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# COURT OF APPEALS

*In the Matter of the Application of Alonya Renee Knight for Admission to the Bar of Maryland*, Misc. No. 27, September Term 2018, filed June 24, 2019. Opinion by McDonald, J.

<https://www.mdcourts.gov/data/opinions/coa/2019/27a18m.pdf>

ADMISSION TO THE MARYLAND BAR – GOOD CHARACTER REQUIREMENT –  
GROUNDS FOR DENIAL OF APPLICATION

## **Facts:**

After the dissolution of an allegedly abusive marriage, Alonya Renee Knight graduated from college and, in October 2016, from the David A. Clarke School of Law of the University of the District of Columbia. In December 2016, she submitted her application to take the Maryland bar exam in February 2017. She passed that exam.

Because of various issues in Ms. Knight’s application, the State Board of Law Examiners (“Board”) referred it to the Character Committee for the Seventh Appellate Circuit (“Committee”). The flagged matters included her answers to questions about delinquent accounts, civil actions, criminal proceedings, and terminations of past employment. The Committee investigator interviewed Ms. Knight in May 2017, and a number of discrepancies soon became apparent. After a thorough investigation and some contentious follow-up communications from Ms. Knight, the investigator forwarded a 20-page report to the full Committee in July 2017.

Many of Ms. Knight’s explanations of the flagged issues in her application appeared not in the application itself, but in subsequent communications to the Board in response to the investigator’s inquiries. In correspondence with the investigator, Ms. Knight accused the investigator of “fabricating” information, deliberately misstating facts, and conducting an “inquisition.” The investigator concluded that Ms. Knight did not meet her burden of demonstrating good moral character and fitness for the practice of law and recommended that the Committee hold a hearing.

The Committee held a hearing on Ms. Knight’s application over four days from November 2017 to April 2018. After the hearing, the Committee unanimously concluded that Ms. Knight had not

met her burden of proving good moral character and fitness for the practice of law. The Committee issued a 32-page memorandum in September 2018 recounting its investigation and the hearing. The Committee found that Ms. Knight demonstrated “an alarming lack of candor throughout the investigation and hearing process” and a “pervasive pattern of incomplete facts, inconsistencies and positions which strained credulity.”

The Committee expressed sympathy for Ms. Knight’s past difficulties in life, but concluded that those problems did not excuse her from “meeting reasonable expectations of honesty, candor and cooperation with the investigation process” for Bar admission.

The Board considered the Committee’s adverse recommendation and held its own hearing in October 2018. In her testimony at the hearing, Ms. Knight disputed the accuracy of the Committee report and criticized the fairness of its process.

In November 2018, a majority of the Board issued a report agreeing with the Committee that Ms. Knight’s “lack of candor and her failure to timely disclose” various matters “seals her fate.” The Board majority recommended that the Court of Appeals deny Ms. Knight’s application for Bar admission. The Board reported that it could not find that she responded to the flagged issues “with appropriate candor,” although it left open the possibility that her non-disclosures were negligent rather than intentional.

**Held:** Bar admission denied.

After independently reviewing the record, the Court agreed with the Committee and the Board majority that Ms. Knight did not demonstrate the moral character and fitness required for admission to the Maryland Bar.

Candor and forthrightness are at the core of the character and fitness requirement. The failure of a Bar applicant to demonstrate these traits signals that he or she may not conduct a legal practice in accordance with the rules of professional conduct.

In her Bar application and her interactions with the Committee and Board, Ms. Knight failed to act with sufficient candor and forthrightness. The issues flagged by the Board, even in the aggregate, would not necessarily have disqualified her. But when the investigator, Committee, and Board asked about these issues, Ms. Knight consistently gave misleading and incomplete answers.

The Court reasoned that if Ms. Knight is not diligent in obtaining and verifying information and making necessary disclosures when something as important as her bar admission is at stake, it suggests that she may take a similarly lax approach when an important matter for a client is at stake. Therefore, the Court denied Ms. Knight’s application for Bar admission.

*Diane Steele v. Diamond Farm Homes Corp.*, No. 59, September Term 2018, filed June 26, 2019. Opinion by Hotten, J.

McDonald and Adkins, JJ., concur.

<https://mdcourts.gov/data/opinions/coa/2019/59a18.pdf>

HOMEOWNER’S ASSOCIATIONS – UNPAID ASSESSMENTS – ULTRA VIRES  
DEFENSE

HOMEOWNER’S ASSOCIATIONS – UNPAID ASSESSMENTS – EQUITABLE ESTOPPEL

ATTORNEY’S FEES – REASONABLENESS

**Facts:**

Petitioner, Diane Steele (“Steele”), owned a home in the Diamond Farm development of Montgomery County, which was managed by a homeowner’s association (“Association”). The State Department of Assessments and Taxation of Maryland approved and received the Association’s Articles of Incorporation on April 21, 1969.

In accordance with the Association’s Declaration of Covenants, Conditions and Restrictions (“Declaration”), the Association must obtain at least two-thirds of the total votes of all classes of members voting in person or by proxy to increase annual assessments. Through a letter dated September 19, 2016, Steele discovered that assessment increases in 2007, 2011, and 2014 did not receive the requisite two-thirds vote for approval. As a result, Steele calculated her overpayment in assessment dues, determined that she was entitled to an offset, and ceased making payments.

The Association noted Steele’s payment delinquency in October 2016 and brought suit against her in the District Court located in Montgomery County regarding the unpaid assessments and attorney’s fees. Steele’s motion for judgment, based on failure to prove the amount of dues owed, was granted at the close of the Association’s case. The Association noted a *de novo* appeal to circuit court.

