Amicus Curiarum

VOLUME 38
ISSUE 3 MARCH 2021

A Publication of the Office of the State Reporter

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https://mdcourts.gov/data/opinions/cosa/2021/2347s19.pdf

JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISION – PROCEDURES FOR REVIEW – TRANSMISSION OF RECORD

Facts: Amy Brown worked for the Washington Suburban Sanitary Commission ("WSSC") until WSSC terminated her employment. She challenged her termination within WSSC unsuccessfully, then appealed. The Office of Administrative Hearings ("OAH") held a hearing and upheld WSSC's decision to terminate her. Ms. Brown filed a petition for judicial review in the Circuit Court for Prince George's County. WSSC moved to dismiss the petition on the ground that the OAH hearing record had not been transmitted to the circuit court. The circuit court granted WSSC's motion to dismiss.

Held: Reversed and remanded for further proceedings.

The Court of Special Appeals reversed. Maryland Rule 7-206 requires the agency to transmit the record to the circuit court for judicial review of its decision, but the agency in this case was the WSSC, not the OAH, as both parties had erroneously assumed. Upon receiving notice of the petition from the circuit court, Rule 7-206(d) requires "the agency" to transmit to the circuit court the original or a certified copy of the record, which consists of papers that were part of the administrative proceedings, including transcripts. Rule 7-206(b) allows the agency to charge the petitioner with the cost of obtaining any transcripts.

But in this case, both Ms. Brown and WSSC appeared to assume, mistakenly, that OAH is the "agency." They conflated the responsibility to transmit the record under Rule 7-206(d) and the responsibility to order and pay for transcription of the OAH hearing transcript under Rule 7-206(b). Specifically, Ms. Brown argued that the circuit court shouldn't have dismissed her petition because OAH never received notification of it (the notice went to WSSC), and thus was unable to transmit the record to the circuit court or notify Ms. Brown of transcription costs.

WSSC argued that it was Ms. Brown's responsibility to secure not only the transcript but also the entire record from OAH.

But the agency is the initial decisionmaker. The Office of Administrative Hearings, an entity that often reviews administrative agency decisions, is not an agency itself, but is a neutral arbitrator for administrative agency decisions. In this case, WSSC was the initial decisionmaker, and it was therefore WSSC's responsibility to transmit the record to the circuit court under Rule 7-206, and it was also WSSC's responsibility to notify Ms. Brown, the petitioner, that it would require her to obtain and pay for transcripts in time for WSSC to transmit the record to the circuit court. Because that did not happen here, the circuit court erred in dismissing the petition.

Enoch Silver, III v. Greater Baltimore Medical Center, Inc., et al., No. 3491, September Term 2018, filed December 21, 2020. Opinion by Kehoe, J.

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

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Facts:

Enoch Silver sued Greater Baltimore Medical Center, Medstar Union Memorial Hospital, and The Johns Hopkins Hospital for violating Md. Code, Health Gen. § 4-304. He alleged that the hospitals violated the statute by charging him excessive and unreasonable fees for copies of his medical records. He requested damages and injunctive relief and also sought class action certification for each class.

The circuit court denied both requests for certification. Silver's proposed damages class encompassed all patients of the hospitals who had paid for medical records from the hospitals from September 2013 through the date of trial. The court concluded that Silver's proposed damages class satisfied the "numerosity" and "typicality" requirements of Md. Rule 2-231(b) and assumed for purposes of analysis that the proposed class satisfied the "commonality" criterion as well. However, the court decided that the proposed damages class failed to satisfy the "predominance" and "superiority" requirements under Md. Rule 2-231(c). The court noted that the hospitals used fee schedules that varied over time and from one another and also varied according to the type of record, the number of copies, the formats in which the records were stored, whether the records were requested by the patient or by a lawyer and the means and the medium by which the copies were to be delivered. The court concluded that these variables would have to be addressed on an individual basis and that "these individual inquiries would overwhelm any common questions" presented by Silver.

The circuit court also declined to certify the proposed injunctive-relief class. In explaining why, the court noted that the primary purpose of a Md. Rule 2-231(c)(2) class action is nonmonetary relief. The court also noted the theoretical possibility of a "hybrid class action," in which a class could be certified under more than one section of Md. Rule 2-231(c). But because a damages class could not be certified under Md. Rule 2-231(c)(3), the court said, "a hybrid class action shall not be considered." Without appearing to consider the possibility of a non-hybrid class—

that is, a class seeking purely injunctive relief, certified under Md. Rule 2-231(c)(2) alone—the court decided Silver's proposed injunctive-relief class could not be certified.

On appeal, Silver argued that the court abused its discretion in denying his motions for class certifications. He asserted that the class action for damages satisfied the predominance and superiority standards under Md. Rule 2-231(c)(3). The common question that predominated, Silver asserted, was that each class member was charged unreasonable fees for their medical records. And a class action for damages was the superior method of litigating the issue because the type and size of relief sought make individualized claims impracticable or impossible. Silver also argued that the class action for injunctive relief should have been certified under Md. Rule 2-231(c)(2) because the hospitals were still overcharging members of the class, in violation of Maryland law.

Held: Affirmed in part, vacated in part, and remanded.

The Court of Special Appeals held that the circuit court did not abuse its discretion in denying Silver's request to certify a damages class but that the reason for the court's denial of certification for the injunctive relief class was incorrect.

As to the class action for damages under Md. Rule 2-231(c)(3), the Court first noted that for a common question to predominate over the class, a shared question in the abstract is not enough. Rather, that question must be "susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The Court found that Silver's proposed damages class failed to meet the predominance requirement for many of the same reasons that had been identified by the circuit court.

