninsured motorist resulted in a jury verdict in favor of the insured in an amount above the stated UM limits and below the liability limits in the policy.

Insured appealed the grant of partial summary judgment in favor of the company, arguing that the changes in the policy over time made it effectively new and therefore a policy "issued or delivered" after October 1, 1992, and subject to the equality of coverage law. The company

responded that the trial court ruled correctly that the policy simply was renewed over a long period of time and was not new.

Held: Reversed.

As the parties acknowledge, uncodified section 2 cannot mean that all policies issued or delivered after October 1, 1992, including standard renewal policies, are within the equality of coverage law, because the legislature would not have included "only" as a word of limitation if that were the case. The meaning of uncodified section 2 otherwise is not clear. It must be ascertained in light of the purpose of the 1992 equality of coverage law, which was to maximize the number of auto insurance customers who would have UM coverage equal to liability coverage by making that the default coverage situation, unless affirmatively waived. Looking to other jurisdictions that have addressed the question of when a policy is "new" for purposes of similar equality of coverage laws, Court holds that when there has been a material change in the risk relationship between the insurer and the insured under the policy, considering the totality of the circumstances, the policy effectively is new and an equal coverage provision will be read into it.

Because there is no dispute over the underlying facts, whether the policy was issued or delivered after October 1, 1992, *i.e*., was effectively new after that date, can be answered as a matter of law. In the 1998 to 2000 renewal periods, there were three major changes in the policy that were material: the original named insured died; the new named insured was added to the policy as the named insured and for the first time as a driver; and the number of vehicles covered was reduced from three to two. These changes were material in that they altered significant terms, introduced a new decision-maker for waiver purposes, and affected the premium charged. Accordingly, the policy effectively was "issued and delivered" within the meaning of uncodified section 2 at that time, and the equality of coverage law applied. Because there was no waiver of equal coverage, equal coverage must be implied in the terms of the policy.

Return to ToC

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated January 3, 2018, the following attorney has been suspended:

MICHAEL DAVID DOBBS

*

By an Opinion and Order of the Court of Appeals dated December 15, 2017, the following attorney has been indefinitely suspended, effective January 16, 2018:

JOHN ALEXANDER GIANNETTI, JR.

*

By an Order of the Court of Appeals dated January 16, 2018, the following attorney has been suspended:

ELIZABETH MARGARET FISCHER

*

By an Order of the Court of Appeals dated January 16, 2018, the following attorney has been disbarred by consent:

JEFFREY ADAM WERTKIN

*

By an Order of the Court of Appeals dated January 18, 2018, the following attorney has been indefinitely suspended by consent:

DAVID EUGENE FURRER

*

*

This is to certify that the name of

LAURENCE FLEMING JOHNSON

has been replaced upon the register of attorneys in this state as of January 18, 2018.

*

JUDICIAL APPOINTMENTS

*

On November 29, 2017, the Governor announced the appointment of **MAGISTRATE JUDY LYNN WOODALL** to the Circuit Court for Prince George's County. Judge Woodall was sworn in on January 3, 2018 and fills the vacancy created by the retirement of the Hon. Albert W. Northrop.

*

On November 29, 2017, the Governor announced the appointment of **PETER KEVIN KILLOUGH** to the Circuit Court for Prince George's County. Judge Killough was sworn in on January 5, 2018 and fills the vacancy created by the retirement of the Hon. C. Philip Nichols, Jr.

*

On December 11, 2017, the Governor announced the appointment of the **HONORABLE MARGARET MARIE SCHWEITZER** to the Circuit Court for Montgomery County. Judge Schweitzer was sworn in on January 5, 2018 and fills the vacancy created by the retirement of the Hon. John W. Debelius, III.

*

On December 11, 2017, the Governor announced the appointment of **ERIN MARGARET DANZ** to the District Court of Maryland – Carroll County. Judge Danz was sworn in on January 5, 2018 and fills the vacancy created by the retirement of the Hon. JoAnn M. Ellinghaus-Jones.

*

On December 11, 2017, the Governor announced the appointment of **JILL REID CUMMINS** to the Circuit Court for Montgomery County. Judge Cummins was sworn in on January 12, 2018 and fills the vacancy created by the retirement of the Hon. Joseph A. Dugan, Jr.