On appeal, the Association maintained its assessment value of \$1,257.60 against Steele and sought attorney’s fees in the amount of \$26,589.13. The circuit court awarded judgment in the full amount of \$1,257.60 plus \$4,200 in attorney’s fees in the Association’s favor. In its oral ruling, the circuit court elaborated on three alternative grounds that justified awarding the Association assessment fees and precluding Steele’s offset defense: Md. Code, Corporations and Associations (“Corps. & Ass’ns”) § 1-403 (“ultra vires statute”); laches, or alternatively, equitable estoppel; and general principles of waiver, ratification and acquiescence. With regards to the Association’s request for attorney’s fees, the circuit court considered a number of factors and concluded that the uppermost range of permissible fees would be three times the amount in

**Held:** Affirmed.

Steele appealed to the Court of Appeals to determine whether her offset defense was invalid on account of the ultra vires statute and laches. Steele also contended that the circuit court abused its discretion by awarding attorney's fees in the amount of \$4,200.

The Court of Appeals concluded that Steele owed dues to the Association in the amount of \$1,257.60 based on its interpretation of the ultra vires statute, Corps. & Ass'ns. § 1-403, and application of the doctrine of equitable estoppel. The Court also held that the circuit court did not abuse its discretion in awarding the Association \$4,200 in attorney's fees because it properly considered factors of reasonableness.

*Malik Small v. State of Maryland*, No. 19, September Term 2018, filed June 24, 2019. Opinion by Greene, J.

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

<https://mdcourts.gov/data/opinions/coa/2019/19a18.pdf>

CRIMINAL LAW – CRIMINAL PROCEDURE – EYEWITNESS IDENTIFICATION – PHOTO ARRAY

**Facts:**

On June 17, 2015 at 2:00 a.m., Ellis Lee (“Mr. Lee”) was sitting at a bus stop in Baltimore City when a man approached him. The man stood approximately one foot away from Mr. Lee, covering the bottom portion of his face with a white T-shirt and pointing a gun at Mr. Lee. The man said, “Let me get your money,” but Mr. Lee did not have any money. The man told Mr. Lee to run, so Mr. Lee ran away. As Mr. Lee fled, the man fired the gun, and one bullet struck the back of Mr. Lee’s right leg.

Following the incident, Mr. Lee went to the hospital. There, he was interviewed by Detective Matthew DiSimone (“Detective DiSimone”). Mr. Lee described the assailant to Detective DiSimone as “a black male, light skin, believed he had seen him before, a light [T]-shirt, tattoo on the right side of his neck, 5’8”, regular sized, a short haircut. He held the bottom of his shirt up over his face, blue jeans, block letter tattoo on neck, had letter ‘M’ in it.” Mr. Lee believed that he had seen the assailant twice before at Staples, where Mr. Lee worked.

When Mr. Lee was released from the hospital, Detective DiSimone brought him to the police station. There, Mr. Lee gave Detective DiSimone another description of the assailant. He described the assailant as “a light brown, black male, 5’8”, regular sized, with a scraggly beard, a tattoo on his neck.” He also described the assailant’s neck tattoo “in detail,” as being “[b]lock styled cursive script, bold, not dull, containing multiple letters and at least one of them was an ‘M.’”

Detective DiSimone used a police database to compile mugshots to include in a photographic array identification procedure. He included six photographs in the array – one photo of Petitioner Malik Small (“Petitioner” or “Mr. Small”) and five filler photos. Mr. Small had an “M” tattooed on his neck, and he was the only individual in the first array who had a visible neck tattoo. Detective DiSimone included one front-facing photo of each person in order to keep Mr. Small’s tattoo out of view. Despite his intentions, Mr. Small’s tattoo was plainly visible in his photograph in the array.

The array was administered at 8:37 a.m. by Detective Stanley Ottey (“Detective Ottey”) using a blind procedure. Upon being shown Mr. Small’s photo, Mr. Lee indicated that he “looks like [the assailant], doesn’t think it’s him.” Mr. Lee was 80% sure that Mr. Small was the assailant.

Subsequently, Detective DiSimone compiled a second array. The second array ultimately included twelve photographs – one front facing photo and one right profile photo of six individuals. Mr. Small was included in the array with five new fillers, making Mr. Small the only individual from the first array who was repeated in the second array. All of the fillers in the second array had a tattoo on their neck. At least one filler had a tattoo with letters, but none of the fillers had a tattoo with the letter “M” in it.

The second array was administered at approximately 11:45 a.m. by Sergeant Detective Ethan Newberg (“Sergeant Newberg”). When shown Mr. Small’s photograph, Mr. Lee said, “That’s him. That’s who shot me.” On Petitioner’s photo, Mr. Lee wrote, “This is the same tattoo and face I remember robbing me and the man I remember shooting me. I also remember him from coming into my job [at Staples] on two different occasions.” Mr. Lee said that he was 100% sure of his identification.

Two weeks later, Mr. Lee saw a man on a dirt bike whom he believed was the assailant. Mr. Lee had already been told that Petitioner was arrested, but he called the police to report the man he saw. In addition, at one point, Mr. Lee spoke with an Assistant State’s Attorney about his identification. During that conversation, Mr. Lee indicated that he was 70% sure about his identification.

The State brought charges against Mr. Small in the Circuit Court for Baltimore City. Before the matter proceeded to trial, Mr. Small moved to suppress evidence of both extrajudicial photographic array identification procedures on due process grounds. On March 18, 2016, the court held a suppression hearing to assess the admissibility of evidence of the identification procedures.

The suppression court ruled that evidence of the first photo array could not be admitted by the State against Mr. Small at his trial because Detective Ottey was not available to testify. The suppression court, however, ruled that evidence of the second photo array was admissible against Mr. Small. The presiding judge was troubled by the temporal proximity between the first array and the second array, given that Mr. Small was the only person who appeared in both identification procedures. Nevertheless, the suppression court found that Mr. Lee’s identification was reliable by clear and convincing evidence.

Mr. Small noted an appeal to the Court of Special Appeals, and the intermediate appellate court affirmed the trial court’s ruling. Thereafter, Mr. Small petitioned this Court for *certiorari*. The Court granted the petition on June 1, 2018 to review whether the suppression court properly denied Mr. Small’s motion to suppress evidence of the second photo array on due process grounds. In conjunction with the petition, the Court also reviewed a brief submitted by *amici curiae*, challenging the framework that Maryland courts apply when assessing due process challenges to pretrial identification procedures.

