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COURT OF APPEALS

Stanley Rochkind v. Starlena Stevenson, No. 47, September Term 2019, filed August 28, 2020. Opinion by Getty, J.

Watts, Hotten, & Greene, J.J., dissent.

https://www.mdcourts.gov/data/opinions/coa/2020/47a19.pdf

EXPERT WITNESS TESTIMONY – MARYLAND RULE 5-702 – SUFFICIENT FACTUAL BASIS – *FRYE-REED* STANDARD – *DAUBERT* STANDARD

Facts:

As a child, doctors diagnosed Starlena Stevenson ("Stevenson") with Attention Deficit Hyperactivity Disorder ("ADHD") and other "major psychological disorders," resulting in behavioral and cognitive issues as she aged. Between the ages of ten and twenty-five months old, she and her mother lived in an apartment on Fairview Avenue ("Fairview") partially owned by Stanley Rochkind ("Rochkind"). At the time, tests showed Stevenson had high blood-lead levels which later receded when the family moved.

In 2011, Stevenson sued Rochkind in the Circuit Court for Baltimore City, claiming that negligence and violations of the Maryland Consumer Protection Act resulted in Stevenson's alleged exposure to lead paint while living at Fairview. At trial, a pediatrician filed a report concluding to "a reasonable degree of medical probability," that Stevenson was poisoned by lead while living at Fairview. The report cited the lead poisoning as "a significant contributing factor" to Stevenson's "neuropsychological problems, including her ADHD." The admissibility of this report and the physician's testimony was at issue in four trials.

In the first trial, the court denied Rochkind's motion for a *Frye-Reed* hearing to determine the admissibility of the physician's expert testimony. The jury ruled in favor of Stevenson, granting an award of $829,000 in economic damages and $534,000 in noneconomic damages. A new trial was granted on damages alone. Again, the court denied a Frye-Reed hearing, stating the physician's report "drew from 'reliable sources,'" under Maryland Rule 5-702, was "not new science," and did not draw "new conclusions." During the retrial, the physician testified as to the link between lead exposure and ADHD symptoms, relying on an Environmental Protection

Agency publication for support. The jury again awarded Stevenson roughly $1 million in damages after statutory caps were applied.

On appeal, the Court of Special Appeals held the circuit court did not err in failing to conduct a *Frye-Reed* hearing on the physician's testimony as to the causation of Stevenson's neuropsychological problems because the study relied upon did not reach novel conclusions and used generally accepted methodologies. On appeal to the Court of Appeals, the Court applied Rule 5-702, holding the physician's testimony as to the causal link between lead exposure and ADHD was not sufficiently supported. The Court did not address whether the circuit court should have held a *Frye-Reed* hearing regarding the admissibility of the expert's testimony. The Court remanded the case, permitting the physician to "opine on the effects of lead exposure" but not permitting her to speak to a causal link between lead exposure and ADHD.

In the third trial, the physician again testified that lead exposure caused ADHD. This resulted in a mistrial. In the fourth trial, the physician testified again, stating a causal link between lead exposure and several neuropsychological issues, but not mentioning ADHD. The jury awarded Stevenson $1 million in economic damages and $2 million in non-economic damages. Rochkind appealed to the Court of Special Appeals. While that appeal was pending, Stevenson filed a petition for certiorari to the Court of Appeals. The Court granted certiorari to address four questions—among them whether the Court should "adopt the standard for admitting expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (193)[.]"

Held: Reversed and remanded.

The Court of Appeals held expert testimony will no longer be evaluated using the *Frye-Reed* test under Rule 5-702, but instead must meet the threshold determination of being "not only relevant but reliable" as articulated in *Daubert*.

Over four decades ago, the Court of Appeals in *Reed v. State*, 283 Md. 374 (1978), adopted the "general acceptance" test—first espoused in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)—for the admissibility of expert testimony based on new or novel scientific principles. In 1993, the Supreme Court of the United States, in adopting a new "reliability" standard for admissibility of expert testimony in federal courts, endorsed a nonexclusive list of reliability factors. *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993). In that case, the Supreme Court held that Federal Rule of Evidence ("FRE") 702 superseded *Frye*. The following year, the Court of Appeals adopted Maryland Rule 5-702, a rule modeled after FRE 702, which laid out the elements of admissible expert testimony. Maryland Rule 5-702, however, did not overrule *Reed* or *Frye*. Since 1994, the relationship between *Frye-Reed* and Maryland Rule 5-702 has been complicated in Maryland jurisprudence.