*

On December 21, 2017, the Governor announced the appointment of **AMY JULIA BILLS** to the District Court of Maryland – Montgomery County. Judge Bills was sworn in on January 12, 2018 and fills the vacancy created by the retirement of the Hon. Gary G. Everngam.

*

*

On December 21, 2017, the Governor announced the appointment of **KAREN ANNE FERETTI** to the District Court of Maryland – Montgomery County. Judge Feretti was sworn in on January 18, 2018 and fills the vacancy created by the retirement of the Hon. Barry A. Hamilton.

*

On December 21, 2017, the Governor announced the appointment of **DAVID WARREN LEASE** to the Circuit Court for Montgomery County. Judge Lease was sworn in on January 19, 2018 and fills the vacancy created by the retirement of the Hon. Marielsa A. Bernard.

*

On December 28, 2017, the Governor announced the appointment of **MAGISTRATE MARY MARGARET KENT** to the Circuit Court for Worcester County. Judge Kent was sworn in on January 19, 2018 and fills the vacancy created by the retirement of the Hon. Thomas C. Groton, III.

*

On December 28, 2017, the Governor announced the appointment of **BEAU HENDRICK OGLESBY** to the Circuit Court for Worcester County. Judge Oglesby was sworn in on January 26, 2018 and fills the vacancy created by the retirement of the Hon. Richard R. Bloxom.

*

On December 21, 2017, the Governor announced the appointment of **CARLOS FEDERICO ACOSTA** to the District Court of Maryland – Montgomery County. Judge Acosta was sworn in on January 26, 2018 and fills the vacancy created by the retirement of the Hon. Barry A. Hamilton.

*

Return to ToC

UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

	Case No.	*Decided*
A.		
Abler, Stanley C. v. Semmes	0270	January 19, 2018
B.		
Backyard Paradise of Edgewood v. Walker	1544 *	January 5, 2018
Barnes, Charles v. Shaulis	0492	January 10, 2018
Bobrov, Boris v. University of Md. Physicians	1700 *	January 17, 2018
Boyd, Linda v. Brown	0684	January 17, 2018
Brown, James v. State	2075 *	January 2, 2018
Burton, Bradley Levar v. Md. Insurance Admin.	2024 *	January 12, 2018
C.		
Cartwright, Lundes A. v. State	1817 *	January 2, 2018
Cason, Breyon v. State	1622 *	January 30, 2018
Colkley, Clayton Daman v. State	2474 **	January 19, 2018
Cornish, Ronald v. State	0222	January 8, 2018
Cornish, Ronald v. State	2369 *	January 8, 2018
D.		
Dailey, Jamie Lynn v. State	0420 *	January 23, 2018
Devine, Scott v. Prince George's Co. Personnel Bd.	2360 *	January 30, 2018
E.		
Efthimiou, Georgia S. v. Ward	1034 *	January 3, 2018
Estate of Moore v. Jones	2231 **	January 5, 2018

September Term 2017
* September Term 2016
** September Term 2015
*** September Term 2014

F.

Ford, Anthony v. State	2438 *	January 8, 2018
Fried, Jared v. Garrison Property & Casualty Ins.	2414 *	January 30, 2018

G.

GEICO General Insurance v. Barnes-Simmons	1401 *	January 8, 2018
Grace, Brian v. Bd. Of Liquor License Comm'rs	1389 *	January 11, 2018
Graham, Edward N. v. State	2074 *	January 2, 2018
Gray, Rydell Orlando v. O'Sullivan	1993 *	January 3, 2018
Gray-El, Richard v. State	2511 **	January 17, 2018
Greene, Michaela Ann v. Greene	0502	January 11, 2018

H.

Haddad, Kayed v. Hess	1672 **	January 3, 2018
Hailes, Jermaine Quintonio v. State	1561 *	January 24, 2018
Harris, Guy D. v. Green	1495 *	January 23, 2018
Hawkins, Stacey J. v. Regional Management	2550 **	January 19, 2018
Huber, Tara v. Montgomery Co.	1228 *	January 26, 2018
Hutchins, Garrett v. State	2567 *	January 11, 2018
Hyde, David v. State Bd. of Dental Examiners	2618 ***	January 24, 2018

I.