**Held:** Affirmed.

The Court began by reviewing the two-step framework that Maryland courts apply when assessing due process challenges to pretrial identification procedures. The test was articulated by the United States Supreme Court in *Manson v. Brathwaite* and adopted by this Court in *Jones v. State*.

In step one, the suppression court must evaluate whether the identification procedure was suggestive. The defendant bears the burden of making a prima facie showing of suggestiveness. If the court determines that the procedure was suggestive, then the suppression court must weigh whether, under the totality of the circumstances, the identification was reliable. At this stage, the State bears the burden of proving reliability by clear and convincing evidence. The Supreme Court and this Court have identified five factors that may be used to assess reliability: the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's description of the criminal, the witness's level of certainty in his or her identification, and the length of time between the crime and the identification.

The Court reaffirmed that the *Manson-Jones* framework is the proper test for assessing the admissibility of evidence of an extrajudicial identification procedure that is challenged on due process grounds. In doing so, the Court recognized that the reliability assessment hinges upon the totality of the circumstances, and such an inquiry is necessarily a comprehensive one. As such, suppression courts can and ought to consider the myriad of facts and circumstances presented by a particular case, which may impact the reliability of an identification.

Applying the aforementioned principles to the facts of the present case, the Court determined that the second photo array procedure was suggestive. Petitioner's photo was emphasized during the first photo array. The cursive-script "M" tattooed on his neck was prominently visible during the first array, and he was the only person in the first array who had a visible neck tattoo. Then, Petitioner was the only person from the first array who recurred in the second array.

Nonetheless, Mr. Lee's identification had sufficient indicia of reliability under the totality of the circumstances to overcome the taint of the suggestiveness. Mr. Lee had previously encountered the assailant at Staples and had ample opportunity to view the assailant at the time of the incident. Mr. Lee gave a specific and detailed description of the assailant. He identified the assailant shortly after the crime and was aided in making that identification because the assailant displayed a unique tattoo. Accordingly, the State presented clear and convincing evidence that Mr. Lee's identification was reliable, even in light of the suggestive extrajudicial procedure. Beyond that, the weight of the identification was a matter for the jury to resolve. Petitioner's motion to suppress evidence of the second pretrial identification on due process grounds was properly denied.

*State of Maryland v. Willie B. Stewart*, No. 53, September Term 2018, filed June 25, 2019. Per Curiam Opinion.

Plurality opinion by McDonald, J., which Barbera, C.J., and Adkins, J., join.  
Watts and Getty, JJ., concur.  
Greene, J., concurs and dissents.  
Hotten, J., dissents.

<https://mdcourts.gov/data/opinions/coa/2019/53a18.pdf>

## CRIMINAL LAW – INCONSISTENT VERDICTS

### **Facts:**

Willie B. Stewart was charged in the Circuit Court for Baltimore County with robbery, second-degree assault, and theft due to events that allegedly occurred at an ice cream store in August 2016. The trial took place in May 2017. At the close of the evidence, the Circuit Court denied a defense motion for judgment of acquittal on each count, thus finding sufficient evidence to create a jury issue as to each charge.

The Circuit Court used jury instructions based on Maryland State Bar Association pattern instructions. As to robbery, the court instructed the jury that the State needed to prove, among other things, that Mr. Stewart took property “by force or threat of force.” As to second-degree assault, the court instructed the jury that the State had to prove, among other things, that Mr. Stewart “committed an act with the intent to place [the store owner] in fear of immediate physical harm” and that Mr. Stewart “had the apparent ability at that time to bring about physical harm.”

The parties agreed that these instructions accurately stated the law governing robbery and second-degree assault and that the evidence presented at trial generated these two instructions. No objection was made to these or any of the court’s other instructions.

The jury found Mr. Stewart guilty of robbery and theft but not guilty of second-degree assault. At Mr. Stewart’s sentencing on July 25, 2017, the Circuit Court merged the theft conviction into the robbery conviction and sentenced him to 15 years imprisonment.

Mr. Stewart appealed his convictions, solely on the ground that the trial court erred by accepting inconsistent verdicts. In an unreported decision, the Court of Special Appeals reversed the conviction on the robbery count, based on a distinction between “legally inconsistent” verdicts and “factually inconsistent” verdicts made in *McNeal v. State*, 426 Md. 455 (2012), which held that in criminal trials “factually inconsistent” verdicts are acceptable but “legally inconsistent” verdicts are not.

**Held:** Reversed.

A majority of the Court agreed, for different reasons, that the judgment of the Court of Special Appeals should be reversed and that the guilty verdict on the robbery count should be affirmed.

Three judges – in an opinion by Judge McDonald (joined by Chief Judge Barbera and Senior Judge Adkins) – were not concerned with distinguishing “legally inconsistent” verdicts from “factually inconsistent” ones. Instead, they would have asked whether the verdicts, on their face, showed that the jury disregarded the trial court’s proper instructions. Concluding that the verdicts in this case did not demonstrate that the jury disregarded the court’s instructions, they agreed that the guilty verdict on the robbery count should not be reversed on the ground of inconsistency.

Two judges – in an opinion by Judge Watts (joined by Judge Getty) – applied a two-step analysis in which a reviewing court first confirms that the trial court correctly instructed the jury on the elements of the offenses and then ascertains whether the verdicts are “legally inconsistent” – that is, whether the charge of which the jury found the defendant not guilty is a lesser-included offense of the charge of which the jury found the defendant guilty. They concluded that Mr. Stewart’s guilty verdict on the robbery charge was not “legally inconsistent” with the not guilty verdict on the second-degree assault charge because second-degree assault of the intent-to-frighten type is not a lesser-included offense of robbery. In addition, they concluded that the evidence at trial satisfied the elements of robbery but not those of second-degree assault of the intent-to-frighten type.

Two members of the Court dissented from the Court’s disposition and would have affirmed the judgment of the Court of Special Appeals. First, Judge Greene agreed with Judge Watts that the analysis should distinguish “legally inconsistent” verdicts from “factually inconsistent” ones. But he concluded that, because second-degree assault is generally a lesser-included offense of robbery, Mr. Stewart’s guilty verdict on the robbery count was “legally inconsistent” with the not guilty verdict on the second-degree assault count and therefore should be reversed.