Rule 5-702 governs the admissibility of expert testimony and requires courts to determine if such testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Under Rule 5-702, courts must determine if an expert witness (1) is a qualified expert "by

knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." To assess expert testimony that involves novel scientific theories, Maryland adopted the *Frye-Reed* test in 1978, which asks courts to determine whether the "scientific opinion" is "shown to be generally accepted as reliable within the expert's relevant scientific community." However, the Court explained that the application of *Frye-Reed* in Maryland courts has drifted towards a *Daubert*-style test and has caused confusion. The Court noted that some courts have used *Frye-Reed* "not only to evaluate scientific methods, but also to access scientific conclusions."

In replacing the *Frye-Reed* test, the Court set forth a non-exclusive list of *Daubert* factors it found persuasive when evaluating expert testimony under Rule 5-702:

> (1) whether a theory or technique can be (and has been) tested; (2) whether a theory or technique has been subjected to peer review and publication; (3) whether a particular scientific technique has a known or potential rate of error; (4) the existence and maintenance of standards and controls; . . . (5) whether a theory or technique is generally accepted; . . . (6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying; (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; (8) whether the expert has adequately accounted for obvious alternative explanations; (9) whether the expert is being as careful as he [or she] would be in his [or her] regular professional work outside his [or her] paid litigation consulting; and (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

The Court held that no single factor is dispositive and novel techniques no longer need to be distinguished. The new *Daubert* test, based upon the Supreme Court's 1993 opinion and subsequent cases, is designed to assess the reliability, but "not the ultimate validity," of an expert's asserted methodology or theory. Trial courts retain their "gatekeeping function," permitting all usual lines of adversarial challenge against "shaky but admissible evidence." As applied to appellate courts, "[a]ll expert testimony is reviewed under the abuse of discretion standard."

In making this precedential change in Maryland jurisprudence, the Court noted the continued evolution of methods and rules used to evaluate the admissibility of expert testimony discussing both novel and non-novel scientific standards, the ambiguity and criticisms of the former *Frye-Reed* application, and the creation and legislative intent of the Maryland Rules permitting such a common law revision.

Ultimately, the Court found that the Supreme Court's opinions forming a "*Daubert*'s trilogy" including *General Electric Co. v. Joiner,* 522 U.S. 136, 145–46 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), and the fact that "a super majority of our sister jurisdictions" follow these standards for expert testimony encouraged the adoption of the *Daubert* standard in Maryland.

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West Montgomery County Citizens Association v. Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission, No. 579, September Term 2019, filed October 29, 2020. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2020/0579s19.pdf

ADMINISTRATIVE LAW – JUDICIAL REVIEW OF AGENCY DECISION

Facts:

The West Montgomery County Citizens Association ("WMCCA"), appellant, along with eight neighboring homeowners (the "Neighbors"), filed a petition for judicial review challenging the decision of the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission (the "Planning Board"), appellee, approving a preliminary plan filed by Sara A. Vazer (the "Applicant"), co-appellee. The Applicant filed an application for approval of a preliminary plan ("Preliminary Plan") to subdivide a 2.77 acre property on Glen Mill Road in Montgomery County (the "Property") into two lots with the intention of building one residence on each.

The Planning Board Staff ("Staff") recommended conditional approval of the Preliminary Plan in a report ("Staff Report"). Staff concluded that the proposed subdivision met the applicable requirements contained in the Subdivision Regulations, Chapter 50 of the Montgomery County Code ("Subdivision Regulations"), and in the Montgomery County Forest Conservation Law, Chapter 22A of the Montgomery County Code. ("Forest Conservation Law"). The WMCCA and the Neighbors filed written objections to the Preliminary Plan with the Planning Board.

The Planning Board held a public hearing to consider the application and the associated Preliminary Forest Conservation Plan on June 7, 2018. WMCCA and the Neighbors testified in opposition, but the Planning Board ultimately voted to approve the preliminary plan and accompanying Preliminary Forest Conservation Plan, with conditions. On July 2, 2018, the Planning Board issued a resolution ("Resolution"), which certified the Planning Board's conditional approval and described the Planning Board's related findings.

WMCCA and the Neighbors filed separate petitions for judicial review in the circuit court. The circuit court affirmed the decision of the Planning Board in a written decision on April 29, 2019. WMCCA noted a timely appeal.

Held: Affirmed.

The Court of Special Appeals reached three holdings. First, the Court held that, for purposes of enabling judicial review, the Planning Board's final determination need not restate all facts upon which it rests so long as the administrative record and the final determination reflect that the Planning Board considered all of the factors and conditions required by the applicable provisions of the Land Use Article and the Montgomery County Subdivision Regulations. Because the Planning Board addressed all of the statutory requirements for approving the Preliminary Plan and considered the statutory requirements provided by § 50-35 of the Subdivision Regulations, the administrative record enabled judicial review of the Planning Board's final determination.