In re: A.S., M.S., and M.S.	0615	January 12, 2018
In re: Adoption/G'ship of J.M.	0926	January 5, 2018
In re: Adoption/Guardianship of K.L.	0592	January 19, 2018
In re: Aselefech Bayou Teklewold	1959 *	January 23, 2018
In re: B.L., B.L. & B.L.	0703	January 19, 2018
In re: D.B.	1088	January 23, 2018

J.

Jones, Jeffrey v. State	1973 *	January 9, 2018
Jones-Joyner, Juliun E. v. State	0555 *	January 10, 2018

K.

Katana Properties v. Martinez	2206 *	January 23, 2018
Kessler, Windsor W., III v. State	2211 *	January 2, 2018
Keyser, Richard v. State	2545 *	January 16, 2018

September Term 2017
* September Term 2016
** September Term 2015
*** September Term 2014

Kim, Yong Ran Sunwoo v. Sunwoo	1595 *	January 3, 2018
Kirson, Benjamin L. v. Johnson, Quanita	1861 *	January 30, 2018
L.		
Larocca, Frank v. Creig Northrop Team	0644 *	January 12, 2018
Lomax, Marlo v. State	0022	January 26, 2018
M.		
Marston, Brian v. State	2146 *	January 24, 2018
McCorkle, Edward Ernest v. State	1183 *	January 26, 2018
Morris & Ritchie Assoc. v. H&H Rock	1824 *	January 30, 2018
Murray, Michael Wayne v. State	1581 *	January 12, 2018
O.		
OCSE v. Brown	2417 *	January 23, 2018
Off. Of Child Support Enforcement v. Dickens	2492 *	January 19, 2018
O'Neil, Mark v. State	2565 *	January 10, 2018
P.		
Pacheco, Michael v. State	0133	January 24, 2018
Pederson, Ann v. Flesher	1303 *	January 5, 2018
PMIG 1024 LLC v. SG Maryland LLC	2576 *	January 23, 2018
R.		
Randall, Crystal v. State	0529	January 4, 2018
Randall, Crystal v. State	2273 *	January 4, 2018
Ruby, Whitney v. State	1656 *	January 17, 2018
S.		
Shaw, Racheal v. SMS Assist	2223 *	January 3, 2018
Sherwood Hill Improvement Assoc. v. TTV Properties III	0676 *	January 26, 2018
Shulman, Brian v. Rosenberg	1889 *	January 4, 2018
Simpson, James Robert, Jr. v. State	2168 *	January 4, 2018
Slaven, Ronald James, Jr. v. State	2658 *	January 17, 2018
Smith, Loretta v. Rucker	0685	January 8, 2018
Stevenson, Shawn v. State	1582 *	January 5, 2018
Stewart, Joshua v. State	2242 *	January 23, 2018

September Term 2017
* September Term 2016
** September Term 2015
*** September Term 2014

Strong, Peggy v. Dept. of General Services	1334 *	January 11, 2018
Summers, Pamela v. Harmel	1536 *	January 5, 2018
T.		
Taylor, Jamaal v. State	0056	January 11, 2018
Taylor, Michael v. State	1174 *	January 5, 2018
Temple, Davon v. State	2730 *	January 5, 2018
U.		
USA Real Estate-2 v. Carter	2648 **	January 12, 2018
V.		
Vanmeter, Aaron Jacob v. State	1992 *	January 16, 2018
W.		
Wagner, James v. Board of Appeals	2448 *	January 23, 2018
Walker, Donta v. State	2830 **	January 17, 2018
Ward, Gary v. State	0208	January 26, 2018
Warrington Condo. Council v. Dannenberg	1451 *	January 3, 2018
Washington, Dorothy v. Washington	2488 *	January 23, 2018
Wensel, Duane v. Zettergren	1383 *	January 8, 2018
Wertlieb, Stuart J. v. Wertlieb	2430 *	January 9, 2018
Williams, Craig v. State	2592 *	January 23, 2018
Y.		
Yost, Terry Lee, Jr. v. State	0301	January 24, 2018

September Term 2017
* September Term 2016
** September Term 2015
*** September Term 2014