Second, Judge Hotten also would assess whether a verdict is “legally inconsistent” by deciding whether one of the charged offenses is a lesser-included offense of another charge. In her view, case law has established that second-degree assault, of either the battery or intent-to-frighten variety, is a lesser-included offense of robbery. Thus, she would have held that the verdicts in this case were legally inconsistent and the guilty verdict on the robbery count should be reversed. In addition, unlike Judge Watts, Judge Hotten concluded that the evidence at trial was sufficient to prove second-degree assault.

*State of Maryland v. Nicholas Heath*, No. 36, September Term 2018, filed June 28, 2019. Opinion by Greene, J.

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

<https://www.courts.state.md.us/data/opinions/coa/2019/36a18.pdf>

CRIMINAL LAW – PROCEEDINGS – OPENING STATEMENT – “OPENING THE DOOR”  
– APPROPRIATE REBUTTAL EVIDENCE

**Facts:**

Nicholas Heath (“Mr. Heath”) was charged with the murder of Tom Malenski (“Mr. Malenski”) and the attempted murder of Martin Clay (“Mr. Clay”). The charges stemmed from an altercation that occurred outside of Ottobar in Baltimore City.

According to Mr. Clay, both he and Mr. Malenski chased Mr. Heath’s friend away from Ottobar. While Mr. Clay and Mr. Malenski were returning to Ottobar, Mr. Heath came at them with a knife, slashing Mr. Clay across the face. Mr. Clay asserted that while Mr. Malenski was attempting to “get in between” Mr. Clay and Mr. Heath, Mr. Heath slashed Mr. Malenski’s throat.

Although Mr. Heath did not testify, he offered a different version of events to the police. His version of the events included a claim that he was acting in self-defense. Mr. Heath told police that Mr. Malenski had a knife and that Mr. Heath was trying to disable Mr. Malenski by cutting his deltoid muscle. According to Mr. Heath, Mr. Malenski lunged forward, causing Mr. Heath to miss Mr. Malenski’s deltoid and cut his throat. Mr. Heath explained that Mr. Clay was probably cut in the face while Mr. Heath was defending himself from the attack.

Prior to trial, the parties entered into a stipulation and agreed to various redactions of Mr. Heath’s statement to the police. Much of the redactions related to Mr. Heath’s references to drugs.

During the opening statement phase of trial, Defense counsel made the following comment about Mr. Heath’s purpose for going to Ottobar that night:

Ladies and gentlemen, the young man that sits here [next to counsel] is Nicholas Heath. And just as the State described to you in regards to [Mr. Malenski and Mr. Clay], he too loved music, liked to hang out, had friends, **was busy doing tattoos, that’s one of his primary sources of income** in order to pay a lawyer to get his wife from England to the United States. **That was his goal and that was his purpose to stop by the Ottobar that night.** His friend, Dustin Cunningham says lots of people there have tattoos or had tattoos, this is a good source.

Later in the trial, citing the above remark, the State moved to unredact a portion of Mr. Heath's statement to the police in which he said that he went to Ottobar intending to sell "white." Specifically, the State sought to unredact the following portion of Mr. Heath's statement:

I mean look at nobody's being violent man. Nobody's went in there starting trouble. **I went in there to sit down to sell a god damn bit of white** that they, I'm just trying to make a fucking living. And everybody around me is gotta act like an asshole. **That's all I wanted to do.** You know am I wrong? Yeah.

After hearing argument from both parties about whether defense counsel had opened the door to Mr. Heath's "true" purpose for being at Ottobar, the trial court ultimately admitted Mr. Heath's statement into evidence. The jury convicted Mr. Heath of involuntary manslaughter and second-degree assault. Mr. Heath appealed his conviction to the Court of Special Appeals, which held that Mr. Heath's defense counsel did not open the door during her opening statement and that even if the door had been opened, the remedy was not proportionate to the malady. The Court of Special Appeals held that the trial court's error in allowing the statement into evidence was not harmless and therefore reversed the trial court decision and remanded the case for a new trial.

**Held:** Affirmed.

The Court of Appeals held that defense counsel's comment in opening statement triggered an analysis under the opening the door doctrine. The trial court committed a legal error in admitting the prosecutor's legally irrelevant responsive evidence on a collateral issue that was immaterial to the issues in the case. Furthermore, the trial court abused its discretion when it allowed the State to present evidence that was not a proportionate response to the comment made in defense counsel's opening statement. The response was not proportionate because the jury, when determining Mr. Heath's guilt/innocence, likely gave the statement admitted into evidence more weight than the remark defense counsel made in opening. The trial court also abused its discretion when it concluded that the probative value of the State's responsive evidence was not substantially outweighed by the danger of unfair prejudice. An association with drugs is extremely prejudicial and likely led the jury to believe that Mr. Heath's intent to engage in drug dealing played a role in the altercation. As such, Mr. Heath's statement should not have been admitted into evidence.

*State of Maryland v. Andrew Brown*, No. 65, September Term 2018, filed June 24, 2019. Opinion by Watts, J.

<https://www.mdcourts.gov/data/opinions/coa/2019/65a18.pdf>

MARYLAND RULE 4-345(c) – CORRECTION OF EVIDENT MISTAKE IN ANNOUNCEMENT OF SENTENCE

**Facts:**

In the Circuit Court for Baltimore City, the State, Petitioner, charged Andrew Brown, Respondent, with several crimes that arose out of the attempted armed robberies and nonfatal shooting of William Rich and Demaris Glover. A jury found Brown guilty of, among other crimes, attempted robbery with a dangerous weapon as to Rich and Glover, conspiracy to rob with a dangerous weapon as to Rich and Glover, and use of a handgun in the commission of a crime of violence.