Second, the Court determined that the Planning Board addressed the statutory requirements for approving the Preliminary Plan, and considered the arguments made by WMCCA beyond the statutory requirements of section 50-35 of the Subdivision Regulations. The Staff made recommendations and findings on the five major areas that the Planning Board must examine before approving a preliminary plan in its Staff Report and at the hearing. The Resolution noted that the Planning Board "considered the recommendations and findings of its Staff as presented in the hearing and as set forth in the Staff Report," and adopted and incorporated the Staff Report by reference.

Third, the Court held that the Planning Board did not err in granting the Applicant's tree variance request, because there was substantial evidence in the record to support the Board's decision. The Planning Board found that, without the tree variance, the Applicant would not be able to develop two lots—a use of the Property that is significant and reasonable. The Applicant also met her burden of showing that she could not accomplish the use elsewhere on the Property, as the other environmental constraints precluded shifting the proposed lots. In addition, the Planning Board determined that the Applicant's request did not violate any of the prohibited conditions in § 22A-21(d).

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Donna Kemp v. Nationstar Mortgage Association d/b/a Mr. Cooper, as successor by merger to Seterus, Inc., et al., No. 2652, September Term 2018, filed October 1, 2020. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2020/2652s18.pdf

BANKING – MORTGAGE LENDING – ASSESSMENT OF FEES

Facts:

Donna Kemp obtained a mortgage loan from Countrywide Home Loans, Inc., that later was assigned to the Federal National Mortgage Association ("Fannie Mae"). In 2017, Ms. Kemp fell behind on her payments and the loan servicer, Seterus, Inc. ("Seterus"), declared the loan in default. Ms. Kemp exchanged correspondence with Seterus and, among other things, learned that Seterus had charged her $180 for twelve property inspections that it ordered after she defaulted. In November 2017, Seterus offered (on Fannie Mae's behalf) and Ms. Kemp accepted a loan modification, and some or all of the property inspection fees were rolled into the balance of the loan.

In December 2017, Ms. Kemp filed suit against Fannie Mae and Seterus on behalf of herself and a class. She alleged that Section 12-121 of the Commercial Law Article ("CL"), which prohibits a "lender" from imposing a property inspection fee "in connection with a loan secured by residential property," barred Seterus from charging property inspection fees. The Second Amended Complaint asserted five state law counts, all derived to one degree or another from Seterus's alleged violation of CL § 12-121: (1) a claim for statutory damages under CL § 12-114; (2) a claim for declaratory judgment and injunctive relief; (3) a common law claim for unjust enrichment; (4) violations of the Maryland Consumer Debt Collection Practices Act ("MCDCA"), CL §§ 14-201 *et seq*., and a derivative claim under the Maryland Consumer Protection Act ("MCPA"), CL § 13-301(14); and (5) a claim based on violations of the Maryland Mortgage Fraud Protection Act ("MMFPA"), CL §§ 7-401 *et seq*.

At all relevant times, the applicable statute defined a "lender" as a person who "makes" loans. Md. Code (1975, 2013 Repl. Vol.), CL § 12-101(f). Fannie Mae and Seterus moved to dismiss, contending that they aren't "lenders" because, as the assignee and the servicer, they did not make Ms. Kemp's loan, and therefore CL § 12-121 doesn't preclude *them* from charging inspection fees. The circuit court agreed and dismissed the Complaint primarily on that ground.

Held: Affirmed in part and reversed in part.

The Court of Special Appeals held that CL § 12-121 applies to assignees of the loan and servicers as well as the original maker of the loan and therefore prohibits Fannie Mae and

Seterus from charging property inspection fees to borrowers. The Court reasoned that Fannie Mae and Seterus's reading of the statute was inconsistent with the General Assembly's intent and purpose in enacting CL § 12-121, which was to prohibit the charging of property inspection fees. Excluding assignees and servicers from the ambit of the statute would lead to the absurd result of allowing those parties to charge fees that the original maker of the loan cannot. The Court also reasoned that its holding was consistent with Court of Appeals's application of CL § 12-121 to an assignee in *Taylor v. Friedman*, 344 Md. 572 (1997).

Accordingly, the Court reversed the circuit court's dismissal of Ms. Kemp's claims under CL § 12-121. The Court also (1) held that the circuit court erred in finding that Seterus waived or paid the property inspection fees in the course of modifying Ms. Kemp's loan; (2) affirmed the circuit court's dismissal of the MCDCA and derivative MCPA claims; (3) held that Ms. Kemp did not preserve her argument that the Complaint supports a standalone MCPA claim; and (4) held that Ms. Kemp waived her challenge to the circuit court's conclusion that the Complaint failed to state her MMFPA claim with particularity.