The Court also noted that Silver's argument that a class action for damages was the superior method to litigate the case because the claimants could not otherwise vindicate their rights otherwise was not persuasive. The court concluded that Silver could have defined the proposed damages class more narrowly or have proposed subclasses but that Silver had not done so.

The court further held that the circuit court did not abuse its discretion by declining to divide the damages class into sub-classes in the absence of a request from Silver to do so.

Next, the appellate court disagreed with the circuit court's reasons for denying certification to Silver's proposed injunctive relief class. The circuit court treated Silver's proposed injunctive relief class as a "hybrid class," i.e., a class seeking both monetary and injunctive relief. But Silver did not propose a hybrid class; the only remedy he sought for the injunctive relief class was an injunction.

Finally, the Court declined to address arguments presented by both parties as to alternative reasons "why certification of an injunctive relieve class [would be] appropriate (Silver) or inappropriate (the hospitals)." This was because "[t]he decision whether to certify a class is discretionary, entrusted to the circuit court's sound judgment and based on a variety of factors

with which the circuit court is much more familiar than we are." The appellate court's role "is to review the circuit court's exercise of this discretion for abuse—not to exercise that discretion on the circuit court's behalf."

Clark Office Building, LLC v. MCM Capital Partners, LLLP, et al., No. 544, September Term, 2019, filed January 29, 2021. Opinion by Deborah S. Eyler, J.

https://mdcourts.gov/data/opinions/cosa/2021/0544s19.pdf

UNJUST ENRICHMENT - RESTITUTION - QUASI-CONTRACT – CLAIM AGAINST STRANGER TO CONTRACT FOR RESTITUTION BASED ON UNJUST ENRICHMENT FOR MONEY NOT PAID BY CONTRACTING PARTY - SECTION 25, *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (2011).

Facts:

For three months, Tenant failed to pay rent under commercial lease, and allowed Occupants to use at least part of the premises, for free. Tenant and Occupants vacated the premises and Tenant surrendered the premises to Clark, the lessor. Clark sued Tenant for breach of contract for unpaid rent for the remainder of the lease term, which included the period that Occupants occupied the premises, and sued Occupant for unjust enrichment, seeking to recover the benefit to Occupants of its use and occupancy of the premises for three months. In a bench trial, Clark recovered against Tenant on the contract claim, but lost primarily on legal grounds on the unjust enrichment claim against Occupants. Clark appealed verdict in favor of Occupants. Tenant did not appeal.

Held: Affirmed.

Trial court incorrectly ruled that, as a matter of law, a party to a contract (Clark) cannot recover restitution for unjust enrichment against a non-party to the contract (Occupants) that was benefitted by the other party's (Tenant's) breach of the contract when the subject matter of the contract and the unjust enrichment claim are the same (payment for use of premises). Nevertheless, Clark could not recover restitution against Occupants, as a matter of law, for two reasons: 1) any enrichment enjoyed by Occupants was conferred upon them by Tenant, not Clark; and 2) any such enrichment was not unjust because, among other reasons, Clark was able to pursue and obtain a judgment against Tenant for the same value of the premises during the same time that Occupants used them.

Christopher Eric Glanden v. State of Maryland, Nos. 1114, 1871, 1872, & 1873, September Term 2019, filed February 5, 2021. Opinion by Shaw Geter, J.

https://mdcourts.gov/data/opinions/cosa/2021/1114s19.pdf

SEARCHES AND SEIZURES – IN GENERAL – PLAIN VIEW FROM LAWFUL VANTAGE POINT

CONTROLLED SUBSTANCES – OFFENSES – DEFENSES – MEDICAL NECESSITY OR ASSISTANCE

Facts:

Christopher Glanden, appellant, was arrested and charged with possession with intent to distribute Fentanyl after a large quantity of drugs were found in his possession during an incident in which his mother had called 911 seeking medical assistance for his suspected drug overdose. Prior to trial, appellant filed a motion to suppress, which the circuit court denied without holding an evidentiary hearing. Appellant was ultimately convicted. He timely filed an appeal.

While that appeal was pending, appellant was charged with violating his probation in three other criminal cases. The State alleged that, in each of the three criminal cases, appellant had violated certain conditions of his probation, namely, that he obey all laws, that he abstain from possessing, using, or selling a controlled dangerous substance, and that he totally abstain from alcohol, illegal substances, and abuse of prescription drugs. As evidence of those violations, the State presented a certified copy of appellant's conviction of possession with intent to distribute Fentanyl.

Before the circuit court accepted the certified conviction into evidence, appellant moved to exclude the conviction from the court's consideration. He argued that the conviction could not serve as the basis for a finding that he violated his probation because such a finding was prohibited by Section 1-210(d) of the Criminal Procedure Article ("CP") of the Maryland Code (Maryland's "Good Samaritan" statute), which prohibited an individual from being sanctioned for a violation of probation if the evidence of the violation was obtained solely as a result of the person seeking medical assistance for a drug overdose.

The court ultimately denied the motion and accepted the certified copy of appellant's conviction into evidence. The court then found that, in each of the three cases, appellant had violated his probation as a result of his conviction for possession with intent to distribute Fentanyl. Appellant noted an appeal of all three judgments. Those appeals were later consolidated into his then-pending direct appeal of his conviction for possession with intent to distribute Fentanyl.

In an unreported opinion, this Court held that the circuit court had erred in not conducting a hearing on appellant's motion to suppress. *Glanden v. State*, 2019 WL 1306341 (filed March 21, 2019). We remanded the case with instructions that the court hold a suppression hearing.

