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PROCLAMATION

On December 14, 2022, the Governor issued a proclamation announcing that a majority of votes from the November 8 General Election were in favor of the constitutional amendment to change the names of Maryland's two appellate courts. As a result, the Court of Appeals of Maryland is now named the Supreme Court of Maryland, its judges are now justices of that Court, and the Court of Special Appeals is now named the Appellate Court of Maryland.

All briefs or other papers filed in the Supreme Court of Maryland must now be captioned in the Supreme Court of Maryland. Any Briefs and papers filed in the Supreme Court but that are captioned in the Court of Appeals of Maryland will be received by the Clerk, but the filer may be required to file a corrected brief or paper captioned in the Supreme Court of Maryland. All briefs or other papers filed in the Appellate Court of Maryland must now be captioned in the Appellate Court of Maryland. Any Briefs and papers filed in the Appellate Court but that are captioned in the Court of Special Appeals of Maryland will be received by the Clerk, but the filer may be required to file a corrected brief or paper captioned in the Appellate Court of Maryland.

The change that occurred on December 14, 2022, is a change in name only. The precedents, Rules, and all other practices of the Courts are unaffected by the change and will continue in force as the precedents, Rules, and practices of the Supreme Court of Maryland and the Appellate Court of Maryland.

SUPREME COURT OF MARYLAND

Access Funding, LLC, et al. v. Chrystal Linton, et al., No. 5, September Term 2022, filed December 1, 2022. Opinion by Watts, J.

Gould, J., dissents.

https://www.mdcourts.gov/data/opinions/coa/2022/5a22.pdf

ARBITRATION – EXISTENCE OF AGREEMENT TO ARBITRATE – FRAUD – TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS

Facts:

Crystal Linton and Dimeca D. Johnson, Respondents, who had been lead paint tort plaintiffs, obtained structured settlements with periodic payments over time as the resolution of lead paint exposure claims. Subsequently, Linton and Johnson signed agreements purporting to transfer their rights to the structured settlement payments to Access Funding, LLC and Assoc, LLC in exchange for discounted lump sum cash payments. Later, Linton and Johnson filed a class action complaint in the Circuit Court for Baltimore City against Access Funding, LLC, and its affiliates Access Holding, LLC, Reliance Funding, LLC, Assoc, LLC, and En Cor, LLC (collectively, "Access"), Anuj Sud and Sudlaw, LLC (collectively, "Sud"), and Charles E. Smith and CES Law Group, LLC (collectively, "Smith"), Petitioners, alleging negligence; negligent misrepresentation; fraud, misrepresentation, and deceit; constructive fraud; and civil conspiracy in connection with procurement of the agreements.

Because the agreements contained arbitration clauses, Petitioners filed motions to compel arbitration and to stay the proceedings. Before the circuit court ruled on the motion to compel arbitration, the parties filed a joint motion for approval of a class action settlement. While the joint motion was pending, the Consumer Protection Division of the Office of the Maryland Attorney General ("the CPD"), Respondent, moved to intervene in the case, and the circuit court granted the motion. As an intervenor, the CPD opposed the joint motion to approve the settlement. Nonetheless, after a hearing, in February 2018, the circuit court approved the settlement. The Court of Special Appeals reversed the circuit court's approval of the settlement, and the Court of Appeals affirmed the judgment of the Court of Special Appeals, *see Linton v. Consumer Prot. Div.*, 467 Md. 502, 521, 225 A.3d 456, 467 (2020) ("*Linton I*"), resulting in the case being remanded to the circuit court for further proceedings.

On remand, Petitioners renewed the motions to compel arbitration and stay the proceedings. The circuit court granted the motions, ruling that the question of "arbitrability" must be determined by an arbitrator and not the court. The Court of Special Appeals reversed and remanded the case to the circuit court for further proceedings, holding that the circuit court erred in compelling arbitration because a court, not an arbitrator, must decide the question of whether a valid arbitration agreement exists. *See Linton v. Access Funding, LLC*, 253 Md. App. 507, 510, 517, 526, 268 A.3d 937, 939, 943, 948 (2022). Petitioners filed a petition for a writ of *certiorari*, which the Court of Appeals granted. *See Access Funding, LLC v. Linton*, 478 Md. 244, 273 A.3d 890 (2022).

Held: Affirmed.

The Court of Appeals reaffirmed that question of whether valid agreement to arbitrate exists is question for trial court, not arbitrator, to determine. The Court of Appeals held that where Linton and Johnson alleged that the circuit court's approval of the transfer of their structured settlement payment rights was procured through fraud and deceit, Linton and Johnson denied the existence of a valid agreement to arbitrate, and the question of whether a valid arbitration agreement exists is a question for the court to determine, not the arbitrator. Because Linton and Johnson alleged fraud as to the arbitration clause of the agreement in particular, the existence of a valid arbitration agreement is in dispute and the issue is a matter for the court to decide. In addition, because the plain language of the arbitration clause expressly conditions arbitration on closure of the transaction, by challenging the validity of the circuit court's approval of the transfer, Linton and Johnson challenge the existence of an agreement to arbitrate, which is an issue for the court, and not an arbitrator, to determine.

The Court of Appeals concluded that the question of whether an agreement to arbitrate exists, *i.e.*, whether the arbitration clause in the agreements is valid, has been raised and is a question for the circuit court, not the arbitrator, to determine. It is well settled that where a party denies the existence of an arbitration agreement, the court—not an arbitrator—determines if the agreement exists. In the case, the Court concluded that the circuit court erred in compelling arbitration of the question of whether the arbitration clause in the agreements is valid. Accordingly, the Court affirmed the judgment of the Court of Special Appeals.

The Court of Appeals concluded that, although Linton and Johnson did not specifically seek rescission of the agreements, it was readily apparent that, in the complaint, Linton and Johnson alleged "grounds that exist at law or in equity for the revocation of" the agreements in accord with Md. Code Ann., Cts. & Jud. Proc. (1974, 2020 Repl. Vol.) ("CJ") § 3-206(a), and thereby denied the existence of a valid arbitration agreement. *See* CJ § 3-207(b) ("If the opposing party denies existence of an arbitration agreement, the court shall proceed expeditiously to determine if the agreement exists."). By its express terms, the arbitration clause states that it is effective only "[o]nce [the] transaction has closed[.]" Closure of the transaction necessarily depended on the court's approval of the transfer under the MSSPA. In the complaint, Linton and Johnson specifically pled that the circuit court's finding that they had received independent professional

advice from Smith was procured through fraud and deceit. Linton and Johnson alleged that the court would not have approved the transfer—meaning that the transaction would not have closed—had the court been aware of Smith's relationship with Access. With these allegations, Linton and Johnson disavowed the validity of both the agreements and the arbitration clause within them. The Court concluded that, under Maryland law, the circuit court was required to determine whether a valid agreement to arbitrate existed rather than finding "that arbitrability in this case must be determined by an arbitrator and not the court" and compelling arbitration.

The Court of Appeals determined that, where Linton and Johnson have alleged fraud with respect to both the agreements generally and the arbitration clause specifically, the holdings of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Holmes v. Coverall N. Am., Inc.*, 336 Md. 534, 649 A.2d 365 (1994) were not applicable. The Court stated that, contrary to the circuit court's ruling and Petitioners' contentions, *Prima Paint* and *Holmes* did not control because in the complaint, Linton and Johnson alleged fraud and deceit as to the procurement of the agreements in general and the arbitration clause in particular, the latter allegation going directly to the making of an agreement to arbitrate—an issue that must be decided by the court, not the arbitrator.

Petitioners' contention that there was no allegation that the arbitration clause in particular was procured by fraud was incorrect. In the complaint, Linton and Johnson clearly alleged that had they known of the fraud, they would not have entered into any aspect of the agreement at all. In paragraph 81 of the complaint, Linton and Johnson specifically alleged that by using Smith as counsel, Petitioners sought to prevent them from understanding the agreement's provision with respect to binding arbitration. A fair reading of the allegations of the complaint and paragraph 81 in particular demonstrated that Linton and Johnson alleged that, by denying them independent professional advice required by statute, Petitioners engaged in fraud to obtain their consent to the arbitration clause specifically and deprived them of the ability to understand the arbitration clause.