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Luis Christian Rivera v. State of Maryland, No. 116, September Term 2019, filed October 6, 2020. Opinion by Eyler, J.

https://mdcourts.gov/data/opinions/cosa/2020/0116s19.pdf

CRIMINAL LAW – PRESERVATION FOR APPELLATE REVIEW

Facts:

After a bench trial, appellant was convicted by the Circuit Court for Cecil County of drug offenses. On appeal, appellant argued that the trial court based its verdict on information that had not been admitted into evidence. Appellant did not object at the time the court delivered its verdict, during which the court referred to information that had not been admitted into evidence. Appellant also argued that the evidence was legally insufficient to sustain the verdict.

Held: Affirmed.

After reviewing the history of Md. Rule 8-131(c), the Court of Special Appeals held that appellant failed to preserve his first argument for appeal because he failed to object at the time the court improperly referred to information outside of the record. The Court also held that, based on the evidence that was admitted, the evidence was legally sufficient to sustain the verdict. Thus, the convictions were affirmed.

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Edward Andre Bodeau v. State of Maryland, No. 1365, September Term 2019, filed October 1, 2020. Opinion by Kehoe, J.

https://www.mdcourts.gov/data/opinions/cosa/2020/1365s19.pdf

PETITION FOR WRIT OF ERROR CORAM NOBIS – SCOPE

CORAM NOBIS – LACHES

CORAM NOBIS – LACHES – DELAY AND UNREASONABLE DELAY

CORAM NOBIS – CHALLENGE TO A CONVICTION BASED UPON AN INSTRUCTION THAT THE JURY WAS THE JUDGE OF THE LAW AS WELL AS THE FACTS

CORAM NOBIS – LACHES – DELAY AND PREJUDICE

Facts:

In 1971, Edward Bodeau was charged and convicted of daytime burglary and theft of property valued at $100 or more. As part of its instructions, the trial court told the jury that its instructions on matters of law, including the burden of proof, were "advisory-only." Bodeau's counsel did not object. Bodeau appealed his convictions to this court, filed a petition for a writ of certiorari with the Court of Appeals, and later filed a petition for post-conviction relief. All three efforts proved unsuccessful.

In 1989, Bodeau was convicted of armed robbery. The prosecution sought a sentence under a four-strikes statute that mandated that a "person who has served three separate terms of confinement . . . as a result of three separate convictions of any crime of violence shall be sentenced, on being convicted a fourth time of a crime of violence, to life imprisonment without the possibility of parole." Md. Code, art. 27, § 643B(b). The sentencing court found that the 1971 daytime-burglary conviction qualified as one of the three predicate offenses under the four-strikes statute. As a result, Bodeau was sentenced to life without the possibility of parole.

On January 25, 2019, Bodeau filed a petition for a writ of error coram nobis in the Circuit Court for Montgomery County. He asserted that the trial court's advisory-only instruction rendered his 1971 conviction for daytime burglary constitutionally deficient. Bodeau conceded that he had long ago finished serving his 1971 sentence. However, he asserted that he faced collateral consequences from that conviction because it was one of the predicate convictions used to justify the 1989 life-without-parole sentence.

The State argued that the petition should be denied for three reasons. First, the State argued that coram nobis relief was restricted to cases in which there was a "sudden," that is unpredictable, collateral consequence to the conviction. According to the State, Bodeau's life-without-parole sentence was a foreseeable and predictable consequence of his 1971 conviction. Second, there

were other qualifying predicate offenses apart from the 1971 burglary conviction. Third, said the State, Bodeau should have been alerted to the deficiencies in his 1971 conviction when the Court of Appeals held in *Montgomery v. State*, 292 Md. 84, 91 (1981), that advisory-only instructions were unconstitutional, at least as to the burden of proof and other "bedrock characteristics" of the American notion of a fair trial. According to the State, the three decade plus delay between the filing of *Montgomery* and the filing of Bodeau's petition was unreasonable. Moreover, asserted the State, it was prejudiced by that delay because a key witness had died, records were no longer available, etc. After a hearing, the circuit court denied Bodeau's petition concluding that the doctrine of laches barred the relief sought. Bodeau subsequently appealed this denial.

Held: Reversed and remanded.

The Court of Special Appeals held that the circuit court erred when it denied Bodeau's coram nobis petition on the basis of laches.

The Court held that Bodeau unreasonably delayed in bringing his coram nobis petition but that the State did not show it had been prejudiced by that delay.