At a sentencing proceeding, the circuit court imposed three concurrent sentences of twenty years of imprisonment, with all but ten years suspended, followed by two years of supervised probation, for attempted robbery of Rich with a dangerous weapon, conspiracy to rob Rich with a dangerous weapon, and attempted robbery of Glover with a dangerous weapon. In the same proceeding, the circuit court announced Brown’s sentences as to conspiracy to rob Glover with a dangerous weapon and use of a handgun in the commission of a crime of violence as follows: “Count 10, conspiracy to rob with a dangerous weapon as to [] Glover, the sentence of the Court is 20 years, suspend all but time served, place him on two years supervised probation. . . . Count 19, use of a handgun in the commission of a felony or crime of violence, 10 years to the [Division] of Correction[], first five without parole, will run consecutive to Count 10.”

After the circuit court announced Brown’s sentences, Brown asked: “Count 19, that’s to be run consecutive?” The circuit court responded: “Right. So what happens is, basically you got a 20 year sentence, suspend all but 10 and then the handgun, use of a handgun in a crime of violence runs consecutive so once you finish the -- and you got to do at least five years without parole on that[.]” Shortly afterward, Brown’s counsel stated: “So you have 20 years to serve; right?” The circuit court responded: “20 years suspend all but 10. Well, 20, yeah, altogether[.]” The commitment record, probation order, and docket entries indicate that the circuit court sentenced Brown to twenty years of imprisonment, with all but ten years suspended, followed by two years of supervised probation, for conspiracy to rob Glover with a dangerous weapon (Count 10).

Brown appealed, and the Court of Special Appeals affirmed his convictions, but remanded with instructions to amend the commitment record, probation order, and docket entries to reflect that the circuit court sentenced Brown to twenty years of imprisonment, with all but time served suspended, followed by two years of supervised probation, for conspiracy to rob Glover with a dangerous weapon. The State filed a petition for a writ of certiorari, which this Court granted.

**Held:** Affirmed.

The Court of Appeals held that, for a “mistake in the announcement of a sentence” to be “evident” under Maryland Rule 4-345(c)—which states: ““The court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding”—the mistake must be clear or obvious. Where a trial court has imposed a sentence that is merely unusual or anomalous compared to other sentences that the trial court imposed during the same sentencing proceeding, that circumstance alone does not establish that the trial court made an evident mistake in the announcement of a sentence under Maryland Rule 4-345(c). An appellate court may determine a trial court to have corrected an evident mistake in the announcement of a sentence under Maryland Rule 4-345(c) where the trial court acknowledges that it made a mistake in the announcement of a sentence, and indicates that it is correcting that mistake. Where a trial court merely discusses a sentence in a manner that could be construed as inconsistent with the announcement of the sentence, that discussion alone does not constitute a correction of an evident mistake in the announcement of a sentence under Maryland Rule 4-345(c).

Applying its holdings to this case’s facts, the Court of Appeals concluded that, under Maryland Rule 4-345(c), the circuit court did not make an evident mistake in the announcement of Brown’s sentence for conspiracy to rob Glover with a dangerous weapon. Brown’s sentence for conspiracy to rob Glover with a dangerous weapon was unusual or anomalous, as it appears to be inconsistent with Brown’s sentences for attempted robbery of Rich with a dangerous weapon, conspiracy to rob Rich with a dangerous weapon, and attempted robbery of Glover with a dangerous weapon. The record of the sentencing proceeding, however, falls far short of demonstrating that the circuit court made an evident—i.e., clear or obvious—mistake in the announcement of Brown’s sentence for conspiracy to rob Glover with a dangerous weapon, or that the circuit court intended to suspend all but ten years, as opposed to time served, as to conspiracy to rob Glover with a dangerous weapon. In addition to the record not demonstrating that the circuit court made an evident mistake in the announcement of Brown’s sentence for conspiracy to rob Glover with a dangerous weapon, the record does not demonstrate that the circuit court corrected a mistake under Maryland Rule 4-345(c). At no point did the circuit court acknowledge that it had made a mistake in the announcement of Brown’s sentence for conspiracy to rob Glover with a dangerous weapon, or indicate that it was correcting such a mistake.

*John Junek v. St. Mary's County Department of Social Services*, No. 74, September Term 2018, filed June 25, 2019. Opinion by Hotten, J.

<https://mdcourts.gov/data/opinions/coa/2019/74a18.pdf>

FAMILY LAW ARTICLE – INDICATED CHILD NEGLECT – ELEMENT OF INTENT

**Facts:**

On September 3, 2014, Mr. Junek was responsible for taking his older son to preschool and younger son to daycare before going to work at the Naval Air Station Patuxent River. Mr. Junek first dropped his older son off at preschool, and then drove directly to work. Mr. Junek arrived at work just before 9:00 a.m. and proceeded inside, overlooking his 17-month-old younger son, whom he had forgotten to bring to daycare, in the backseat of the car. At 3:20 p.m. that afternoon, Mr. Junek received a call from his wife, who was unable to find the younger son's car seat that was supposed to be left at the daycare that morning. It was then, for the first time, that Mr. Junek realized he had forgotten to drop his younger son off at daycare, and had left the toddler in the backseat of the vehicle. Mr. Junek found his son unconscious, still strapped into his car seat. Outside temperatures had reached a high of 85 degrees that day, and attempts to revive the child failed, who was pronounced dead at the scene.

The St. Mary's County Department of Social Services ("DSS") initiated an investigation into the matter and rendered a finding of "indicated child neglect" against Mr. Junek. Following a hearing, an Administrative Law Judge affirmed, explaining that there was no intent requirement to sustain a finding of child neglect under Family Law Article ("Fam. Law") § 5-701(s). Mr. Junek petitioned for judicial review and the Circuit Court for St. Mary's County affirmed. On appeal, the Court of Special Appeals affirmed, concluding "that a finding of indicated child neglect under the statutory provisions of Section 5-701 et seq., of the Family Law Article, does not require intent[.]" *J.J. v. St. Mary's Cty. Dep't of Soc. Servs.*, No. 2038, 2018 WL 6839467, slip op. at \*4 (Dec. 31, 2018).