In addition, the Court of Appeals determined that, by alleging that the court's approval of the transfers was obtained by fraud and in violation of the Maryland Structured Settlement Protection Act ("the MSSPA"), Linton and Johnson necessarily alleged that the closing of the transfers should not have occurred and that the arbitration clause was not valid. The arbitration clause in each Purchase and Sale Agreement expressly conditions the obligation to arbitrate on the closing of the transactions, providing that "[o]nce your transaction has closed," any claim or dispute "arising from or relating in any way to this Agreement . . . including Claims regarding the applicability of this arbitration clause or the validity of the entire Agreement . . . , shall be resolved by mandatory binding arbitration." The arbitration clause provides that it "cannot be used to bypass state and federal laws requiring court approval of th[e] transaction." The Purchase and Sale Agreements defined closing as occurring after entry of an order of approval of the transfer "by a court of competent jurisdiction in accordance with an applicable state transfer statute of a state of the United States of America." Unlike the arbitration clauses at issue in *Prima Paint* and *Holmes*, which were not conditioned upon the occurrence of any event, the arbitration clause in the agreements in the case conditioned arbitration upon the happening of an express event—closing—stating that claims shall be arbitrated only "[o]nce [the] transaction has

closed[.]" Under the express terms of the Purchase and Sale Agreements, closing occurs only following court approval of the transfer in accordance with the applicable state transfer statute, *i.e.*, the MSSPA. In short, under the plain language of the arbitration clause, the clause is not effective until the transaction has closed, after court approval of the transfer. The Court concluded that, unlike the arbitration clauses in *Prima Paint* and *Holmes*, which were severable from the contracts they were contained within, the language of the arbitration clause in the case was inconsistent with the general rule of severability because application of the arbitration clause is contingent upon approval of the transfer and closing.

The Court of Appeals determined that plaintiffs alleged an inability to understand the terms of an arbitration clause in a written agreement, on the ground that the other party procured the agreement through fraud and deceit, and thereby placed the existence of a valid agreement to arbitrate at issue and raised an issue to be decided by the court, not the arbitrator. In the complaint, Linton and Johnson alleged that they "suffer from cognitive deficits and other brain impairments" and they specifically pled that Petitioners colluded to fraudulently interfere with their ability to obtain independent professional advice and sought to prevent them from fully understanding and appreciating the agreement's provision with respect to binding arbitration. Such allegations clearly went to the issue of the making of a valid agreement to arbitrate.

The Court of Appeals concluded that the circumstance that a party may have sought damages under a contract on allegations of fraud and deceit and alleged having been prevented from understanding the meaning of an arbitration clause, rather than specifically seeking rescission of the contract, would not negate the application of the Maryland Uniform Arbitration Act ("the MUAA") and case law directing that the court, not an arbitrator, determines whether an agreement to arbitrate exists where the issue is raised. The Court determined that Petitioners' contentions concerning the collateral attack doctrine were flawed for two main reasons. First, the doctrine was not applicable under the circumstances of the case because approval of the transfer did not involve entry of judgment. Second, a judgment procured by extrinsic fraud that deprives a court of fundamental jurisdiction to enter the judgment is subject to collateral attack.

In sum, the Court of Appeals held that Linton and Johnson have denied the existence of a valid agreement to arbitrate, meaning that, under Maryland case law and CJ § 3-207(b) of the MUAA, the court, not the arbitrator, must decide the question of whether an arbitration agreement exists. Like the Court of Special Appeals, the Court refrained from expressing any view as to how the circuit court should decide the merits of the question. *See Linton*, 253 Md. App. at 526, 268 A.3d at 949. Pursuant to CJ § 3-207(c), the merits of the question are for the circuit court to decide. The Court stated that what was plain, though, was that because Linton and Johnson denied the existence of a valid arbitration agreement, the circuit court erred in compelling arbitration of the matter.

Steven G. Carver v. State of Maryland, No. 14, September Term 2022, filed December 20, 2022. Opinion by Hotten, J.

Gould, J., dissents.

https://mdcourts.gov/data/opinions/coa/2022/14a22.pdf

CRIMINAL LAW – POSTCONVICTION RELIEF – PETITION FOR WRIT OF ACTUAL INNOCENCE – MATERIALITY ANALYSIS

CRIMINAL LAW – POSTCONVICTION RELIEF – PETITION FOR WRIT OF ACTUAL INNOCENCE – EVIDENCE THAT SPEAKS TO ACTUAL INNOCENCE

CRIMINAL LAW – POSTCONVICTION RELIEF – PETITION FOR WRIT OF ACTUAL INNOCENCE – DUE DILIGENCE

Facts:

In 1989, Steven G. Carver ("Petitioner") and Joe Hodge were tried jointly in the Circuit Court for Baltimore City and convicted for the murder of John Green and related handgun charges. In 2012, Petitioner filed a petition for a writ of actual innocence under Md. Code Ann., Criminal Procedure ("Crim. Proc.") § 8-301, asserting that the following categories of newly discovered evidence entitled him to relief: (1) reports concerning threats by Bryant McArthur to Mr. Green; (2) Joseph Kopera's false credentials as an expert; (3) the opinion of another firearms expert, William Conrad; and (4) two open warrants against Hodges Epps. Petitioner argued that the cumulative evidence established that Mr. McArthur plotted Mr. Green's death because Mr. Green previously witnessed Mr. McArthur murder another person. According to Petitioner, evidence of Mr. Epps's warrants would have demonstrated his motivation to lie in favor of leniency from the State. Petitioner also contends that Mr. Conrad would have testified that only one gun was used in the crime.

In 2018, the circuit court denied the actual innocence petition because Petitioner's evidence was neither newly discovered nor material. The circuit court found that defense counsel was aware that Mr. McArthur wanted Mr. Green dead. The circuit court also ruled that Petitioner could have retained his own expert witness at trial, but he elected not to do so. Lastly, the circuit court determined that defense counsel could have uncovered Mr. Epps's outstanding warrants through a background check.

The Appellate Court of Maryland (previously known as the Court of Special Appeals of Maryland) affirmed and held that the circuit court did not abuse its discretion. The Appellate Court reasoned that evidence of Mr. McArthur's conspiracy merely elaborated on information defense counsel had previously known. The Appellate Court determined Mr. Epps's warrants could have been easily discovered through a background check and was immaterial. In the

Appellate Court's view, while Mr. Kopera's fraud was "newly discovered" under *Hunt v. State*, 474 Md. 89, 110, 252 A.3d 946, 958 (2021), his fraud was immaterial because his testimony was inconclusive and added little to the State's case.

Held: Affirmed.

The Court held that, in evaluating a petition under Crim. Proc. § 8-301, consideration must be given to the cumulative effect of newly discovered evidence within the context of the entire adversarial proceeding, including its impact on: (1) any evidence admitted at trial; (2) any evidence available at the time of trial, including both evidence (a) offered but excluded and (b) not offered but available; and (3) the defendant's or defense counsel's trial strategy. *Faulkner v. State*, 468 Md. 418, 463, 469 n.24, 227 A.3d 584, 610, 614 n.24 (2020). This hindsight assessment requires courts to ascertain whether the cumulative evidence "would lead to the substantial possibility of a different outcome[]" at trial because it "undermine[s] confidence in the verdict." *Id*. at 465–66, 227 A.3d at 611–12; *Strickler v. Greene*, 527 U.S. 263, 290, 119 S. Ct. 1936, 1952 (1999) (citation omitted). The Court concluded that Petitioner presented speculative evidence which cumulatively did not undermine his conviction, given the three eyewitness accounts of the shooting and individuals present at the scene.

The Court held that the report of Mr. McArthur's threats against Mr. Green did not "speak to" Petitioner's innocence because it was not evidence that "would potentially exonerate" him. *Smallwood v. State*, 451 Md. 290, 319, 152 A.3d 776, 793 (2017). Assuming, *arguendo*, that the evidence "spoke to" Petitioner's innocence, it was immaterial because it was primarily conjecture and speculation. Petitioner's new evidence established that an imprisoned Mr. McArthur sought Mr. Green's death and, through a speculative chain of events, *perhaps* successfully enlisted Mr. Hodge, some phantom third-party assailant, or even Petitioner himself. None of this evidence meaningfully casts doubt on the powerful eyewitness testimony that Petitioner and Mr. Hodge killed Mr. Green.

The Court also held that its prior holding in *Hunt v. State*, was limited. 474 Md. at 110, 252 A.3d at 959 ("This is (hopefully) a unique class of cases."). Expert opinions acquired after trial do not constitute new evidence, because due diligence did not require trial counsel in *Hunt* to uncover Joseph Kopera's fraud prior to 2007. In this case, defense counsel could have "discovered" the expert opinion of Mr. Conrad by retaining his own ballistics expert at trial. Mr. Kopera's favorable reputation at the time of trial did not negate Petitioner's ability to retain his own expert or obviate the value of having such an expert. Even if Mr. Conrad's opinion was newly discovered, it was immaterial because his opinion was just as inconclusive as Mr. Kopera's own testimony at trial.

The Court further held that Mr. Epps's open warrants were not "newly discovered" because defense counsel could have easily uncovered them by diligently executing a simple background check "in time to move for a new trial under Maryland Rule 4-331." Crim. Proc. § 8-301(a)(2). Assuming, *arguendo*, that Mr. Epps's criminal history constituted "newly discovered" evidence,

it was immaterial because it would, at best, be impeachment evidence. The warrants were never served, making it unlikely that Mr. Epps was aware of them or that he had any motivation to lie in his testimony in exchange for leniency.

Tapestry, Inc. v. Factory Mutual Insurance Company, Misc. No. 1, September Term 2022, filed December 15, 2022. Opinion by Fader, C.J.

https://www.courts.state.md.us/data/opinions/coa/2022/1a22m.pdf

POLICY INTERPRETATION – ALL-RISK PROPERTY INSURANCE – RISKS OR LOSSES COVERED.