At the suppression hearing that followed, Sergeant Brian McNeill of the Federalsburg Police Department testified that, on July 29, 2016, he responded to the home of Eva Eason, appellant's mother, after receiving a call for a possible cardiac arrest. Upon arriving at the home, Sergeant McNeill spoke to Ms. Eason, who reported that her son had suffered a possible overdose. Sergeant McNeill then went to one of the home's bedrooms, where he encountered appellant, who was "conscious and alert." Upon entering the bedroom, Sergeant McNeill observed "two tennis shoes" on the floor and that appellant was standing, barefoot, next to the tennis shoes. Sergeant McNeill then observed that inside one of the tennis shoes there appeared to be a "bundle" of suspected heroin packets that had been "manicured and banded together with a rubber band." Sergeant McNeill later secured the tennis shoes containing the suspected heroin and relayed that information over his police radio.

Federalsburg Police Officer Michael Stivers testified that he had also responded to the Eason home on July 29, 2016, and that he had been responsible for escorting appellant outside to an awaiting ambulance shortly after appellant's initial interaction with Sergeant McNeill. According to Officer Stivers, after he and appellant reached the ambulance, he asked appellant to "face the back door of the ambulance" so that he could "check him for any kind of weapons before he got in the ambulance." As he was standing directly behind appellant, Officer Stivers observed "a very big bulge inside the pocket" of appellant's shorts. Officer Stivers testified that the pocket was "bulged open" and that he could "see some white baggies, which turned out to be waxfolds." Officer Stivers then reached into appellant's pocket and "retrieved the suspected CDS." Officer Stivers testified that he did not conduct a pat down or "feel the bulge;" instead, he "just reached into the pocket and grabbed the bulge." Officer Stivers added that he seized the bulge because appellant's pocket was "open" and the "white wax folds" of "suspected heroin" could be seen inside the pocket.

At the conclusion of the suppression hearing, the circuit court found that both officers had sufficient probable cause to conduct a warrantless search of appellant's person and property. The court stated that, when Sergeant McNeill went into appellant's bedroom, "he found [appellant] standing and tennis shoes with waxed envelopes typically used in heroin distribution." The court stated further that, when Officer Stivers was standing behind appellant at the rear of the ambulance, "he could look in the pocket, see a bulge and see wax papered folds commonly known to be used by people who sell, distribute, or keep heroin or Fentanyl or that type of drug." Based on those findings, the court denied appellant's motion to suppress.

On appeal, appellant raised two issues: 1) whether the circuit court erred in denying the motion to suppress; and 2) whether CP § 1-210 immunized him from sanctions for violations of probation resulting from his conviction for possession with intent to distribute Fentanyl.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err in denying appellant's motion to suppress. The Court reasoned that, at the time the drugs were found, the officer was in a lawful vantage point; the incriminating character of the drugs was immediately apparent; and, because the drugs were in plain view, the officer had a lawful right of access to the drugs. The Court also rejected appellant's arguments that Officer Stivers' testimony was "entirely implausible" and that the search was unreasonable because it occurred during an "unlawful pat-down." The Court concluded that the circuit court was within its discretion in crediting Officer Stivers' testimony that he did not conduct a pat-down but rather was preparing to conduct the pat-down when he observed the drugs in plain view.

The Court also held that CP § 1-210(d) did not immunize appellant from sanctions for violations of his probation resulting from his conviction of possession with intent to distribute Fentanyl. The Court explained that, although the statute prohibits an individual from being sanctioned for a violation of probation if the evidence of the violation was obtained solely as a result of the person seeking medical assistance for a drug overdose, such evidence did not serve as the "sole" basis for the violations of probation in appellant's case. The Court noted that, in finding that appellant had violated his probation, the circuit court did not consider the facts underlying the conviction; instead, the court relied solely on a certified copy of the conviction. The Court noted further that possession with intent to distribute Fentanyl is not one of the enumerated crimes for which an individual is provided immunity from prosecution under CP § 1-210(b) and (c). The Court decided that, because the protections provided by CP § 1-210(d) were intended as an extension of the protections provided by CP § 1-210(c), allowing appellant to receive the benefits of CP 1-210(d) for a crime that the legislature expressly excluded from CP 1-210(b) would be contrary to the legislature's intent.

Damian Gerety v. State of Maryland, No. 2349, September Term, 2019; *Briana Antkowiak v. State of Maryland*, No. 2365, September Term 2019, filed February 24, 2021. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2021/2349s19.pdf

CRIMINAL PROCEDURE – CONTROLLED SUBSTANCES – DEFENSES – MEDICAL NECESSITY OR ASSISTANCE

CRIMINAL PROCEDURE – CONTROLLED SUBSTANCES – DEFENSES – ATTENUATION

Facts:

On October 23, 2019, around 6:30 p.m., a man called 911 from the parking lot of a Dunkin Donuts on Camp Meade Road in Linthicum Heights. He told the dispatcher that a man and a woman were inside a parked SUV and appeared to be "either sleeping or they are really highed out." An Anne Arundel County police officer responded to the Dunkin Donuts for a "report of a check a sick or injured subject." Emergency medical technicians from the fire department were on the scene already. An EMT advised the officer that the SUV was no longer in the parking lot, but believed it had moved to a parking lot across the street, the lot serving a Checkers restaurant. The officer responded to that location and discovered two people, later identified as Damian Gerety and Briana Antkowiak, in the front seats of an SUV.