**Held:** Affirmed.

The Court of Appeals held "that intent or scienter is not an element of child neglect under § 5-701(s) of the Family Law Article." The Court explained that even though intent is a requirement to sustain a finding of emotional and physical child abuse, "any 'attempt to expand the definition of neglect to mirror the intent requirements established by the Court of Appeals for the definition of abuse, is to no avail.'" *See I.B. v. Frederick County Department of Social Services*, 239 Md. App. 556, 570-71, 197 A.3d 598, 607 (2018). The Court further commented that the General Assembly has taken the affirmative action of amending the definition and elements of "abuse" under Fam. Law § 5-701(b), and "neglect" under Crim. Law § 3-602.1, with no similar action

taken regarding neglect under Fam. Law § 5-701(s), clearly evidencing the General Assembly's intent to differentiate between abuse and neglect in the Family Law Article. The Court of Appeals declined to require an implicit element of intent in order to sustain a finding of child neglect, and affirmed the judgment of the Court of Special Appeals.

*In the Matter of Judge Devy Patterson Russell Judge of the District Court of Maryland Located in Baltimore City, District One, JD Docket No. 1, September Term 2018, filed June 28, 2019. Opinion by Greene, J.*

<https://mdcourts.gov/data/opinions/coa/2019/1a18jd.pdf>

## JUDGES – REMOVAL OR DISCIPLINE – SANCTION

### **Facts:**

On December 6, 2018, the Maryland Commission on Judicial Disabilities (“Commission”) issued Amended Findings of Fact, Conclusions of Law, Order and Recommendation, concluding that Respondent, the Honorable Devy Patterson Russell (“Judge Russell”) engaged in misconduct. Specifically, the Commission found that from 2007-2015, Judge Russell abdicated her duty to handle and process search warrant materials in a manner consistent with Maryland Rule 4-601 and internal courthouse policies. According to the Commission findings, Judge Russell instructed a law clerk to destroy the warrant materials. In addition, the Commission found that when clerical errors were made, Judge Russell yelled at court clerks, subjected them to lineups, and on one occasion physically pushed a clerk. Furthermore, Judge Russell repeatedly yelled at fellow judges and attempted to undermine the authority of judges delegated administrative duties. Her conduct occurred in public and in private, and it fostered an uncomfortable and tense work environment in the courthouse to which Judge Russell was assigned.

The Commission found clear and convincing evidence that Judge Russell’s conduct violated Md. Rules 18-101.1 (Compliance with the Law), 18-101.2 (Promoting Confidence in the Judiciary), 18-102.5 (Competence, Diligence, and Cooperation), 18-102.8 (Decorum, Demeanor, and Communication with Jurors), and 18-102.12 (Supervisory Duties). Having concluded that Judge Russell committed sanctionable conduct, the Commission recommended her immediate suspension for a period of six months without pay. In addition, the Commission recommended that Judge Russell be required to undertake remedial measures to assist her as she returns to her duties. The Commission ordered that the matter be referred to this Court for review, and Respondent filed Exceptions to the Commission’s factual and legal determinations.

**Held:** Judge Russell committed sanctionable conduct.

The appropriate sanction for Judge Russell’s misconduct is a consecutive six-month suspension without pay, with her reinstatement conditioned upon her completion of remedial measures set forth by this Court.

As a preliminary matter, the Court reviewed Respondent's legal challenges to the Commission's disposition of her case. Respondent argued that the Commission erred when it denied her Motion to Recuse and Motion to Suppress. Furthermore, Respondent claimed that the doctrines of limitations, laches, constitutional separation of powers, res judicata, estoppel, or fundamental fairness may warrant dismissing the charges against her. Finally, Respondent argued that several procedural defects occurred, which required that the charges brought against her be dismissed. The Court concluded that Respondent's legal challenges were without merit and did not warrant dismissing the charges against her.

Next, the Court turned its attention to Respondent's Exceptions to the Commission's findings of fact and conclusions of law. Upon its independent review of the record, the Court sustained Respondent's Exception to one of the Commission's factual findings. Otherwise, the Court was satisfied that the Commission's findings of fact and conclusions of law were supported by clear and convincing evidence, and therefore overruled Respondent's Exceptions thereto. In sum, the Court explained Respondent failed to properly handle search warrants and related materials in accordance with her judicial duties over the course of nearly eight years. No less than 135 warrants were not processed due to Respondent's failure to comply with the applicable rules and procedures. Respondent also sought to have a law clerk destroy the warrant materials. Moreover, the interpersonal issues spawned by Respondent's misconduct involved both verbal and physical confrontations with courthouse staff. Her interpersonal conflicts were not limited to encounters with courthouse personnel, but also occurred between fellow judges. Respondent's conduct included yelling at other judges, both in chambers and in locations where she could be overheard by employees of the judiciary and members of the general public. Respondent also attempted to undermine the authority of judges delegated administrative duties.

The Court concluded that Respondent's pattern of misbehavior was prejudicial to the administration of justice and therefore warrants sanction. The Court suspended Respondent for six months without pay from her service as a judge of the District Court, to commence on July 1, 2019. The Court set as conditions precedent to Respondent's reinstatement of her duties as a judge that Respondent shall: (1) submit to a health care evaluation, to be performed by a qualified health care professional or professionals who are acceptable to the Commission and, ultimately, this Court, for a complete emotional and behavioral assessment; (2) fully cooperate in the health care evaluation and comply with the recommended course of treatment, including counselling, if any; and (3) if and when Respondent applies for reinstatement, she shall provide, to the Commission and ultimately this Court, a written report from the evaluating health care professional or professionals as to her current medical condition, including any reason for which she should not be reinstated as a judge of the District Court. In addition, Respondent's reinstatement is conditioned upon her satisfactory completion of an approved course on judicial ethics as recommended by the Commission.

*Elliot Dackman, et al. v. Daquantay Robinson, et al.*, No. 60, September Term 2018, filed June 24, 2019. Opinion by Watts, J.