Facts:

The United States District Court for the District of Maryland certified a question to the Supreme Court of Maryland asking whether an insurance policy that "covers property . . . against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded," and further covers "TIME ELEMENT" losses "directly resulting from physical loss or damage of the type insured," is triggered when a toxic, noxious, or hazardous substance such Coronavirus or COVID-19 (1) is present in the air and on surfaces on the premises of an insured property or (2) causes the loss, in whole or in part, of the functional use of the property. The question arose in a case in which Tapestry, Inc. sued Factory Mutual Insurance Company ("FM"), which issued two relevant property insurance policies to Tapestry, following FM's denial of the bulk of Tapestry's claim for losses related to the COVID-19 pandemic. Tapestry contended that coverage under the policies was triggered because it suffered "physical loss or damage" both by the presence of Coronavirus particles in its stores and when those stores had to close for business due to the presence of Coronavirus. FM contended that "physical loss or damage" requires structural alteration or permanent dispossession of property, and that Tapestry suffered neither.

Held:

In response to the certified question, the Supreme Court of Maryland held that the FM insurance policies requirement of "physical loss or damage" was not triggered by the alleged presence of a toxic, noxious, or hazardous substance on insured property nor by the loss of functional use of the property, provided the substance causes neither tangible, concrete, and material harm to the property nor deprivation of possession of the property.

The Court began its discussion by noting that it interprets insurance policies under contract principles, focusing on the meaning a reasonably prudent layperson would attribute to the language. This analysis considers the ordinary meaning of the language at issue and examines that language in the larger context of the policies as a whole. The Court first reviewed dictionary definitions of the terms contained in the key phrase "physical loss or damage," and concluded that, based on those definitions, the phrase "physical loss or damage" would cover only tangible, concrete, and material harm to property or a deprivation of possession of the property, and not a loss of functional use.

The Court then examined the phrase within the context of other provisions of the policies and determined: (1) "physical loss or damage" is what happens to covered property to trigger coverage and not the cause itself, and if "physical loss or damage" encompassed functional loss of use, then the policy would in circular effect provide coverage for loss of use of property caused by the loss of use of the property; (2) the period of liability, which extends from "the time of physical loss or damage of the type insured" to the time when "the building and equipment could be [] repaired or replaced; and [] made ready for operations," contemplates more than a temporary functional loss of use; and (3) the inclusion of a separate coverage extension for Interruption by Communicable Disease that is not subject to the "physical loss or damage" requirement demonstrates that FM contemplated how a disease like COVID-19 could interrupt business and undermined Tapestry's argument that the primary coverage would apply. Based on its interpretation of the policies, the Court concluded that the functional loss of use of property did not trigger coverage requiring "physical loss or damage."

The Court then addressed Tapestry's alternative argument that the physical presence of Coronavirus particles in its stores caused property damage by physically altering the air and caused surfaces to become "fomites," or carriers of disease, when the infected particles landed. The Court rejected this argument on the grounds that even if "damage to air" were sufficient to constitute "physical loss or damage," Tapestry had not sufficiently alleged physical damage to the air. The Court also rejected Tapestry's argument that Coronavirus particles turn into "vectors of disease" upon landing on merchandise and other store surfaces, explaining that such particles do not cause any physical or structural alteration to the property.

Finally, the Court noted that an overwhelming majority of decisions addressing Coronavirus-related insurance claims, including several cases interpreting Maryland law, have reached the same conclusion regarding policy interpretation and its application. The Court addressed the few appellate decisions that have reached a contrary conclusion but determined that the majority of decisions adhere more closely to Maryland's caselaw. The Court also discussed cases that concerned whether other hazardous substances, such as ammonia, asbestos, gaseous fumes, smoke, and cat urine, caused "physical loss or damage" under a property insurance policy. The Court observed that most of these cases were distinguishable and, to the extent they were not, were unpersuasive.

Ernest and Maryann Elsberry v. Stanley Martin Companies, LLC, No. 6, September Term 2022, filed December 1, 2022. Opinion by Hotten, J.

https://www.courts.state.md.us/data/opinions/coa/2022/6a22.pdf

STATUTORY INTERPRETATION – REAL PROPERTY – MD. CODE ANN., REAL PROP. ARTICLE § 14-117 – ESTIMATED COSTS OF DEFERRED WATER AND SEWER CHARGES

Facts:

Petitioners, Ernest and Maryann Elsberry (the "Elsberrys") sued Stanley Martin Companies, LLC ("Stanley Martin") in the Circuit Court for Charles County, alleging that Stanley Martin violated Md. Code Ann., Real Property ("Real Prop.") § 14-117(a)(3)(ii) by imposing a deferred water and sewer charge for a period of thirty-years following the date of the initial sale of residential real property in Charles County, Maryland. The Elsberrys challenged Real Prop. § 14-117(a)(3)(ii), asserting that the provision extends to all counties in Maryland—not just Prince George's County—and prohibited the amortization of water and sewer charges for a period longer than twenty-years. Stanley Martin moved to dismiss, arguing that Real Prop. § 14-117(a)(3)(ii) only applied to property located in Prince George's County. Stanley Martin maintained that the Elsberrys' claim was predicated on a misreading of Real Prop. § 14-117(a)(3)(ii) in an attempt to extend its geographical reach contrary to the intention of the General Assembly. The circuit court agreed with Stanley Martin, concluding that Real Prop. § 14-117(a)(3)(ii) applies only to Prince George's County.

The Elsberrys appealed to the Court of Special Appeals, which concluded that the General Assembly intended Real Prop. § 14-117(a)(3)(ii) to apply to properties *only located within Prince George's County*—not statewide. *Elsberry v. Stanley Martin Cos.*, LLC, No. 172 Sept. Term, 2021, 2022 WL 94616, *7 (Md. Ct. Spec. App. Jan. 10, 2022). The court first examined the plain language of Real Prop. § 14-117(a)(3)(ii), noting the ambiguity surrounding its geographical scope. *Id.* at *3. Therefore, the court turned to the legislative history of Real Prop. § 14-117(a)(3)(ii) to determine the General Assembly's intent. *Id.* The court examined several sources to ascertain legislative intent, including, but not limited to, the title and function paragraphs and legislative amendments. *Id.* at *4. The Court of Special Appeals determined that the legislative history of Real Prop. § 14-117(a)(3)(ii) confirmed its geographical limitation to Prince George's County. *Id.* at *4. Finally, the court declined to extend the geographical reach of Real Prop. § 14-117(a)(3)(ii) beyond Prince George's County to avoid a violation of Article III, § 29 of the Maryland Constitution. *Id.* at *6.

Held: Affirmed.

Whether the circuit court was legally correct in dismissing the Elsberrys' complaint turned on a question of statutory interpretation. *Sullivan v. Caruso Builder Belle Oak, LLC*, 251 Md. App. 304, 317, 253 A.3d 1142, 1149 (2021). "Where questions of law and statutory interpretation are presented, this Court reviews them de novo . . . ." *Wheeling v. Selene Fin. LP*, 473 Md. 356, 373, 250 A.3d 197, 207 (2021) (citations omitted).

The Court of Appeals began with a plain text reading of Real Prop. § 14-117(a)(3)(ii) viewed within the context of its entire statutory scheme. *Lockshin v. Semsker*, 412 Md. 257, 275–76, 987 A.2d 18, 28–29 (2010) (citation omitted). The Court of Appeals held that the plain language of § 14-117(a)(3)(ii), when examined in context of the entire statutory scheme, including the short title and purpose paragraph, indicates that the plain text applies only applies to Prince George's County. The Court, therefore, looked to the legislative history to confirm the Court's plain text interpretation. *Brown v. State*, 454 Md. 546, 551, 165 A.3d 398, 401 (2017); *see also Nationstar Mortg. LLC v. Kemp*, 476 Md. 149, 170, 258 A.3d 296, 308 (2021). The Court concluded that the legislative history confirms the Court's plain text interpretation that Real Prop. § 14-117(a)(3) only applies to Prince George's County. Finally, under the doctrine of constitutional avoidance, the Court limited the geographic reach of Real Prop. § 14-117(a)(3)(ii) to Prince George's County to avoid a violation of Article III, § 29 of the Maryland Constitution. *See Koshko v. Haining*, 398 Md. 404, 425–26, 921 A.2d 171, 183 (2007).

Comptroller of Maryland v. FC-GEN Operations Investments LLC, No. 7, September Term 2022, filed December 19, 2022. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2022/7a22.pdf

ADMINISTRATIVE LAW & PROCEDURE – JUDICIAL REVIEW – AGENCY DEFERENCE ON MATTERS RELATED TO INTERPRETATION OF TAX LAWS.

TAX STATUTE – REFUND OF ESTIMATED INCOME TAX PAYMENTS WHERE PASS-THROUGH ENTITY HAS NO TAX LIABILITY.