The officer asked if they needed medical assistance and both parties responded "No." The officer ran Mr. Gerety's name (and a false name provided by Ms. Antkowiak) through computer databases, and discovered that Mr. Gerety had outstanding warrants for his arrest. The officer returned to the SUV, directed Mr. Gerety to step out, and placed him under arrest. The officer conducted a full search of the SUV and discovered a number of controlled substances.

In cases consolidated in the Circuit Court for Anne Arundel County, Mr. Gerety and Ms. Antkowiak each pleaded not guilty on an agreed statement of facts to one such crime—possession of heroin—then moved for judgment of acquittal, arguing that they were immune from prosecution for the charges under Maryland's Good Samaritan Law (Maryland Code (2002, 2018 Repl. Vol.), § 1-210 of the Criminal Procedure Article ("CP")) because the drug evidence was seized "solely as a result of" a call for medical assistance made by a bystander. The circuit court denied the motions, convicted each of the single charge, and sentenced each to time served.

Held: Reversed.

The Court of Special Appeals reversed. To qualify for immunity under CP § 1-210(c), a defendant must satisfy three elements, all of which were satisfied here. First, the 911 caller reasonably believed that Mr. Gerety and Ms. Antkowiak were experiencing a medical emergency. Second, Mr. Gerety and Ms. Antkowiak were charged with one of the enumerated criminal violations. Third, the evidence supporting the arrest, charge, or criminal prosecution was "obtained solely as a result" of Mr. Gerety and Ms. Antkowiak seeking medical assistance. The State contended that the drugs seized from the SUV were not obtained solely as a result of their receipt of medical assistance because the police searched the vehicle only after Mr. Gerety was arrested on outstanding warrants. The State argued that the search after the arrest broke the causal chain between the 911 call and the evidence supporting the possession charge. The Court of Special Appeals rejected that argument and held that immunity from prosecution under CP § 1-203(c) is not attenuated or otherwise eliminated by the fact that the person possessing heroin had outstanding warrants that were discovered during the encounter with police. Mr. Gerety and Ms. Antkowiak were immune from prosecution under the Good Samaritan Law because the police were present at the scene, and discovered them and the drugs, solely as a result of a 911 call by a passer-by.

Kirk Matthews v. State of Maryland, Case No. 3280, September Term 2018, filed February 25, 2021. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2021/3280s18.pdf

EXPERT WITNESSES – RULE 5-702(3) – ANALYTICAL GAP UNBRIDGED

Facts:

On June 1, 2017, at approximately 12:30 a.m., the bodies of Linda McKenzie and Leslie Smith, her boyfriend, were found by the side of Scott Town Road, a dead-end street in Shady Side. The cause of death for both was multiple shotgun wounds to the upper extremities at close range. After a lengthy jury trial in the Circuit Court for Anne Arundel County, at which the only disputed issue was the identity of the shooter, Kirk Matthews was convicted of two counts each of second-degree murder and use of a firearm in the commission of a crime of violence and one count each of possession of a shotgun after a disqualifying conviction and illegal possession of ammunition. On appeal he argued, among other things, that the circuit court erred in denying his motion to preclude an expert report and testimony using photogrammetry and reverse photogrammetry projection.

Held: Reversed and remanded for further proceedings.

Mr. Matthews had filed a motion *in limine* to preclude the testimony and report of Kimberly Meline and Jenna Walker, an FBI physical scientist and her trainee, in which they used photogrammetry and reverse photogrammetry projection to identify the shooter from contemporaneous videos. He argued that allowing the testimony and report of Ms. Meline would violate Rules 5-702 and 5-403, the then-prevailing *Frye-Reed*[1] standard, and the due process and fair trial rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 24 of the Maryland Declaration of Rights.

At a pre-trial hearing, Ms. Meline explained that reverse photogrammetry projection involves going back to a scene, recreating the image conditions, and then placing a calibrated measuring device where the subject was standing as a way of determining how tall the person was. Ms. Meline explained that to estimate the shooter's height, she had identified an image from the surveillance camera on a house near to the place where the shooting had occurred. The camera had not captured video of the shooting itself, but it had captured video of an individual walking on the street, carrying what appears to be a shotgun, cutting past the house and into the woods.

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Reed v. State*, 283 Md. 374 (1978).

Based on her reverse photogrammetry projection analysis, Ms. Meline estimated the suspect's height as 5′8″, with a margin of error of plus or minus 0.67 of an inch. Ms. Meline also identified "incalculable uncertainties" such as the quality of the image (it was taken at night), the unevenness of the terrain, the body position of the individual, the inability to see his feet, and the head covering the individual was wearing. Ultimately, the expert undermined her calculation by acknowledging that there was no scientific way to calculate the actual uncertainty, and that the margin of error could be significantly greater due to the "far from pristine" circumstances of this case. And the height mattered: one witness had testified that the man she saw walking past her house with a gun was 5′11″ or taller, white, and in his mid-20s; Mr. Matthews is African-American and was 5′8″, and the contemporaneous videos weren't clear enough to allow a distinction even between these two possible suspects.

The Court of Special Appeals held that the expert photogrammetry and reverse photogrammetry projection testimony was unreliable, and failed to satisfy Maryland Rule 5-702(3), where the expert's seemingly precise calculation of the suspect's height failed to account for missing and potentially significant input variables. As a result, the analytical gap between the data available for reverse photogrammetry projections and the conclusion the expert offered to the jury remained unbridged, and the trial court erred by admitting the testimony over objection.