<http://www.mdcourts.gov/data/opinions/coa/2019/60a18.pdf>

LEAD-BASED PAINT CASE – ADMISSION OF EXPERT TESTIMONY – MARYLAND RULE 5-702(3) – SUFFICIENT FACTUAL BASIS – MOTION IN LIMINE

**Facts:**

Daquantay Robinson (“Respondent”) alleged that he suffered lead-based paint poisoning while residing at a row house located at 1642 East 25th Street in Baltimore City (“the Property”). On February 11, 1997, Respondent was born. Shortly before his birth, Respondent’s mother, Tiesha Robinson, grandmother, Sandra Moses, and three other family members began residing in the Property, which, at all relevant times, was owned and managed by Elliot Dackman, the Estate of Sandra Dackman, and the Estate of Bernard Dackman (together, “Petitioners”). From his birth until July 2001, Respondent resided at the Property.

On November 28, 2012, in the Circuit Court for Baltimore City, Respondent, by and through his mother and next friend, Robinson, filed a complaint and demand for jury trial against Petitioners for negligence, violations of the Maryland Consumer Protection Act, and negligent misrepresentation arising out of Respondent’s alleged exposure to lead-based paint at the Property.

On January 30, 2013, the circuit court issued a scheduling order, which provided that discovery, including depositions of expert witnesses, was to be completed by May 10, 2014. The scheduling order established deadlines for discovery, including that Respondent was to “respond to all interrogatory requests concerning the findings and opinions of experts . . . no later than” August 7, 2013. Trial was scheduled to begin on September 9, 2014, and any motions *in limine* were to be filed no later than fifteen days before the first day of trial. In a letter to Petitioners’ counsel dated May 9, 2013, Respondent’s counsel designated various expert witnesses, and identified Estelle L. Davis, Ph.D., as one of the vocational rehabilitation experts, and Richard J. Lurito, Ph.D., as one of five economic experts.

In a letter dated July 9, 2014, Dr. Davis evaluated Respondent’s “employability and earning capacity given his impairments and absent his impairments.” Dr. Davis’s letter was forwarded to Petitioners’ counsel as an attachment to a letter dated July 14, 2014, from Respondent’s counsel. On August 15, 2014, Dr. Davis was deposed. In July 2014, Dr. Lurito prepared a report entitled “Present Value of Lost Future Earnings of [Respondent].” In a letter to Petitioners’ counsel dated July 29, 2014, which was both mailed and faxed, Respondent’s counsel stated that he had attached Dr. Lurito’s report.

In a motion *in limine*, Petitioners sought to exclude the reports and testimony of Dr. Davis and Dr. Lurito, contending that, among other things, Dr. Davis lacked an adequate factual basis to offer an opinion as to Respondent's employment capabilities absent lead exposure. Petitioners requested that "Dr. Davis'[s] report and testimony regarding [Respondent]'s future employability and loss of earning claim [] be excluded." Petitioners asserted that, because "Dr. Lurito's report, opinions[,] and calculations of [Respondent]'s alleged economic loss" relied on Dr. Davis's opinion, Dr. Lurito's report and testimony should also be excluded. And, on August 28, 2014, Petitioners filed a motion *in limine* to exclude Dr. Lurito's report and testimony as untimely, contending that Dr. Lurito's report was produced after the discovery deadline, in violation of the circuit court's scheduling order, and that they suffered prejudice as a result.

From September 15 to 19, 2014, the circuit court conducted a jury trial. On the first day of trial, the circuit court heard argument on the various motions *in limine*, including the motions as to the reports and testimony of Dr. Davis and Dr. Lurito, and denied the motions. As to the motion to exclude Dr. Lurito's report and testimony as untimely, the circuit court observed that, although Petitioners received Dr. Lurito's report weeks before trial, Dr. Lurito was listed on Respondent's expert designation, and Petitioners failed to depose Dr. Lurito or request a postponement after they received his report on August 4, 2014. The circuit court, however, offered to permit Petitioners to take the deposition of Dr. Lurito that day and to designate their own economic expert. Petitioners' counsel stated that he would like to take Dr. Lurito's deposition, but he said nothing about designating an economic expert for Petitioners.

At trial, without objection, the circuit court accepted Dr. Davis as an expert "in the area of vocational rehabilitation counseling." Dr. Davis opined that, with the cognitive deficits caused by exposure to lead, Respondent would not have the academic and intellectual competency of a high school graduate, would work in unskilled or low-level semi-skilled jobs, and would have the earning capacity of someone with less than a twelfth-grade education. Dr. Davis also opined that, absent cognitive deficits caused by exposure to lead, Respondent would have been able to graduate high school and attend a vocational technical school or a community college "where he would learn some type of . . . hands-on work."

Without objection, the circuit court accepted Dr. Lurito as an expert. Relying on Dr. Davis's conclusions about Respondent's vocational probabilities with and without deficits and general statistical data, Dr. Lurito opined that Respondent's loss of earning capacity over his lifetime—the difference between his earning capacity absent deficits (*i.e.*, an individual with some college education) and with deficits (*i.e.*, an individual who was "a below[-]average high school graduate")—was \$1,073,042.

At the conclusion of Respondent's case-in-chief, Petitioners moved for judgment on the only remaining claim (negligence), contending that Respondent had failed to establish a lead hazard at the Property during the time that he resided there. Petitioners also made a partial motion for judgment as to Respondent's economic loss claim, contending that Dr. Lurito's opinion was "premised on" Dr. Davis's letter, and that Dr. Davis's testimony lacked an adequate foundation. The circuit court denied the motions.

Petitioners called experts who testified, among other things, that Respondent is not cognitively impaired; that Respondent “has the capability to go to college [and] get a decent job”; that there was no “evidence that [Respondent had] suffered any neurological, developmental, or cognitive intelligence deficit or injury related to his lead levels at age two or so”; that Respondent is capable of “maintaining gainful employment in a semi-skilled to skilled job” and “will not experience an earning capacity loss or . . . a reduced work-life expectancy”; and that “analytical results” did not “indicat[e] or suggest[] the presence of a lead hazard” in the Property during the period that Respondent resided there. And, at least one expert questioned the reliability of Respondent’s medical expert’s opinion regarding the degree to which lead-based paint caused Respondent to suffer an IQ loss. That expert testified that there are other sources of lead exposure for children besides lead-based paint, such as dirt, dust, water, canned food, and secondhand smoke.