Facts:

In tax year 2012, a pass-through entity made quarterly estimated tax payments on behalf of its members in accordance with Maryland tax law. When the pass-through entity prepared its 2012 federal income tax return, it determined that it had a taxable loss attributable to Maryland for the 2012 tax year. As a result of this loss, the pass-through entity sought a refund of its estimated payments on behalf of its eligible nonresident members. The Comptroller reviewed the pass-through entity's tax forms and associated schedules and denied the pass-through entity's refund request, determining that the pass-through entity was not a "claimant" eligible to claim a refund under the Tax General Article of the Maryland Code ("TG") § 13-901.

The pass-through entity appealed to the Tax Court. The Tax Court ordered the Comptroller to issue a refund to the pass-through entity, finding that the pass-through entity complied with the applicable tax laws in requesting its refund. The Comptroller filed a petition for judicial review to the Circuit Court, which affirmed the Tax Court's order. The Comptroller then appealed to the Appellate Court of Maryland, which affirmed the judgment of the Tax Court in an unreported opinion. In upholding the decision of the Tax Court, the intermediate appellate court pointed out that judicial review of the Tax Court's factual findings, inferences therefrom, and findings of mixed fact and law is pursuant to a substantial evidence standard. Moreover, the court determined that it must defer to the Tax Court's interpretations of the legal regulations as well as its factual findings.

Held: Affirmed.

The Supreme Court of Maryland affirmed the judgment of the Appellate Court of Maryland, holding that under the plain language of TG § 13-901(a)(1), the pass-through entity that made estimated income tax payments on behalf of its members is a claimant that is entitled to a refund for the overpayment of estimated taxes.

In reaching this decision, the Court corrected course in connection with judicial review of a Tax Court decision in which a party alleges an error of law. The Court reviewed its agency deference jurisprudence in the tax law context and observed that some cases state that a reviewing court should defer to the Tax Court's interpretation of tax laws that it "administers." Despite this language that appears in some appellate cases, the Court observed that it has not applied agency deference to the Tax Court's interpretation of tax laws or regulations but has instead chosen to conduct a de novo statutory review utilizing traditional canons of statutory interpretation. The Court held that where the reviewing court determines that it is appropriate to give a degree of deference to an agency's interpretation of tax laws, the agency to whom deference is owed is the Comptroller, as the agency responsible for administering the tax laws and promulgating regulations for that purpose, not the Tax Court.

The Court determined that under the plain language of TG § 13-901(a)(1), a "claimant" is the one who paid the tax and is eligible to claim a refund. The Court held that in this case, the pass-through entity was entitled to a refund as the claimant because the pass-through entity made the estimated tax payments on behalf of its members where it was later determined that there was a taxable loss for the year.

United Parcel Service, et al. v. David Strothers, No. 9, September Term 2022, filed December 1, 2022. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2022/9a22.pdf

LABOR AND EMPLOYMENT – WORKERS' COMPENSATION

Facts:

Respondent, David Strothers, sustained a hernia in September 2019 during employment with United Parcel Service ("UPS"). He presented to Howard County General Hospital ("HCGH") with right side abdominal pain, and a computerized tomography scan revealed a 3.3-centimeter hernia. The following day, Petitioner filed a claim, pursuant to Md. Code Ann., (1991, 2016 Repl. Vol., 2021 Supp.) Lab. & Emp. ("L&E") § 9-504(a), with the Maryland Workers' Compensation Commission (the "Commission"). That section reads in its entirety:

> Except as otherwise provided, an employer shall provide compensation in accordance with this title to a covered employee for a hernia caused by an accidental personal injury or by a strain arising out of and in the course of employment if:
> (1) the covered employee provides *definite proof* that satisfies the Commission that:
> (i) the hernia did not exist before the accidental personal injury or strain occurred; *or*
> (ii) as a result of the accidental personal injury or strain, a preexisting hernia has become so aggravated, incarcerated, or strangulated that an immediate operation is needed; and
> (2) notwithstanding any other provision of this title about notice, the accidental personal injury or strain was reported to the employer within 45 days after its occurrence.

(Emphases added). Dr. Alan B. Kravitz surgically repaired Respondent's hernia that following November.

Respondent's claim proceeded to the Commission for a hearing in February 2020. Respondent argued that his September 2019 hernia was unrelated to either of his two previous hernias (one incurred in May 2016 and the other roughly 20 years ago). To support his argument, Respondent submitted a January 2020 medical opinion from Dr. Robert W. Macht, who opined to a reasonable degree of medical certainty that Respondent's September 2019 was new and unrelated to the May 2016 hernia. At the Commission, Petitioners, UPS and its insurer, agreed that the September 2019 hernia was unrelated to the May 2016 hernia, but they argued that it was related to the 20-year-old hernia, which Dr. Macht did not address in his opinion. That shortcoming, they argued, did not satisfy § 9-504(a)'s requirement of "definite proof" that the

hernia was new. In the alternative, they argued that there was no definite proof that Respondent needed an "immediate operation." In March 2020, the Commission granted Respondent's claim, finding that Respondent's current hernia was caused by his September 2019 work accident; it subsequently denied Petitioners' request for rehearing.

Petitioners sought judicial review in the Circuit Court for Howard County. There, Petitioners argued that the phrase "definite proof" required evidence free of all ambiguity and that it raised a hernia claimant's burden of proof from a preponderance of the evidence to clear and convincing evidence. Respondent argued that the phrase merely relates to the quality of evidence that a hernia claimant must submit. The circuit court affirmed the Commission. In a reported opinion, the Court of Special Appeals affirmed the circuit court, holding that the phrase "definite proof" did not create a heightened burden of proof for hernia claimants; rather, it speaks to the quality of the evidence that a claimant must present to the Commission. *United Parcel Service v. Strothers*, 253 Md. App. 708, 715–23 (2022). The intermediate court also held that Respondent submitted definite proof that he needed immediate surgery. *Id.* at 725.

Held: Affirmed

The Court of Appeals held that, under L&E § 9-504(a)(1), (1) the phrase "definite proof" refers to the quality of evidence that a hernia claimant must submit under his or her burden of production and that it does not change the overall burden of persuasion, which remains by a preponderance of the evidence; and (2) that Dr. Macht's January 2020 medical opinion satisfied Respondent's burden to produce definite proof in this matter. Because of that favorable holding for Respondent, the Court declined to address the meaning of "immediate" contained in L&E § 9-504(a)(1)(ii).

Before interpreting the Workers' Compensation Act's (the "Act's") plain language, the Court noted that it is a remedial statute and that it is construed as liberally as possible to effectuate its purpose. In assessing the plain language, the Court looked at the meaning of "definite," circa 1934, which overwhelming showed that it was meant to limit or modify the noun it was describing. Although the term, then and now, *could* mean unambiguous or free of all doubt, that is not the prevailing interpretation. Adopting such a requirement, the Court held, would require hernia claimants to submit opinions with absolute medical certainty—something that goes above the clear-and-convincing standard for which Petitioners advocated. The Court disavowed Petitioners' assertion that every claimant must submit medical evidence for a workers' compensation claim and that hernia claimants, therefore, must bear a higher burden so as to not render "definite proof" superfluous. The Court could find no such requirement in the Act, and it refused to read one into the plain language, holding that definite proof speaks to the quality of evidence and not a claimant's burden of persuasion.

The Court next turned to the Act's purpose, which is to protect workers and their families from hardships inflicted by accidental, work-related injuries. The Court recognized that hernias are unique because a variety of everyday activities can cause a hernia. Thus, Respondent's proposed

interpretation of definite proof harmonized the General Assembly's intent with wanting to compensate claimants for work-related hernias while requiring more from them, i.e., definite proof, that the hernia was work related. Adopting Petitioners' view, that hernia claimants must shoulder a higher burden of persuasion, would do harm to the Act's remedial purpose, the Court said.

The Court then addressed the clear-and-convincing standard and the General Assembly's use of that standard elsewhere. The Court noted that the clear-and-convincing standard is the highest possible burden that civil claimants can bear and usually is required for cases that have profound consequences. Furthermore, because the General Assembly knows well how to implement that standard, as evidenced throughout the State's Code, the Court reasoned that the General Assembly's decision not to require in clear and precise language that burden for hernia claimants counseled against Petitioners' proposed construction.

Having found that the phrase "definite proof" speaks to a hernia claimant's burden of production and the quality of evidence that he or she must produce, the Court then assessed the evidence in this case. It held that Dr. Macht's January 2020 medical opinion satisfied L&E § 9-504(a)(1)(i)'s requirement to show by definite proof that Respondent's September 2019 was a new hernia. The Court, thus, affirmed the Court of Special Appeals.

APPELLATE COURT OF MARYLAND

Sean Urbanski v. State of Maryland, No. 1318, September Term 2020, filed December 7, 2022. Opinion by Reed, J.