Joshua Maddox v. State of Maryland, Nos. 990 and 996, September Term 2019, filed February 24, 2021. Opinion by Zarnoch, J.

https://mdcourts.gov/data/opinions/cosa/2021/0990s19.pdf

STATUTES – STATUTORY INTERPRETATION – CONSEQUENCES

CRIMINAL PROCEDURE – STATUTORY INTERPRETATION – EXTENSION OF PROBATION FOR RESTITUTION

Facts:

In April 2010 Maddox entered *Alford* pleas to second degree arson in two separate cases. The court imposed 24 months of probation subject to the condition that Maddox pay restitution. Maddox began his probation in March 2013, but was unable to make timely restitution payments. Maddox consented to an extension of his probation for an additional three years to March 2018 to continue to make restitution payments. Maddox again failed to make restitution payments, and after a hearing in May 2018, Maddox consented to another three-year extension of his probation under Maryland Code, § 6-222(b) of the Criminal Procedure Article to March 2021.

In ordering the second extension, the court imposed both standard and special conditions of probation. Maddox was charged with violating his probation in June 2019 when he was charged with new offenses.

Maddox filed a motion to correct an illegal sentence in June 2019, arguing that the court lacked the authority to impose conditions of probation when his probation was extended, other than that he pay restitution. The court denied the motion, reasoning that Crim. Proc. § 6-222(b) provides the court the discretion to impose conditions of probation to ensure the purpose of repaying restitution is fulfilled. This timely appeal followed.

Held: Reversed and remanded.

The Court of Special Appeals held that Crim. Proc. § 6-222(b) does not permit the circuit court to impose any conditions of probation other than to make restitution payments and not to hinder supervision of those payments.

The statute provides that the circuit court can extend probation for three years "for the purpose of making restitution." To the extent that the parties have contrary views of the meaning of "purpose," and how to achieve the purpose of making restitution, the Court considered the phrase in light of the remainder of the statute and the legislative history.

Crim. Proc. § 6-222 provides two opportunities for the court to extend probation. Under subsection (b), the court can extend probation beyond the initial term of probation "for the purpose of making restitution." Under subsection (c), the court may again extend probation, however, the defendant must consent in writing and the extension is "only for making restitution."

The legislative history indicates that Crim. Proc. § 6-222(b) initially included the limitation that probation could be extended "only for the purposes of making restitution." The Legislature amended the statute in 2003 to include subsection (c) to permit a second extension with the defendant's consent. The Legislature amended the statute again in 2005 and removed the limiting language "only" in subsection (b). It is clear this amendment was not intended to express a substantive change in the interpretation of the statute.

The Court rejected the State's argument that Crim. Proc. § 6-222(b) does not limit the court's authority to impose conditions of probation that are "conducive to achieving the legislature's intent." The Court recognized that Crim. Proc. § 6-222 was enacted to provide judicial oversight to ensure repayment, but does not provide the court unbridled authority to impose any condition that might be conducive to achieving repayment of restitution.

The Court determined that under Crim. Proc. § 6-222(b), the circuit court does not have the authority to impose any conditions of probation other than to make restitution payments and not to hinder supervision of those payments. The Court concluded that it is illogical and contrary to the text of the statute to revoke probation or sanction a probationer for violating a condition other than making restitution payments or engaging in restitution-related misbehavior in supervised probation.

Maryland Property Management, LLC, et al., v. Helena Peters-Hawkins, et vir., No. 278, September Term 2019, filed January 28, 2021. Opinion by Salmon, J.

https://mdcourts.gov/data/opinions/cosa/2021/0278s19.pdf

LANDLORD AND TENANT – APPEAL AND ERROR – TRIAL

Facts:

Helen Peters-Hawkins and her husband, Charles Hawkins, filed a suit in the Circuit Court for Baltimore City against the following appellants: Maryland Properties Management, ANT Properties and Ted Thornton, who was the managing partner of Maryland Management. The last named company managed, on behalf of ANT Properties, a house that was later rented to Mr. and Mrs. Hawkins. The complaint contained two counts. Count 1 alleged a violation by all three appellants of Md. Code (2015 Repl. Vol.), Real Property Article (RP), § 8-216(b), which reads, in material part, as follows:

> *In general*. – (1) Except as provided in paragraph (2) of this subsection, a landlord may not take possession or threaten to take possession of a dwelling unit from a tenant or tenant holding over by locking the tenant out or any other action, including willful diminution of services to the tenant.
>
> (2) A landlord may take possession of a dwelling unit from a tenant or tenant holding over only:
>
> (i) In accordance with a warrant of restitution issued by a court and executed by a sheriff or constable; or
>
> (ii) If the tenant has abandoned or surrendered possession of the dwelling unit.

Section 8-216(a)(2) defines the words "threaten to take possession" as "using words or actions intended to convince a reasonable person that the landlord intends to take imminent possession of the property in violation of this section."

Another surviving count in the complaint alleged a cause of action for common law conversion against all three appellants.

After extensive discovery was completed, the case was tried before a jury over a three-day period in the Circuit Court for Baltimore City. The jury found in favor of both plaintiffs and against all three defendants as to both counts. In regard to the violation of the statute, the jury awarded economic damages of $3,000.00 and awarded non-economic damages of $10,000.00 to Mrs. Hawkins and $5,000.00 to Mr. Hawkins. In regard to count II, the conversion count, the jury awarded the plaintiffs $10,000.00.