The Court noted that passage of time by itself does not constitute laches. A party asserting laches must demonstrate that the delay was unreasonable. In the coram nobis context, the first step in determining when delay becomes unreasonable is to identify when the petitioner's claim became ripe, that is, when (i) the petitioner knew or should have known of the trial error, and (ii) a judicial remedy existed to rectify the error. Although the State was correct in asserting that Bodeau was on notice of the infirmities in his 1971 conviction when *Montgomery* was filed in 1981, his coram nobis claim was not then ripe for two reasons. The error in his 1971 trial was one of law and in 1981 coram nobis relief was available only to correct factual errors. It was not until *Skok v. State*, 361 Md. 52 (2000), that the Court of Appeals expanded the scope of the writ to encompass error of law, as long as the issue had been preserved for review by an objection at trial and Bodeau had not done so. Bodeau's coram nobis claim became ripe when the Court of Appeals filed its opinion in *Unger v. State*, 427 Md. 383 (2012). *Unger* held that the failure to object "w[ould] not constitute a wavier" under Maryland's Post Conviction Procedure Act and for coram nobis relief. *Unger*, 427 Md. at 391. Therefore, the Court of Special Appeals concluded that Bodeau's delay was reasonable until 2012 but became unreasonable at some point after the decision in *Unger v. State*.

As for prejudice to the State, the State argued that Bodeau's unreasonable delay hindered its ability to reprosecute Bodeau because a key eyewitness had died, the homeowner-victim had no memory of the burglary, and the prosecutors' and police files and physical evidence were destroyed. Because the Court held that Bodeau's petition was not unreasonable until after the *Unger* decision in 2012, the State had the burden to prove that it was prejudiced beginning when Bodeau's claim became ripe. The State did not meet its burden because it failed to show when

the key eyewitness had died, when the relevant files were destroyed, or the extent to when the homeowner-victim's memory had deteriorated after, as opposed to before, *Unger* was filed.

The Court of Special Appeals held that the State's argument that coram nobis extended only to "sudden" collateral consequences was based on a misreading of a portion of the Court's analysis in *Skok*.

The Court reversed the judgment and remanded the case to the circuit court decide Bodeau's petition on its merits.

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Qun Lin v. Jose Reyes Cruz, et al., No. 2944, September Term 2018, filed September 30, 2020. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2020/2944s18.pdf

LABOR & EMPLOYMENT – SOLE PROPRIETORSHIP – ECONOMIC REALITY TEST

Facts:

Jose Angel Reyes Cruz, Jose Jorge Perez Gonzalez, and Jesus Emanuel Sanchez Vasquez (collectively, "Employees") were formerly employed by the Teppanyaki Grill & Supreme Buffet ("Teppanyaki Grill") in Rockville, Maryland. They filed a complaint in the Circuit Court for Montgomery County, asserting claims for unpaid wages under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, the Maryland Wage and Hour Law, Maryland Code, Labor & Employment Article (1999, 2016 Repl. Vol., 2018 Supp.), §§ 3-401-431, the Maryland Wage Payment and Collection Law, Maryland Code, Labor & Employment Article (1999, 2016 Repl. Vol., 2018 Supp.), §§ 3-501-509, and the Montgomery County Minimum Wage Act. The Employees initially sued Weiguang Chen and Teppanyaki Grill, later adding Qun Lin (the "Appellant"), and his son, Li Lin.

Teppanyaki Grill failed to answer the complaint and was not represented at trial before a circuit court judge. No business records were introduced showing any of the Employees' work hours or rates of pay because, as witnesses confirmed in their deposition and trial testimony, no such records were kept. Similarly, there was very little documentary evidence introduced to show who should be held liable as the employer under the relevant statutes. Aside from testimony, the following documents were introduced: (1) the Articles of Incorporation for Teppanyaki Grill, bearing the name and signature, "Weiguang Chen"; (2) a lease for the property where the restaurant was located, signed by Appellant; and (3) two amendments to the lease, all bearing the name and signature of Appellant. Appellant asserted at trial that he only signed the lease as a favor to Mr. Chen and that he did not have any interest in the business.

The circuit court found that Appellant was the owner of the business and held him personally liable for the Employees' unpaid wages. The judge based his ruling on the amount of financial risk incurred under the lease, as well as the language "Qun Lin, dba Teppanyaki Grill and Supreme Buffet" in the second amendment to the lease. The judge also concluded that he did not have sufficient evidence to hold Mr. Chen liable for the Employees' unpaid wages. Appellant noted a timely appeal and claimed that he was not liable for the unpaid wages because he does not own Teppanyaki Grill or have any stake in the business.

Held: Vacated.

The Court of Special Appeals reached two holdings. First, the Court held that the trial judge, in performing his role as factfinder, did not err when he credited certain parts of Mr. Chen's deposition testimony and disbelieved others. As the fact-finder, the trial judge had the discretion to decide which evidence to credit and which to reject. Second, in determining whether Appellant was the owner of Teppanyaki Grill, the trial judge failed to apply the economic reality test or articulate an alternate legal principle for his assignment of liability for the Employees' wages. After setting forth some relevant principles of law to guide the circuit court on remand, this Court vacated the judgment and ordered a limited remand so that the circuit court could, based on the evidentiary record already before it, conduct further proceedings and render further factual findings under the appropriate theories of liability discussed in this opinion. The Court did not reach the third issue of attorney's fees in light of its second holding.