Arthur, J. concurs.

https://mdcourts.gov/data/opinions/cosa/2022/1318s20.pdf

CONSTITUTIONAL LAW – FREEDOM OF SPEECH, EXPRESSION, AND PRESS – FIRST AMENDMENT – CRIMINAL CONDUCT BIAS OR HATE CRIMES

CONSTITUTIONAL LAW – FREEDOM OF SPEECH, EXPRESSION, AND PRESS – JUDICIAL PROCEEDINGS – CRIMINAL PROCEEDINGS – ADMISSIBILITY OF EVIDENCE

CIVIL RIGHTS – OFFENSES AND PENALTIES – CONSTITUTIONAL AND STATUORY PROVISIONS

CRIMINAL LAW – EVIDENCE – FACTS IN ISSUE RELEVANCE – NATURE AND ELEMENTS OF CRIME – INTENT – MOTIVE OR ABSENCE OF MOTIVE

CRIMINAL LAW – REVIEW – DISCRETION OF LOWER COURT – RECEPTION AND ADMISSIBILTY OF EVIDENCE

CRIMINAL LAW – EVIDENCE – FACTS IN ISSUE AND RELEVANCE – RELEVANCY IN GENERAL – EVIDENCE CALCULATED TO CREATE PREJUDICE AGAINST OR SYMPATHY FOR ACCUSED

Facts:

On May 20, 2017, Sean Urbanski ("Appellant"), a white male, approached Second Lieutenant Richard Collins III ("Lt. Collins"), a Black male, at a bus stop at the University of Maryland ("UM") campus. He ordered each person to "step left, if you know what's best for you," "step left, step left if you know what's good for you." Lt. Collins said "what?" asking Appellant what he was talking about and Appellant repeated himself. Bender and Lee stepped out of Appellant's way.

Appellant moved forward with the blade of the knife drawn in his hand. Appellant approached Lt. Collins. Bender testified that Lt. Collins was not threatening, nor did he act aggressively in any manner to Appellant. Lt. Collins responded, “no,” to Appellant’s orders. Appellant stabbed Lt. Collins in the chest.

Appellant was charged with first- or second-degree murder (“Count One”) and a hate crime under Md. Code Ann., Crim. Law (“CL”) §10-304 (“Count Two”). Though amended by the General Assembly following this case, at the time of trial, CL §10-304 statute read:

> *Because of* another’s race, color . . . , a person may not:
> (1)(i) commit a crime or attempt to commit a crime against that person. . . . or
> (2) commit a violation of item (1) of this section that:
>
> > (i) except as provided in item (ii) of this item, involves a separate crime that is a felony; or
> > (ii) results in the death of the victim.

Id. (emphasis added). During trial, the State of Maryland introduced evidence of racially offensive and violent memes against, *inter alia*, Black people, stored on the Appellant’s cell phone and Appellant’s membership in a Facebook group named “Alt-Reich Nation” (collectively, “contested evidence”).

Later in the trial, Appellant was acquitted by the Circuit Court of Prince George’s County of Count Two charging the hate crime. The circuit court reasoned that because, as the statute was written, the crime must have been “because of” the victim’s race and State had not met this high evidentiary burden. However, the circuit court stated that the contested evidence was relevant to the Appellant’s motive and intent in Count One charging murder. Appellant motioned for a mistrial, which the circuit court denied. The following day, the jury was instructed on the remaining first- and second-degree murder charges. The jury found Appellant guilty of first-degree murder and Appellant was sentenced to life imprisonment with the possibility of parole.

Appellant timely appealed, contending that under the First Amendment and *Ayers v. State of Maryland*, 335 Md. 602 (1994), a “tight nexus” between the contested evidence must exist to be admissible. Appellant alleges that since there was not a tight nexus between the incident and the contested evidence, the circuit court erred in admitting the contested evidence and declining his motion for a mistrial after Appellant was acquitted of Count Two. U.S. CONST. AMEND. I.

Held: Affirmed.

The Court of Special Appeals held that though the circuit court acquitted Appellant of Count Two, the contested evidence had special relevance to the murder charges under Count One as motive and intent evidence. The Court explains that Appellant’s interpretation of *Ayers* enlarges the original scope of the case because the *Ayers* Court did not create a requirement for a “tight

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Held: Affirmed.

The Court of Special Appeals held that though the circuit court acquitted Appellant of Count Two, the contested evidence had special relevance to the murder charges under Count One as motive and intent evidence. The Court explains that Appellant's interpretation of *Ayers* enlarges the original scope of the case because the *Ayers* Court did not create a requirement for a "tight nexus" to exist between the speech evidence and a crime charged under CL § 10-304. Instead, the Court of Appeals held that under CL § 10-304:

> *only speech actually connected with the offense should be used as evidence of motivation*. Because there was such a "tight nexus" between [previous] incidents, we hold that admitting the evidence regarding the 7-Eleven incident did not violate the First Amendment, nor did it violate the rule which generally prohibits the introduction of other crimes evidence.

exist between the speech evidence and a crime charged under CL § 10-304. Instead, the Court of Appeals held that under CL § 10-304:

> *only speech actually connected with the offense should be used as evidence of motivation*. Because there was such a "tight nexus" between [previous] incidents, we hold that admitting the evidence regarding the 7-Eleven incident did not violate the First Amendment, nor did it violate the rule which generally prohibits the introduction of other crimes evidence.

Ayers, 335 Md. at 637 (emphasis added). By the plain language of the holding in *Ayers*, the issues implicated were possible violations of the First Amendment and, separately, the evidence rule that generally prohibits the introduction of other crimes evidence. Thus, the Court concluded that in accordance with *Ayers*, speech as evidence of a hate crime charged under CL § 10-304 must be connected with the offense, but elucidates that speech as circumstantial motive or intent evidence must only follow general evidentiary rules.

In addressing the constitutionality of the contested evidence, the Court cited the longstanding Constitutional canon that the First Amendment does not prohibit evidentiary use of violent speech to establish elements of crime or to prove motive or intent. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993); U.S. CONST. AMEND. I. Thus, the admission of the contested evidence did not infringe on Appellant's constitutionally protected rights under the First Amendment.

First-degree murder requires proof of deliberation, willfulness, and premeditation. CL §2-201(a)(1). Under Maryland Rule 404(b):

> Evidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of *motive*, opportunity, *intent*, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413.

Id. (emphasis added). In addition to the rules of evidence regarding relevancy and prejudice, as previously addressed, to be admissible evidence of motive or intent, the evidence must have some special relevance to the contested issue and the defendant must have been found to have committed the crimes. *Cf. Odum v. State*, 412 Md. 593, 610 (2010); *Streater v. State*, 352 Md. 800, 806 (1999). Even if not directly concurrent, motive or intent evidence can be proven by prior conduct. *Cf. Odum*, 412 Md. at 610; *Johnson v. State*, 332 Md. 456, 470 (1993). Since the contested evidence was violent and racial in nature, and the victim of the murder was of the racial group that the contested evidence targeted, the Court held that the contested evidence was relevant and probative to show motive or intent.

In balancing the prejudicial nature of the contested evidence, the Court cites that evidence tending to prove guilt can be prejudicial to an accused, but the mere fact that such evidence is powerful because it accurately depicts the gravity and atrociousness of the crime or the callous

nature of the defendant does not thereby render it inadmissible. *Ford v. State*, 462 Md. 3, 58 (2018). In balancing evidence's probative value against prejudice, the Court of Appeals explains

> "the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in [Maryland] Rule 5-403." Rather, "[e]vidence may be unfairly prejudicial if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which he [or she] is being charged."

Id. at 58-59 (quoting *Odum*, 412 Md. at 615 (cleaned up)). However, the contested evidence presented in this case did not contain content that would inherently prevent jurors from rationally considering and weighing the contested evidence with all other evidence presented during trial, such as, *inter alia*, the surveillance footage of Appellant during the incident, the murder weapon found on the Appellant's person with the victim's blood, and the testimony of the eyewitnesses.

Finally, the Court declined to hold that the circuit court erred in denying Appellant's motion for a mistrial, citing that a "mistrial is an extreme sanction" that is necessary only "when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *McIntyre v. State*, 168 Md. App. 504, 524 (2006). Since the Court held that the evidence was admissible after balancing the contested evidence's probative value against prejudice, the Court declined to find the evidence prejudicial enough to warrant such extreme measures.

Thus, the Court of Special Appeals held that the circuit court did not err in admitting the contested evidence or in declining Appellant's motion for a mistrial.

Daniel Ashley McDonnell v. State of Maryland, No. 1246, September Term 2021, filed December 1, 2022. Opinion by Shaw, J.

https://mdcourts.gov/data/opinions/cosa/2022/1246s21.pdf

SEARCHES AND SEIZURES – THE FOURTH AMENDMENT

WARRANT REQUIREMENT – THE FOURTH AMENDMENT

Facts:

In July 2019, investigators from the United States Army Criminal Investigation Division Command approached Daniel McDonnell, without a search warrant, at his residence, and conducted what they characterized as a "knock and talk." During that interaction, investigators asked McDonnell about an upload of suspected child pornography. McDonnell agreed to sign a consent to search form, in which he "consent[ed] to the seizure and subsequent search of" the contents of his electronic devices. Investigators seized multiple electronic devices from his residence including, "a hard drive from a laptop computer." Investigators created a mirror-image copy of McDonnell's hard drive. A few days later, McDonnell's counsel informed investigators that any purported consent to the seizure and examination of McDonnell's laptop is withdrawn.