Evidence introduced at trial showed that the Hawkins's rented a house from Maryland Management, acting as agent for the owner, ANT Properties, in November 2016. The tenants

did not pay the June 2017 rent when due and as a consequence, Maryland Properties filed an eviction action in the District Court of Maryland for Baltimore City against Mr. and Mrs. Hawkins. Mrs. Hawkins responded by filing a rent escrow action against Maryland Management claiming that numerous serious violations existed at the house that had been rented. On September 26, 2017, a hearing was held in the district court regarding the rent escrow issue. The judge ruled that if the tenant paid into escrow two months back rent then the eviction, which had been scheduled for October 4, 2017, would be cancelled. The tenants, however, elected to pay nothing into escrow and the eviction remained as scheduled. According to Mrs. Hawkins, sometime between September 27 and October 2017, Mr. Thornton visited the rental property and expressed the view that Mrs. Hawkins shouldn't have filed the rent escrow case without having first talked to him. He then said, "well, if you drop the rent escrow case, any money [or] whatever that you owe it'll be gone. And we can start over." He then inquired: "Do you have that $1,500 on you like right now[?]" She replied in the negative, but Mr. Thornton reiterated that if she paid him $1,500 immediately then everything would "go away. You don't have [to go to] the court, why would you want to involve the courts."

Mrs. Hawkins turned down the offer and said that she would rather leave the situation the way it was. This caused Mr. Thornton to become very upset. He said, "I want you and your family the f*** out of my house, I want y'all out of here."

Mr. Thornton next said that when he got back to his office on Monday, he was going to talk to people there and was going to find out "what's going on." Mr. Thornton then said that he had "people watching" her and that if she "didn't give him the money . . . he was going to come in the house, he was going to remove my stuff, he was going to take my stuff, it's going to get ugly." Mr. Thornton added that he had lawyers and money, unlike her. He also expressed the view that she couldn't afford a lawyer and that she didn't know who she was dealing with.

The next day, after Mr. Thornton had a chance to go back to his office, he phoned Mrs. Hawkins and said "[y]ou're a f***ing liar. You lied. You never called my office. . . . [N]o one []ever spoke to you, I want you and your family the f*** out of here, and I want y'all out of here today." He then reiterated that she didn't know who she was "messing with." The phone call with Mr. Thornton scared Mrs. Hawkins. Because of these two encounters with Mr. Thornton, she called her son and her nephew and told them that she didn't want them to come to her house to "chill out" because she didn't know if Mr. Thornton was "going to pop up because he already told me that somebody [was] watching, he was going to come in and take my stuff . . . and I believed him."

On a date between September 26, 2017 and October 4, 2017, a man showed up at her doorstep, identified himself as "Mr. Williams," and said he was sent there by Mr. Thornton to fix "all the stuff that was wrong with the house." Mr. Williams also told her that he had been instructed by Mr. Thornton "to retrieve the key to the house from [her], because [she] was getting evicted anyway because he [Mr. Thornton] wanted [her] out of his house." She complied and gave a key to him.

The plaintiffs produced sufficient evidence, if believed, to show that prior to the eviction by the sheriff, the defendants, or their agents, removed, and never returned the furniture and other property that the plaintiffs had left at the rental property but had intended to have picked up prior to the eviction. The value of that property was about $2,600.00. After the jury returned its verdict, the plaintiffs filed a motion for new trial and a motion for J.N.O.V. Both motions were denied. The plaintiffs then filed a petition for attorney fees, which, after a hearing was granted and the court awarded the plaintiffs $66,880.00 in attorney's fees and $1,713.39 in costs.

Held: Affirmed in part and reversed in part.

On appeal, ANT contended that the trial judge erred in failing to grant its motion for judgment notwithstanding the verdict because, purportedly, the defendants had produced no evidence that ANT was the "landlord" as that term is used in RP § 8-216. This contention was rejected. The proof showed that ANT was the owner of the property that the Hawkins' leased and, using the definition of "landlord" as set forth in two modern dictionaries, the word landlord and "owner" are synonymous. The defendants also contended on appeal that there was no evidence from which a jury could have inferred that the necessary elements of the cause of action set forth in RP § 8-216 had been proven. That contention was also rejected. The Court of Special Appeals held that there was sufficient evidence that Mr. and Mrs. Hawkins had been "locked out" of the rental premises within the meaning of RP § 8-216(b). The Court held that the following proof was sufficient in this regard: 1) that the locks to the premises were changed; and 2) that agents of the defendants. Additionally, based on what Mr. Thornton said to Ms. Hawkins when he visited the premises in September of 2017, plaintiffs presented proof that he had "threaten[ed] to take possession of the rental premises in violation of RP § 8-216(b).

The defendants also argued that when the jury awarded the plaintiffs $3,000.00 in economic damages under the count that alleged violation of RP § 8-216 and then awarded economic damages of $10,000.00 in regard to the conversion counts, the verdicts were irreconcilably inconsistent. The Court agreed with that argument inasmuch as the economic damages suffered by the plaintiffs was exactly the same under both counts. Therefore, the Court ordered that the judgment of $10,000.00 under the conversion count be vacated.

In reaching this decision, the court rejected the plaintiffs' argument that the inconsistent verdict issue had been waived because defense counsel made no objection to the verdict at the time the verdict was rendered, but, instead, waited until a motion for new trial was filed to bring up this point. The Court, citing *Southern Maryland Corp. v. Taha*, 378 Md. 461, 492 (2003) held that in a civil case, there was no waiver of an objection to inconsistent verdicts when the first objection was put on the record in a post-trial motion.

Lastly, the defendants objected to the award of attorney's fees to counsel for the plaintiffs in the amount of over $66,000.00 plus an award of costs in the amount of $1,713.39. The defendant's primary objection to the award of attorney's fees was that they were completely disproportionate to the relatively small amount of the recovery ($18,000.00). That argument was rejected by the

Court. Under the fee-shifting provisions of RP § 8-216(c)(1)(ii), the trial judge appropriately applied the lodestar method of calculating an appropriate award of attorney's fees. When that approach is utilized, an objection that the attorney's fees were disproportionate to the amount of recovery by the plaintiffs will not, standing on its own, prevail.