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Pablo Huertas, et ux. v. Carrie M. Ward, et al, No. 2929, September Term 2018, filed October 27, 2020. Opinion by Arthur, J.

https://www.mdcourts.gov/data/opinions/cosa/2020/2929s18.pdf

FORECLOSURE PROCEEDINGS – FINAL JUDGMENT

Facts:

In 2004, Bank of America extended a loan that was secured by a lien on a residence in Olney, Maryland. A few years later, the homeowners stopped making payments due under the promissory note.

In 2014, substitute trustees who had been appointed under a deed of trust initiated a foreclosure action in the Circuit Court for Montgomery County. In response, the homeowners requested various documents and information. The court ultimately denied, without a hearing, the relief requested by the homeowners.

One of the homeowners made a series of requests to prevent the foreclosure sale, accusing the substitute trustees of fraud and other misconduct. The court denied each of his requests. The homeowner filed his first notice of appeal from an order denying several motions seeking to prevent the foreclosure sale.

The substitute trustees eventually sold the property at a foreclosure auction. The homeowner opposed ratification of the sale, raising allegations of forgery. After an exceptions hearing, the court ratified the sale. The homeowner filed a second notice of appeal from the order ratifying the sale.

While the appeal was pending, an auditor filed a report regarding the sale. The court overruled the homeowner's exceptions and ratified the auditor's report. No appeal was taken from the order ratifying the auditor's report.

Held: Affirmed.

As a preliminary matter, the substitute trustees moved to dismiss the appeal as premature. The substitute trustees contended that the order ratifying the sale of the property was not an appealable final judgment. According to the substitute trustees, the court did not enter a final judgment in the foreclosure case until it ratified the auditor's report. The Court of Special Appeals rejected those arguments.

The Court held that an order ratifying a foreclosure sale is a final judgment as to rights in the real property, even if the order refers the matter to an auditor to state an account. The process of

referring the matter to an auditor and resolving any exceptions to the auditor's report is collateral to the foreclosure proceeding. The court's ruling on any exceptions to the auditor's report represents a second judgment, from which a party aggrieved by that ruling may appeal.

The Court also held that the first notice of appeal was a timely notice of appeal from an order refusing to grant an injunction. One of the motions that the court denied in the order included a request to stay the foreclosure sale. Accordingly, the order was appealable to the extent that it denied a request for injunctive relief.

Although the Court denied the motion to dismiss the appeal, the Court ultimately affirmed the judgment ratifying the foreclosure sale.

To sufficiently raise a defense in a foreclosure case, a party must plead all elements of a valid defense with particularity. Here, a homeowner made vague allegations of forgery or fraud, but he offered no factual support for those allegations. The homeowner also cited the federal Fair Debt Collection Practices Act but he never sufficiently alleged any violation of that Act. Because the homeowner failed to meet the minimum pleading standards, the circuit court was not required to hold an evidentiary hearing on the alleged defenses.

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Octavia T. Coit, et al. v. Nicole Nappi, et al., No. 318, September Term 2019, filed October 1, 2020. Opinion by Sharer, J.

https://www.courts.state.md.us/data/opinions/cosa/2020/0318s19.pdf

SURVIVAL & WRONGFUL DEATH ACTION – SUMMARY JUDGMENT – GROSS NEGLIGENCE – SUFFICIENT EVIDENCE

GOOD SAMARITAN ACT – FIRE & RESCUE COMPANIES ACT – IMMUNITY – WILLFUL OR GROSSLY NEGLIGENT CONDUCT

NEGLIGENCE – CONDUCT OF EMPLOYEES – DIRECT CLAIMS AGAINST COUNTIES

Facts:

While at a friend's house, the decedent Ceontay Coit began experiencing the onset of an asthma attack. After attempts to subdue the attack with his inhaler failed, Coit's friend called 911 for assistance. Emergency medical service (EMS) providers were dispatched at 5:08:46 a.m. Paramedic Nicole Nappi and EMT Traci Jackson of the Baltimore County Fire Department were the first to respond to the 911 dispatch that they were "en route" at 5:11:12 a.m. and arrived at the scene at 5:15:30 a.m., finding Coit unconscious and struggling to breathe.

During the course of their assessment and treatment of Coit, Narcan was administered, despite no indication of suspected drug use was present. Treatment efforts were unsuccessful, so Coit was transported to the nearest hospital where he died.

Coit's estate and his parents filed suit against Paramedic Nappi, EMT Jackson, and Baltimore County, alleging survival and wrongful death claims based on allegations of gross negligence in their pre-arrival delay and post-arrival conduct. Defendants moved for summary judgment, claiming, *inter alia*, that they were entitled to immunity, and that there was insufficient evidence to establish a *prima facie* claim of medical negligence. The court granted summary judgment in the defendants' favor, finding no material dispute of fact as to their arrival time, and that there was insufficient evidence to establish that their pre or post arrival conduct was willful or grossly negligent, thus, they were entitled to immunity.