After consent was withdrawn, investigators performed a forensic examination on the mirror-image copy of his hard drive and discovered evidence of child pornography search terms in his browser history. McDonnell was subsequently charged with twenty counts of promotion or distribution of child pornography and twenty counts of possession of child pornography in the Circuit Court for Anne Arundel County. He filed a motion to suppress the evidence which was denied. He entered a not guilty plea and the case proceeded on an agreed statement of facts. McDonnell was found guilty on three counts of distribution of child pornography and was sentenced to an aggregate sentence of thirty years' incarceration, fully suspended, with five years' supervised probation. This appeal followed.

Held: Reversed.

The Court of Special Appeals held that McDonnell's revocation of his consent to examine data from his laptop computer precluded a forensic examination of the mirror-image copy of its hard drive without a warrant. The Court concluded that because individuals have a legitimate expectation of privacy in the digital data within their computer, a warrant or valid warrant exception is required to seize and examine its contents. For that reason, McDonnell's motion to suppress should not have been denied.

Edward Mekhaya v. Eastland Food Corporation, et al., No. 266, September Term 2022, filed December 22, 2022. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/cosa/2022/0266s22.pdf

CORPORATIONS AND BUSINESS ORGANIZATIONS – CAPITAL AND STOCK – DIVIDENDS AND DIVISION OF PROFITS – WHAT IS A DIVIDEND

CORPORATIONS AND BUSINESS ORGANIZATIONS – DERIVATIVE ACTIONS; SUING OR DEFENDING ON BEHALF OF CORPORATION – DERIVATIVE ACTIONS BY SHAREHOLDERS AGAINST DIRECTORS, OFFICERS, OR AGENTS – PERSONS ENTITLED TO SUE OR DEFEND; STANDING – DERIVATIVE OR DIRECT ACTION

Facts:

Mekhaya (Appellant) filed in the Circuit Court for Howard County a complaint advancing claims for shareholder oppression, breach of fiduciary duty, and unjust enrichment, against his former employer ("Eastland") and its board of directors. In his claim for shareholder oppression, Mekhaya alleged that, as a minority shareholder in Eastland, he received, before his firing as an employee and removal from the board, a "de facto" dividend, which Eastland had been paying as part of his salary prior to terminating his employment. He asserted that such expectation was reasonable, despite the fact that Eastland, a closely-held corporation, never declared officially a dividend. Mekhaya alleged that, by depriving him of the *de facto* dividend portion of his salary upon terminating his employment, Eastland and its board of directors defeated substantially his reasonable expectation as a shareholder to share in Eastland's profits.

Underlying his breach of fiduciary duty and unjust enrichment counts, was Mekhaya's assertions that, after his fall from grace, the *de facto* dividend payments (as salary) continued to be paid to the remaining officers, directors, and shareholders, which deprived him of his shareholder rights, were unreasonably extravagant and diverted profits that should have been his.

Eastland and the individual defendants filed a joint motion to dismiss. The motion argued: (1) the complaint's allegations failed to plead oppressive conduct that would, if proven, rebut the "business judgment rule;" and, (2) the allegations of harm under the breach of fiduciary duty and unjust enrichment counts did not demonstrate individual harm suffered by Mekhaya, but were, rather, derivative and must be brought in the name of Eastland.

The trial judge agreed with the motion to dismiss, doing so with prejudice and frustrated Mekhaya's alternative request to be allowed to amend his complaint.

Held: Reversed and remanded.

Building on a trio of Maryland cases (*Bontempo v. Lare*, 444 Md. 344 (2015); *Shenker v. Laureate Educ., Inc.*, 411 Md. 317 (2009); and *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233 (2005) examining whether and when it is appropriate for courts to intervene in internal corporate domestic affairs), it is appropriate for Maryland to recognize claims of *de facto* (or disguised) stock dividends as a cognizable shareholder oppression claim. As such, Mekhaya's allegations were sufficient to state a claim for shareholder oppression. The circuit court erred in finding otherwise. Moreover, because the purported deprivation of Mekhaya's *de facto* dividend could constitute a breach of a fiduciary duty owed directly to him, if proven, and resulted in a direct harm that was separate from any harm suffered by Eastland, Mekhaya's claims for breach of fiduciary duty and unjust enrichment were direct, and not derivative. The court erred in dismissing those claims as derivative. The court erred also in relying on the "business judgment rule," which is inapplicable to direct claims. If, however, Mekhaya fails to adduce evidence supporting direct harm under those counts, his complaint may need to be amended to advance derivative claims in the name of Eastland.

Aaron Lamont Brice v. State of Maryland, No. 1537, September Term 2021, filed December 22, 2022. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/cosa/2022/1537s21.pdf

CRIMINAL LAW – SUFFICIENCY OF THE EVIDENCE – SOLICITATION TO COMMIT FIRST-DEGREE MURDER

Facts:

Brice, in a bench trial in November 2021 in the Circuit Court for Anne Arundel County, was convicted of solicitation to commit first-degree murder of Lauren Friedlieb, his former lover. The mainstay of the State's case was an audiotape and transcript of a telephone call made by Brice from jail to Alton Michael Logan Rivera. The call was made on another inmate's account, for which Brice compensated that inmate, apparently in an effort to conceal that it was Brice who made the call. In that call, among other things, Brice asked Rivera "to take care of something" for him, to wit, "to shoot that bitch up." Later in the conversation, Rivera asked Brice if he wanted him "to fire that bitch up?" Brice replied "Yeah." Brice was in jail at the time of the call based on his earlier conviction on 42 counts of crime against Friedlieb or her property.

In addition to the contents of Brice's jail house telephone call to Rivera, the State introduced at trial (over Brice's objection), testimony from Friedlieb and her father, attempting to clarify and give context to certain matters mentioned in the call, as well as testimony from Rivera seeking his understanding of what the call meant for him to do.

Brice's defense was that the contents of the call reflected only his desire that Rivera commit vandalism or property destruction of a car parked in front of Friedlieb's former apartment, which Brice appeared to believe was owned by Friedlieb or her father. The trial judge believed, however, that the references to the car in front of Friedlieb's former apartment building (where she lived with Brice in happier times) was a coded reference to assist Rivera in finding Friedlieb.

Brice noted a timely appeal, presenting a single question: "Was the evidence insufficient to sustain [his] conviction for solicitation to commit first-degree murder?"

Held: Affirmed.

The State satisfies its burden of evidentiary sufficiency when '"any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' *Kamara v. State*, 205 Md. App. 607, 632 (2012) (quoting *State v. Coleman*, 423 Md. 666, 672 (2011). To prove that a defendant solicited the commission of first-degree murder, the State must prove that: (1) that the defendant urged, advised, induced, encouraged, requested, or commanded another person

to commit first-degree murder; and (2) that at the time the defendant made the oral or written efforts to persuade another person to commit first-degree murder, the defendant intended that the first-degree murder be committed. *See* MPJI-Cr 4:31.

The evidence established that Brice directed Rivera to "[s]hoot that bitch up." Later in the conversation, Rivera asked: "What you want, me to fire that bitch up?" Brice responded: "Yeah." Based on those statements — and all of the other evidence — the court was able to infer reasonably that Brice asked the solicitee to kill the victim, rather than shoot at a vehicle outside the victim's apartment. Moreover, the trial court did not err in relying on evidence extrinsic to the jail house call content itself in concluding that Brice was guilty of solicitation to commit first-degree murder.

In Re Expungement Petitions of Richard M., Nos. 700, 1435, September Term 2021, filed November 30, 2022. Opinion by Reed, J.

https://mdcourts.gov/data/opinions/cosa/2022/0700s21.pdf

STATUTES – CONSTRUCTION – IN GENERAL – INTENT – IN GENERAL

STATUTES – CONSTRUCTION – PLAIN LANGUAGE; PLAIN, ORDINARY, OR COMMON MEANING – NATURAL, OBVIOUS, ACCEPTED MEANING

STATUTES – CONSTRUCTION – PRESUMPTIONS AND INFERENCES AS TO CONSTRUCTION – STATUTE AS A WHOLE; RELATION OF PARTS TO WHOLE AND TO ONE ANOTHER – GIVING EFFECT TO ENTIRE STATUTE AND ITS PARTS; HARMONY AND SUPERFLUOUSNESS

COURTS – ESTABLISHMENT, ORGANIZATION, AND PROCEDURE – RULES OF COURT AND CONDUCT OF BUSINESS – OPERATIONS AND EFFECT OF RULES – IN GENERAL

CRIMINAL LAW – CRIMINAL RECORDS – IN GENERAL – EXPUNGEMENT OR CORRECTION; EFFECT OF ACQUITTAL OR DISMISSAL – IN GENERAL

Facts:

Richard M. ("Appellant") was charged with armed robbery. A criminal information was first filed for the armed robbery, then nolle prossed. Then, for the same armed robbery, an indictment was filed ("first indictment"), then nolle prossed. A superseding indictment for the same robbery followed. Following a two-day jury trial, the jury found Appellant guilty of the robbery.