Bel Air Carpet, Inc. v. Korey Homes Building Group, LLC, et al., No. 1006, September Term 2019, filed January 28, 2021. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2021/1006s19.pdf

NEGLIGENCE – DUTY OF CARE – ECONOMIC LOSS DOCTRINE – INTIMATE NEXUS

Facts:

Appellant Bel Air Carpet, Inc. ("Bel Air Carpet") was one of the last subcontractors to complete work on a series of new homes built by Korey Home Building Group, LLC ("Korey Homes"), a custom home builder with its principal place of business in Harford County. Bel Air Carpet filed a complaint to recover damages in the Circuit Court for Harford County against Korey Homes and several other defendants, including appellee Hamilton Bank. In its complaint, Bel Air Carpet asserted a negligence claim against Hamilton Bank and alleged that "Hamilton Bank owed a duty of care to [Bel Air Carpet] to ensure that the funds it disbursed to Korey Homes w[ere], in fact, paid to [Bel Air Carpet]." According to the complaint, Hamilton Bank breached its duty to Bel Air Carpet "by failing to obtain Mechanic's Lien Releases . . . for work performed and materials provided to its borrowers' custom homes," which was "standard industry practice."

In response, Hamilton Bank filed a motion to dismiss and argued that Bel Air Carpet could not "prevail on its negligence claim against Hamilton Bank as a matter of law because Hamilton Bank had no obligation to ensure that Korey Homes paid subcontractors such as Bel Air [Carpet]." Invoking the economic loss doctrine, Hamilton Bank asserted that it did not have a contractual relationship or the requisite intimate nexus between it and Bel Air Carpet to impose tort liability on Hamilton Bank.

At the hearing on Bel Air Carpet's motion, the court granted the motion to dismiss and explained that, as the conduit for funds, there was neither a special relationship nor an intimate nexus necessary to establish a duty between Hamilton Bank and Bel Air Carpet necessary to assert a claim for negligence. The court then entered a written order and certified this order as a final and appealable judgment pursuant to Maryland Rule 2-602(b). Bel Air Carpet timely noted an appeal.

Held: Affirmed.

The Court of Special Appeals reached two holdings. First, the Court held that Bel Air Carpet failed to allege a cognizable duty of care owed to it by Hamilton Bank because Bel Air Carpet did not allege privity or any equivalent intimate nexus in the complaint. The complaint did not allege the necessary "linking conduct" between the parties to justify Bel Air Carpet's reliance that Hamilton Bank would ensure that its borrower's funds were paid to Bel Air Carpet. The

Court concluded that Maryland law does not recognize a general duty on the homeowner's lender to ensure that the general contractor on a home construction project pays all of its subcontractors for work completed when the lender disburses funds to the general contractor, and where there is no privity of contract or intimate nexus between the lender and the subcontractors.

Second, the Court held that the circuit court's ruling that Hamilton Bank did not owe a duty of care to Bel Air Carpet was a legal determination, and, therefore, discovery could not have saved the deficiency in Bel Air Carpet's complaint.

Giant of Maryland LLC v. Karen Webb, No. 413, September Term 2019, filed February 25, 2021. Opinion by Kenney, J.

https://mdcourts.gov/data/opinions/cosa/2021/0413s19.pdf

NEGLIGENCE – PREMISES LIABILITY – STANDARD OF CARE – STATUS OF ENTRANT – INVITEES – CARE REQUIRED IN GENERAL

LABOR AND EMPLOYMENT – RIGHTS AND LIABILITIES AS TO THIRD PARTIES – WORK OF INDEPENDENT CONTRACTOR – EXTENT OF CONTROL – IN GENERAL

EVIDENCE – ADMISSIBILITY IN GENERAL – MATERIALITY – TENDENCY TO MISLEAD OR CONFUSE

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APPEAL AND ERROR – HARMLESS AND REVERSIBLE ERROR – IN GENERAL – PREJUDICE; PREJUDICIAL ERROR– IN GENERAL

Facts:

Appellee, Karen Webb, was injured while shopping at a supermarket owned and operated by appellant, Giant of Maryland, LLC ("Giant"). She was in the frozen-foods aisle when she came in contact with a pallet cart operated by Keydonne Winzer who was employed by PepsiCo to deliver and stock its products at the Giant store. On October 25, 2017, she sued Giant in the Circuit Court for Anne Arundel County, advancing two causes of action: (1) negligence and (2) negligent hiring, training, and supervision.

Giant moved for summary judgment and for judgment, which presented similar questions at different stages of the proceedings. The court denied Giant's motion for summary judgment, which Giant challenged as an abuse of discretion because Ms. Webb had "failed to offer any disputes of fact or evidence that Mr. Winzer was an agent, servant, or employee of Giant." At the jury trial, Giant moved for judgment on two grounds: (1) that there was no evidence of an unreasonably dangerous condition on the premises to support a claim that Giant breached a non-delegable duty to keep its premises safe; and (2) that there was no evidence that Mr. Winzer was an agent, servant, or employee of Giant sufficient to support a claim for vicarious liability or negligent hiring, supervision, training, or retention. The court granted judgment in favor of Giant on premises liability, but permitted the case to go forward based on vicarious liability. Giant challenged the court's decision, contending that Ms. Webb did not plead or advance a theory of

negligence based on vicarious liability and there was insufficient evidence to support the existence of an employment relationship between Giant and Mr. Winzer.