On appeal, appellants contend that the court erred in granting summary judgment because there were genuine disputes of material facts, and it erred in holding that expert testimony was required to establish the proximate cause of Coit's death.

Held: Affirmed.

Finding the circuit court's analysis to be thorough and well-reasoned, the Court of Special Appeals affirmed the grant of summary judgment and adopted the circuit court's written decision and order as its opinion.

Sufficiency of Evidence – Summary Judgment: Pursuant to Maryland Rule 2-501(f), a "court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party … is entitled to judgment as a matter of law." Recognizing that a claim for gross negligence "sets the evidentiary hurdle at a higher elevation[]" than a claim for negligence, the Court explained that in order to claim that a party has acted with gross negligence, it must be pled that the party acted with wanton and reckless disregard for the rights of others. *Beall v. Holloway-Johnson*, 446 Md. 48, 64 (2016). It is more than the failure to perform a duty, but "an intentional failure to perform a manifest duty in reckless disregard of the consequences …." *Barbre v. Pope*, 402 Md. 157, 187 (2007).

Having compared the pre-arrival and post-arrival conduct of Paramedic Nappi and EMT Jackson to the conduct of the emergency responders in *Tatum v. Gigliotti*, 80 Md. App. 559 (1989) and *McCoy v. Hatmaker*, 135 Md. App. 693 (2000), the Court concluded that their conduct could not have been willful or grossly negligent.

The Court determined that there was no dispute of material fact with respect to their arrival time, and there was no evidentiary basis to support their pre-arrival conduct, in having arrived in under seven minutes, as being willful or grossly negligent. Further, it determined that there was insufficient evidence to support any post-arrival conduct in their assessment and treatment of Coit as being willful or grossly negligent. Their failure to run to the patient was not "abandoning" him, rather, it was for their safety because they would not be able to render the patient aid if they were to become injured while running to him. Furthermore, notwithstanding of how unnecessary the administration of Narcan might have been in retrospect, Narcan does not otherwise harm someone administered with it.

Emergency Responder Immunity: Pursuant to Maryland Code, Courts & Judicial Proceedings Article § 5-603 ("Good Samaritan Act") and § 5-604 ("Fire & Rescue Companies Act"), in the absence of willful or grossly negligent conduct, emergency responders covered under the Good Samaritan Act and/or the Fire & Rescue Companies Act are immune from civil liability for any acts or omissions in providing assistance or in the performance of their duties.

The Court concluded that there was insufficient evidence support Paramedic Nappi and EMT Jackson's pre-arrival and post-arrival conduct as being willful or grossly negligent. And, because Paramedic Nappi and EMT Jackson were employees of the Baltimore County Fire Department, the Court determined that both Paramedic Nappi and EMT Jackson were entitled to immunity for the claims against them under the Good Samaritan Act and the Fire & Rescue Companies Act.

Baltimore County Immunity: The Local Government Tort Claims Act (LGTCA) of the Courts & Judicial Proceedings Article, §§ 5-301, *et seq*., governs claims and lawsuits against local governments. The direct claims asserted against Baltimore County were for the conduct of its

employees and for its failure to have policies in place, requiring the emergency responders to notify dispatch of any delay in responding.

Finding that there was insufficient evidence to support a delayed response by Paramedic Nappi and EMT Jackson or that the existence of a delayed-response policy would have resulted in a different outcome, the Court determined that there was no legal or factual basis for a direct claim of liability against Baltimore County for its failure to have a delayed-response policy in place. As a result, the County was entitled to governmental immunity under the LGTCA.

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Paul Asmussen v. CSX Transportation, Inc., No. 814, September Term 2019, filed September 10, 2020. Opinion by Kehoe, J.

https://www.courts.state.md.us/data/opinions/cosa/2020/0814s19.pdf

PRETRIAL PROCEDURE – SCHEDULING ORDERS – AMENDMENT OR MODIFICATION

PRETRIAL PROCEDURE – PRETRIAL MOTIONS – FAILURE TO IDENTIFY EXPERT WITNESSES

JUDGMENT – ON MOTION OR SUMMARY PROCEEDING – NATURE OF SUMMARY JUDGMENT

Facts:

Paul Asmussen sued his former employer CSX Transportation, Inc. under the Federal Employers' Liability Act and alleged that his cancer was caused by exposure to toxic agents while he was working for the company. Because this case concerned whether the toxins caused Mr. Asmussen's cancer, expert witnesses were required. The circuit court's scheduling order required Mr. Asmussen to designate his expert witnesses by October 10, 2018. It also set a discovery deadline for March 11, 2019.