Appellant simultaneously filed two Petitions for Expungement ("Petitions") on the basis that the charges in the criminal information and first indictment were both nolle prossed. The first petition, filed in the criminal information case, was opposed by the State of Maryland ("State") and denied by the circuit court. The second petition, filed for the first indictment, was not opposed by the State and was granted by the circuit court through an order. However, because of the interrelatedness of the case with the superseding indictment, the Salisbury Police Department notified the State's Attorney's Office that it was having difficulty in complying with the expungement order and "requested guidance." In response, the State filed a "Motion for Appropriate Relief" which was ultimately granted by the circuit court. Appellant timely appealed from the denial of his petitions for expungement in two interrelated cases that were consolidated by this Court.

Held: Remanded.

Affirmed in Appeal No. 700. Vacated in Appeal No. 1435. Remanded.

The Court of Special Appeals addressed an apparent conflict between Maryland Code, Criminal Procedure Article ("CP") § 10 105(d)(2) and Maryland Rule 4 505(d), both of which govern the procedure a court should follow in response to an expungement petition, where the State fails to file a timely response. The Court of Special Appeals applied the canon of construction that the later enacted provision controls and concluded that Rule 4-505(d) supersedes CP § 10-105(d)(2) because the rule and the statute directly trace back to former Rule EX4 and former Art. 27, § 737(d), respectively, and Rule EX4 was enacted after Art. 27, § 737(d).

The Court held that the circuit court did not err in granting the State's objection and denying his Petition in Appeal No. 700. The Court reasoned that the Appellant's charges in the criminal information and first indictment are part of a "unit" under CP § 10-107(a)(1), because they arose from the same armed robbery incident. Where one Petition under a unit is not entitled to expungement, then the other Petition that is part of that same unit is not eligible for expungement. Thus, because the criminal information and first indictment are part of a unit, Appellant's Petition was not eligible for expungement.

However, in Appeal No. 1435, the State filed its "Motion for Appropriate Relief" more than thirty days after entry of judgment. Therefore, the circuit court had authority to revise its judgment only on grounds of "fraud, mistake, or irregularity." There was no such basis for fraud, mistake, or irregularity, so the circuit court lacked the authority to revise its judgment. Thus, the circuit court's order of expungement in the criminal information case remained in effect, despite the Petition's ineligibility for expungement. Subsequently, the judgment in Appeal No. 1435 was vacated and remanded for further proceedings in accordance with the Court's Opinion.

Javonna Andrews v. Laura O'Sullivan, et al., Nos. 1018 and 1553, September Term 2021, filed December 29, 2022. Opinion by Wells, C.J.

https://mdcourts.gov/data/opinions/cosa/2022/1018s21.pdf

FORECLOSURES – DENIAL OF A MOTION TO STAY – FINAL JUDGMENTS – INTERPLAY BETWEEN RULE 8-202, RULE 2-534, AND COURTS AND JUDICIAL PROCEEDINGS ARTICLE SECTION 12-303

Facts:

Andrews executed a promissory note and deed of trust on a property located in Hyattsville. She defaulted on the loan and the lender imitated foreclosure proceedings. Andrews moved to stay the foreclosure. The circuit court set the matter for a hearing, but the substitute trustees on the loan did not receive notice of the stay and sold the house. After a hearing, the court declined to vacate the sale but stayed the ratification of the sale. Because of the COVID-19 pandemic, ratification was stayed for over a year. Finally, the court heard Andrews' motion to stay and denied it. Andrews moved for reconsideration or, alternately, to alter or amend the judgment. The court declined to do so. Andrews appealed (No. 1018). After the court ratified the sale Andrews filed a second appeal (No. 1553).

Held: Affirmed.

The important preliminary issue was whether Andrews' appeals should be dismissed as untimely. As for appeal No. 1018, the Substitute Trustees contended that Andrews' notice of appeal was not filed within 30 days of the court's denial of the motion to stay, as required by Rule 8-202(a)[1]. Further, Substitute Trustees assert that Andrews' Rule 2-534 motion to alter or amend did not toll the time to appeal under Rule 8-202(c)[2], because 2-534 motions are reserved for "final judgments" and the court's denial of a stay is not a final judgment.

The Appellate Court of Maryland held that the denial of the motion to stay should be treated as an appealable interlocutory order, final in nature, by virtue of Courts and Judicial Proceedings Article § 12-303(3)(iii), which states that a party may appeal from an interlocutory order entered by a circuit court in a civil case where the court refuses to grant an injunction. In *Huertas v.*

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[1] Md. Rule 8-202(a) states: "Except as otherwise provided by this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken."

[2] Md. Rule 8-202(c) allows for certain post-judgment motions, including 2-534 motions, to toll the period of time in which to file a notice of appeal with this Court.

Ward, 248 Md. App. 187, 207 (2020), we noted that "a request to stay a foreclosure sale, i.e., to prohibit parties from selling a property, was a request for an injunction. Accordingly, the order was immediately appealable to the extent that it denied his request for injunctive relief." Andrews' Rule 2-534 motion stayed the time for filing the appeal until after the court acted on that motion. Andrews filed her appeal within 30 days of the denial of the motion and was, therefore, timely.

As for Appeal No. 1553, the substitute trustees argued that it was a "post-sale appeal seeking to challenge the denial of a Rule 14-211 motion, which is conclusively not allowed." The Court held that Andrews' assertion of other bases for the appeal, not strictly limited to procedural irregularities, was not a basis for dismissing the appeal.

On the merits, Andrews raised several issues none of which were persuasive. First, the Court held that the circuit court properly determined, based on the evidence adduced at prior hearings, that Andrews had in her possession the necessary financial documents before mediation. She claimed that she had not received these documents.

Second, the circuit court did not err in denying the stay based on Andrews' claim that her loss-mitigation options had not been exhausted, specifically, that the successor loan servicer improperly denied her request for a loan modification. The record demonstrated that the prior loan servicer had considered Andrews for a loan modification but declined to do so because the proposed new loan would have been 25% greater than the original loan. Andrews, having defaulted for a smaller loan, would have posed too great a financial risk. Federal regulations governing foreclosure actions do not mandate that a loan servicer consider more than one modification request. Andrews contended that the successor loan servicer was required to consider her modification request. The Court disagreed, holding that the first and second loan servicers simply merged and were, essentially, the same entity. More importantly, the second loan servicer, in fact did, consider Andrews for a loan modification but declined for reasons like the previous servicer.

Third, the Court held that the circuit court did not err in denying the foreclosure stay based on Andrews' claim that the foreclosure was procured by false affidavits. Here, Andrews asserted that because fees imposed by an earlier lender were not being collected by the substitute trustee was the basis for fraud. The circuit court properly rejected that argument.

Finally, Andrews' assertion that the substitute trustees had "unclean hands" rested on proving the other allegations of misconduct just discussed. As Andrews was unsuccessful in proving any of those allegations, her catch-all claim of unclean hands failed as well.

In the Matter of John Homick, et al., No. 33, September Term 2022, filed December 1, 2022. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2022/0033s22.pdf

APPELLATE JURISDICTION – SCOPE OF REMAND – LAW OF THE CASE – SUBSTANTIAL EVIDENCE – ARBITRARY AND CAPRICIOUS STANDARD

Facts:

This case arises from an appeal of a decision by the Board of Appeals of the City of Annapolis ("the Board") granting the application for a special exception, conditioned upon several requirements regarding the development of the site, for a 75-seat restaurant that is part of a larger development on a parcel of land. The Board also granted the developer's, Noreast Holdings, LLC ("Noreast"), application for a zoning district boundary adjustment but denied its application for variances. John Homick led a group of objectors ("Homick") who appealed the granting of the special exception and the zoning district boundary adjustment to the Circuit Court for Anne Arundel County, while Noreast appealed the denial of the variances.

The circuit court affirmed the denial of the variances and the approval of the zoning district boundary adjustment. The court remanded "for further clarification" the issue of the special exception, with instructions for the Board to better articulate how it could grant the special exception while denying variances that appeared needed for the development to comply with the parking requirements of the Planning and Zoning title of the Annapolis Code ("the Code").

Upon remand, the Board reviewed a new site development plan submitted by Noreast that lowered the number of seats in the restaurant from 75 to 65 and made adjustments to the on-site parking arrangements reflecting the zoning district boundary adjustment and the lack of variances. The Board then issued an order and opinion again approving the special exception and explaining how the application complied with the Code's parking requirements based on the conditions attached to the original approval as well as the modifications to the site plan. Homick again appealed this decision to the circuit court, which ruled that the Board sufficiently explained its approval of the special exception without the variances, followed the appropriate provisions of the Code, and adduced substantial evidence to support its decision.