Giant also challenged the trial court's spoliation instruction to the jury. It argued that giving it was an abuse of discretion because it was "based on pure speculation that: 1) video footage of the incident existed; and 2) the alleged footage was destroyed. In response, Ms. Webb responded that the following circumstantial evidence established its existence: (1) the number of cameras positioned throughout the store pointing in "every direction" including "around the frozen food section"; (2) the store report created on the day of the incident; and (3) her demand to MAC Risk Management on December 16, 2014 to preserve and not destroy the video of the incident.

Held: Reversed.

Judgment of the Circuit Court for Anne Arundel county reversed; Case remanded to the circuit court to enter judgment in favor of Giant. Costs to be paid by appellee.

A trial court can "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 in whose favor judgment is entered is entitled to judgment as a matter of law," but it may also exercise its discretion not to do so. *Fischbach*, 187 Md. App. at 75 (quoting Md. Rule 2-501(f)); *see Dashiell v. Meek*s, 396 Md. 149 (2006). The denial of a technically sufficient motion for summary judgment "in favor of a full hearing on the merits" does not necessarily constitute an abuse of discretion, and we are not persuaded that it did in this case. *See Fischbach*, 187 Md. App. at 75.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he: (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. But the owner or possessor of land is not an insurer of the safety of his customers while they are on the premises and no presumption of negligence on the part of the owner arises merely from a showing that an injury was sustained in his store.

"General control over an independent contractor's work" would not be sufficient to extend liability to Giant for Mr. Winzer's actions. *See Appiah v. Hall*, 416 Md. 533, 563. To do that, it would be necessary to demonstrate that Giant had "retained control over the operative detail and methods" of Mr. Winzer's work, including "*the very thing from which the injury arose*." *Id*. at 555 (citing *Gallagher's Estate v. Battle*, 209 Md. 592, 602 (1956)).

In sum, correcting a vendor *observed* using a pallet jack improperly, requiring a vendor to check in and out, to stock in a particular location of the store, permitting only non-powered jacks, and

"sometimes" checking the vendor's work—do not indicate sufficient control over the "methods" and "operative detail" of Mr. Winzer's work to extend liability on Giant for his actions. *See Appiah*, 416 Md. at 565. Rather than a right to supervise Mr. Winzer's work, these are general rights that a possessor of the premises on which the work is being done would ordinarily retain for itself. For this reason, we held, as a matter of law, that the evidence was insufficient to submit the vicarious liability claim to the jury, and that Giant's motion for judgment should have been granted.

Spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document." *Keyes v. Lerman*, 191 Md. App. 533, 537 (2010). A spoliation instruction is given in a civil case when "a party has destroyed or failed to produce evidence." *Cost v. State*, 417 Md. 360, 370 (2010).

The instruction addresses:

> the destruction or failure to preserve evidence, rendering it unavailable, and not merely the failure to produce evidence that is available, or, indeed, the failure to create evidence, but, for purposes of the permissible inference, it does distinguish between destruction or failure to preserve with an intent to conceal the evidence and destruction or failure to preserve that is the product of negligence.

Keyes, 191 Md. App. at 540.

Before the instruction may be given, the requestor, "[b]y necessity," has the burden to establish and the court would have to find that the video "actually existed." *Solesky v. Tracey*, 198 Md. App. 292, 309 (2011). There can be no act of destruction or failure to preserve evidence not proven to exist, and therefore no act or omission from which inferences can arise.

The failure of the multiple cameras to capture the incident could be grist for credibility and argument mills, but it would not justify a spoliation instruction. Instructions "as to facts and inferences" are not normally required. And when missing evidence permits multiple inferences to be drawn, a trial judge's "emphasis of one possible inference out of all the rest . . . can be devastatingly influential upon a jury although unintentionally so." *Keyes*, 191 Md. App. at 542 (quoting *Yuen v. State*, 43 Md. App. 109, 114 (1979)).

An instruction that "is misleading or distracting for the jury, and permits the jury members to speculate about inapplicable legal principles," is potentially prejudicial. *Barksdale v. Wilkowsky*, 419 Md. 649, 669 (2011). Here, the jury was invited and permitted by the instruction, to engage in speculation regarding concealment, destruction, and failure to preserve evidence that was not shown to actually exist. According to the Court of Appeals, "the mere inability of a reviewing court to rule out prejudice, given the facts of the case, may be enough to declare an error reversible." *Barksdale*, 419 Md. at 669. Prejudice cannot be ruled out in this case. Had we not already reversed the judgment based on vicarious liability, we would also reverse the judgment based on the spoliation instruction and remand to the circuit court for a new trial.

ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated February 2, 2021, the following attorney has been indefinitely suspended by consent, effective February 6, 2021:

RONALD HOWARD COOPER

*

By an Order of the Court of Appeals dated January 4, 2021, the following attorney has been indefinitely suspended by consent, effective February 19, 2021:

JONATHAN FREDERICK SEAMON LOVE

*

By an Order of the Court of Appeals dated February 4, 2021, the following attorney has been disbarred by consent, effective February 25, 2021:

MICHAEL SCOTT BIRCH

*

JUDICIAL APPOINTMENTS

*

On January 13, 2021, the Governor announced the elevation of **HON. STACY ADELE MAYER** to the Circuit Court for Baltimore County. Judge Mayer was sworn in on February 1, 2021 and fills the vacancy created by the retirement of the Hon. Mickey J. Norman.

*

On January 13, 2021, the Governor announced the appointment of **HEATHER LYNNE PRICE** to the District Court – Caroline County. Judge Price was sworn in on February 26, 2021 and fills the vacancy created by the retirement of the Hon. Douglas H. Everngam.

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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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