On October 10, Mr. Asmussen's counsel delivered his expert witness designations, but they were overly broad and lacked specificity as to which of the designated experts would actually testify and their respective subject matters. CSX asked Mr. Asmussen to clarify these issues.

About a month later, Mr. Asmussen stated that two of his expert witnesses—Drs. Regna and Dahlgren—would testify that Mr. Asmussen's exposure to the toxic agents caused his cancer. And a third expert witness—Dr. Runz—would testify to Mr. Asmussen's cancer treatment and the costs associated with it.

On January 22, 2019, Mr. Asmussen sent an email to CSX proposing dates for Drs. Regna's and Runz's depositions. In the same email, Mr. Asmussen withdrew Dr. Dahlgren as an expert witness. CSX and Mr. Asmussen then agreed to schedule Dr. Regna's deposition for February 22, and Dr. Runz's deposition for February 27.

Dr. Regna's deposition revealed that he lacked the background, education, training, and experience to qualify him as an expert on the cause of Mr. Asmussen's cancer. CSX asked Mr. Asmussen to voluntarily dismiss the case. Mr. Asmussen, however, refused to do so.

With less than two weeks until the close of discovery, Mr. Asmussen told CSX that he would now rely on Dr. Dahlgren's testimony regarding the cause of his cancer, despite having previously withdrawn him as an expert witness. Mr. Asmussen also assured CSX that Dr.

Dahlgren would be made available for deposition before the close of discovery on March 11. But he failed to follow through on this promise.

Issues also arose surrounding Dr. Runz's deposition. Mr. Asmussen's lawyers never notified Dr. Runz of the February 27 deposition date. Mr. Asmussen requested that the deposition be pushed back to March 8. But once again, his lawyers failed to coordinate with Dr. Runz, who could not attend because he was scheduled to perform surgery on that day.

Running out of time, Mr. Asmussen moved to modify the scheduling-order deadline on March 11, i.e., the last day of discovery. CSX opposed the motion, arguing Mr. Asmussen lacked good cause for the modification because it was his carelessness that prevented the timely deposition of both doctors. CSX then moved to strike Drs. Dahlgren and Runz as expert witnesses. And later, CSX filed a motion for summary judgment, asserting that Mr. Asmussen could not meet the causation element of his claim on the basis that, without the doctors' testimony.

The circuit court denied Mr. Asmussen's motion to modify, granted CSX's motions to strike Drs. Dahlgren and Runz as expert witnesses, and granted CSX's motion for summary judgment. Mr. Asmussen appealed the circuit court's judgment.

Held:

The Court of Special Appeals affirmed the judgment of the circuit court. The Court held that the circuit court did not abuse its discretion when it denied Mr. Asmussen's request to modify the scheduling order, nor when it struck Dr. Dahlgren as an expert witness. Finally, the court did not err when it granted CSX's motion for summary judgment.

The Court recognized that scheduling-order deadlines are not "unyieldingly rigid" and that a court "shall" modify an order to "prevent injustice" under Md. Rule 5-504(c). But it noted that a modification to "prevent injustice" is appropriate only when the moving party has substantially complied with the order and has shown good cause for its modification.

The Court explained that a trial court's decision to modify a scheduling order was conceptually similar to deciding whether to grant a motion to strike a witness because both decisions either accommodate or refuse to accommodate the moving party's failure to meet the scheduling order's stated deadline. And this is true regardless of whether the issue is analyzed under the analytical template articulated by the Court of Appeals in *Taliaferro v. State,* 295 Md. 376 (1983), or in terms of substantial compliance and good cause.

The Court held that Mr. Asmussen had not substantially complied with the scheduling order because he failed to make Drs. Dahlgren and Runz available for depositions. He also failed to show good cause for the order's modification because the failure to depose either doctor was a product of his own carelessness. Application of the *Taliaferro* factors yielded the same results.

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The Court also held that the circuit court did not abuse its discretion in striking Dr. Dahlgren as an expert witness.

Finally, the Court held that summary judgment for CSX was proper because without Dr. Dahlgren's expert testimony Mr. Asmussen could not prove an essential element of his claim, i.e., the cause of his cancer.

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ATTORNEY DISCIPLINE

*

By a Per Curiam Order of the Court of Appeals dated October 6, 2020, the following attorney has been disbarred:

NICHOLAS G. KARAMBELAS

*

By an Order of the Court of Appeals dated October 13, 2020, the following attorney has been disbarred by consent:

WILLIAM FRANKLIN BURTON

*

By an Order of the Court of Appeals dated October 13, 2020, the following attorney has been placed on inactive status by consent:

VANDY L. JAMISON, JR.

*

By an Order of the Court of Appeals, dated October 30, 2020, the following attorney has been disbarred by consent:

ARTEMIO RIVERA

*

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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