Homick appealed the circuit court's ruling to the Court of Special Appeals, asserting: (1) the Board exceeded the scope of the circuit court's remand order by considering the modifications to the site development plan upon remand; (2) the Board failed to produce a sufficient record of substantial evidence in accordance with the review criteria required by the Code in approving a special exception; and (3) when Board reviewed the proposed changes to the site development plan it acted arbitrarily and capriciously by injecting its "personal preference" into its decision in an effort to avoid a "formalistic" and "unworkable" development process that would require Noreast to wait a year and resubmit a new plan, as Homick argues the Code requires.

Held: Affirmed.

As an initial matter, the Court of Special Appeals held it had jurisdiction over the appeal under Section 4-405(b)(1) and 4-406(b) of the Land Use Article of the Maryland Code, which provides that parties litigating a zoning dispute may appeal a judgment of the circuit court -- issued when that court sits as an appellate court -- to the Court of Special Appeals. Md. Code (2012, 2012 Repl. Vol.), §§ 4-405(b)(1), 4-406(b) of the Land Use Article ("LU").

The Court of Special Appeals held that the Board's review of the "new evidence" the modified site development plan -- did not violate the mandate of the circuit court's remand order, nor the opinion issuing that mandate. The circuit court sought "further clarification" as to how the special exception could be granted despite the denial of variances thought needed to comply with parking restrictions. Because the mandate did not specifically limit the matter upon remand, the Board was entitled to "conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court." Md. Rule 8-604(d)(1). Citing a similar dispute in which the circuit court remanded to the local board of zoning appeals the denial of a conditional use permit due to that board's failure to make sufficient findings of fact, the Court of Special Appeals in that case held that that board did not violate the remand mandate by conducting additional hearings and reviewing additional evidence upon its subsequent review of the application. *E. Outdoor Advert. Co. v. Mayor & City Council of Balt.*, 146 Md. App. 283, 303 (1990). When an appellate court remands a matter to an administrative body for "further proceedings" then "[i]f further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken." *Id.* at 305.

Additionally, the Court of Special Appeals held that the Board did not violate the "law of the case" by approving the special exception despite the prior denial of the variances because the circuit court's opinion did not rule that the variances were necessary for the special exception's approval. The only "law of the case" as to the variances was the affirmance of their denial. Therefore, so long as the Board did not attempt to relitigate the issue of the variances, it did not contradict the circuit court's opinion or upset the "law of the case."

In reviewing the decision issued by the Board following the circuit court's remand order, the Court of Special Appeals held that the Board adhered to the requirements of the Code and made sufficient findings of fact, creating a record of substantial evidence supporting its decision to approve the special exception. The Board articulated findings of fact sufficient to address each criterion required by the Code for the approval of the special exception, particularly those addressing parking minimums. When issuing its decision, the Board was permitted to adopt the findings and recommendations from a report issued by the Department of Planning and Zoning. The Code authorized the use of conditions to ensure the special exception adhered to the Code's requirements. Because this Court defers to decisions of administrative bodies applying the laws they are tasked to enforce, and because special exceptions are legislatively created and enjoy a presumption of correctness, substantial evidence supported the Board's decision to grant the special exception.

Finally, the Court of Special Appeals held that the Board's seeking to avoid an overly formalistic application of the Code that would render the approval process "virtually unworkable" was not arbitrary and capricious. Homick argued that Noreast must be forced to submit a new site development plan rather than proceed with the modified plan that lowered the number of seats from 75 to 65. The Board noted that, according to the Code, any number of seats greater than 50 required a special exception, so the Board's initial approval of the 75-seat application acted as the outer limit for the capacity of the proposed restaurant. The Code provided the Planning and Zoning Director the discretion to authorize "minor modifications," such as the reduction in seating and parking. Further, multiple provisions of the Code evidenced the Code's intent to promote economic development while balancing concerns of the general welfare, thus the Board considering a workable procedure for development applications, such as the one at issue in this case, is at least "fairly debatable." Therefore, the Court of Special Appeals concluded that the Board's decision was not arbitrary or capricious.

Bradley E. Heard v. County Council of Prince George's, et al., No. 1877, September Term 2021, filed December 29, 2022. Opinion by Wells, C.J.

https://mdcourts.gov/data/opinions/cosa/2022/1877s21.pdf

ZONING – ADMINISTRATIVE REVIEW – JURISDICTION – STANDING – AGGRIEVEMENT – PROXIMITY – GENERAL AND MASTER PLANS – NON-BINDING ON SUBSEQUENT AMENDMENTS – ADMINISTRATIVE REVIEW – SUBSTANTIAL EVIDENCE

Facts:

The Prince George's County Council, sitting as the District Council ("District Council"), affirmed the Prince George's County Planning Board's ("Planning Board") approval of an Amended Detailed Site Plan ("DSP). The DSP is for a mixed-use residential and commercial development on property located at 6301 Central Avenue, Capitol Heights—across from the Addison Road Metro Station. Appellant, Bradley E. Heard ("Mr. Heard") lives about 1,000 feet from the subject property and opposes the project. Appellees are the District Council and 6301 Central Avenue, LLC (the "Applicant")—the developer and applicant to the DSP. Before the Appellate Court of Maryland, Mr. Heard and Appellees raise multiple issues including standing, whether General or Master Plans are binding regulations on DSPs, and whether there was substantial evidence in the record to support the substantial evidence in the record to support the District Council's decision to affirm the Planning Board.

Held: Affirmed.

After reviewing the process for approving development in Prince George's County, and a brief history of this particular project, the Court addressed the preliminary issue of standing, raised by both sides in this dispute. As for Mr. Heard's standing to challenge the development, the Court determined that Mr. Heard had standing. First, Mr. heard lived within 1000 feet of the project. Second, he was also aggrieved, in the legal sense, because of certain "plus factors," such as Mr. Heard's contention that the development would dimmish his property's value, pose an increased risk of motor vehicle traffic, and create unsafe conditions, generally, for him. As for the District Council's standing, the Court declined to address that specific issue because the property owner, the developer, was a party to the case, meaning that an analysis of the District Council's standing was not necessary.

On the merits, the Court determined that the General Plan and the applicable Master Plan were advisory, rather than binding regulations on the District Council, as Mr. Heard argued. The Court's analysis of the applicable sections of the Prince George's County Code (PGCC) and determined that the PGCC does not mandate that a DSP be in strict conformity with the General

or Master Plans. So long as the DSP furthers the overall development scheme of the General or Master Plans, the DSP is permitted. In this case, the District Council's finding that the Planning Board correctly determined that the DSP here was in conformity was not error.

Finally, the Court held that the District Council properly determined that there was substantial evidence in the record to support the Planning Board's findings and approval of the DSP. The relevant section of the PGCC states that the Planning Board may approve a DSP so long as the plan represents a reasonable alternative for satisfying the site design guidelines. *PGCC § 27-274*. Mr. Heard named several aspects of the DSP which he argued were not in conformity with the Development District Overlay, such as surface parking, the size and placement of certain sidewalks, the design features of certain light poles, and failure to identify the placement of existing and proposed underground utilities. The Court's analysis of each of Mr. Heard's alleged errors was that the record contained substantial evidence to support the Planning Board's finding that the Applicant complied with the applicable standards of the PGCC.

ATTORNEY DISCIPLINE

*

This is to certify that

JEFFREY LAWSON

has been replaced on the register of attorneys permitted to practice law in this State as of December 5, 2022.

*

This is to certify that

ISAAC H. MARKS

has been replaced on the register of attorneys permitted to practice law in this State as of December 16, 2022.

*

By an Opinion and Order of the Supreme Court of Maryland dated December 16, 2022, the following attorney has been indefinitely suspended:

TERENCE TANIFORM

*

By an Order of the Supreme Court of Maryland dated November 3, 2022, the following attorney has been disbarred by consent, effective December 31, 2022:

MARK LEONARD HESSEL

*

JUDICIAL APPOINTMENTS

*

On November 15, 2022, the Governor announced the appointment of **DARREN LEE KADISH** to the District Court for Baltimore City. Judge Kadish was sworn in on December 5, 2022, and fills the vacancy created by the retirement of the Hon. Halee F. Weinstein.

*

On October 20, 2022, the Governor announced the appointment of **J. BRADFORD McCULLOUGH** to the Circuit Court for Montgomery County. Judge McCullough was sworn in on December 9, 2022, and fills the vacancy created by the retirement of the Hon. Richard E. Jordan.

*

On November 15, 2022, the Governor announced the appointment of **MICHELE BERNICE LAMBERT** to the District Court for Baltimore City. Judge Lambert was sworn in on December 9, 2022, and fills the vacancy created by the retirement of the Hon. Barbara B. Waxman.

*

On October 20, 2022, the Governor announced the appointment of **MARY E. AYRES** to the Circuit Court for Montgomery County. Judge Ayres was sworn in on December 16, 2022, and fills the vacancy created by the retirement of the Hon. Steven G. Salant.

*

RULES ORDERS AND REPORTS

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A Rules Order pertaining to the 212th Report of the Standing Committee on Rules of Practice and Procedure was filed on December 15, 2022.

http://mdcourts.gov/sites/default/files/rules/order/ro212.pdf

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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