After the close of Petitioners’ case, Petitioners renewed the motion for judgment as to the negligence claim and the motion for partial judgment as to “the economic loss component of the case.” The circuit court again denied the motions. The circuit court instructed the jury, counsel made closing arguments, and the jury deliberated. On September 19, 2014, the jury returned a verdict in Respondent’s favor as to negligence, and awarded him \$1,270,000 in economic damages and \$818,330 in non-economic damages.

On September 29, 2014, Petitioners filed a motion for remittitur of the economic and non-economic damages, and a motion for judgment notwithstanding the verdict and/or motion for new trial. On November 3, 2014, the circuit court held a hearing on the motions. At the conclusion of the hearing, the circuit court denied the motion for judgment notwithstanding the verdict and/or motion for new trial. The circuit court granted in part the motion for remittitur, reduced the award of economic damages to \$1,000,000, and reduced the award of non-economic damages to \$530,000 pursuant to Maryland’s cap on non-economic damages. On November 5, 2014, the circuit court issued orders granting the motion for remittitur and denying the motion for judgment notwithstanding the verdict and/or motion for new trial.

Petitioners appealed. On August 31, 2018, in an unreported opinion, the Court of Special Appeals affirmed the circuit court’s judgment. *See Elliot Dackman, et al. v. Daquantay Robinson, a Minor, by his Mother and Next Friend, Tiesha Robinson*, No. 2035, Sept. Term, 2014, 2018 WL 4190963, \*2 (Md. Ct. Spec. App. Aug. 31, 2018). On November 1, 2018, Petitioners petitioned for a writ of *certiorari*, which the Court of Appeals granted on December 13, 2018. *See Dackman v. Robinson*, 462 Md. 82, 198 A.3d 218 (2018).

**Held:** Affirmed.

The Court of Appeals held that Dr. Davis’s testimony, and, specifically, her opinion as to Respondent’s vocational and educational attainment absent cognitive deficits—i.e., that, absent cognitive deficits, Respondent would at least have completed high school and likely would have attended a vocational technical school or a community college where he would have learned

hands-on work—were supported by a sufficient factual basis, as required by Maryland Rule 5-702(3). Moreover, the Court determined that *Lewin Realty III, Inc. v. Brooks*, 138 Md. App. 244, 771 A.2d 446 (2001), *aff'd*, 378 Md. 70, 835 A.2d 616 (2003), and *Sugarman v. Liles*, 460 Md. 396, 190 A.3d 344 (2018) do not establish a requirement that an expert in a lead-based paint case must utilize statistical data or specific studies to have an adequate factual basis to testify as to a plaintiff's vocational and educational attainment absent deficits. Stated otherwise, a sufficient factual basis supporting an opinion as to a plaintiff's vocational and educational attainment absent deficits need not be predicated on statistical data, but instead may be grounded in the expert's detailed and individualized assessment of information about the plaintiff, coupled with the expert's experience and training. That was the case here. As such, the Court concluded that the circuit court did not abuse its discretion in admitting Dr. Davis's testimony and, in turn, admitting Dr. Lurito's testimony, which was based on Dr. Davis's opinions concerning Respondent's vocational and educational attainment with and without cognitive deficits.

The Court of Appeals determined that there was a sufficient factual basis to support Dr. Davis's opinions. Dr. Davis's detailed and individualized assessment of Respondent, coupled with her experience and training, provided a sufficient factual basis for her to opine about Respondent's vocational and educational attainment with and absent cognitive deficits.

The Court of Appeals concluded that neither *Lewin Realty* nor *Sugarman* stood for the principle that a vocational rehabilitation expert's opinion lacks a sufficient factual basis where the expert does not rely on general statistical data in determining a plaintiff's vocational and educational potential absent deficits. The Court explained that, at best, what could be gleaned from *Lewin Realty* and *Sugarman* was that the calculation of loss of earning capacity, i.e., the calculation of damages, must be based on general statistical data. Notably, neither this Court nor the Court of Special Appeals held that an expert must take into account general statistical data when offering an opinion as to a plaintiff's educational and vocational attainment absent deficits. Rather, that opinion must be based on an individualized assessment of the plaintiff. The Court stated that, put plainly, an expert's opinion that an individual would have obtained a higher degree of education and a different, more-skilled type of employment absent deficits caused by injuries related to lead-based paint poisoning need not be based on general statistical data to be supported by a sufficient factual basis.

The Court of Appeals also held that the circuit court did not abuse its discretion in denying Petitioners' motion *in limine* with respect to Dr. Lurito's testimony and report and in admitting Dr. Lurito's testimony at trial. Under the circumstances of this case, the Court could not say that the circuit court had abused its discretion in denying the motion *in limine* to exclude Dr. Lurito's report and testimony on the ground that the report was untimely disclosed. The Court explained that the record demonstrated that, in exercising discretion to address the discovery violation, the circuit court properly weighed the reasons for the late disclosure, the existence of prejudice to Petitioners, the feasibility of curing any prejudice, and other relevant circumstances. As such, the Court would not reweigh the factors and second-guess the circuit court's ruling where the record did not reveal that the circuit court exercised its discretion in a manner that was manifestly unreasonable, or on untenable grounds, or for untenable reasons. The Court

concluded that it did not discern a clear abuse of discretion on the circuit court's part in denying the motion *in limine* and admitting Dr. Lurito's report and testimony.

*Peter Gang v. Montgomery County, Maryland*, No. 67, September Term 2018, filed June 24, 2019. Opinion by Battaglia, J.

<https://www.courts.state.md.us/data/opinions/coa/2019/67a18.pdf>

WORKERS' COMPENSATION ACT – MD. CODE (1991, 2016 REPL. VOL.), § 9-736 LAB. & EMPL. ART. – CONTINUING POWERS AND JURISDICTION; MODIFICATION OF PREVIOUS ORDERS AND AWARDS

**Facts:**

Petitioner, Officer Peter Gang, was injured while working as a Montgomery County correctional officer and, subsequently, filed a claim with the Workers' Compensation Commission ("Commission") seeking compensation. The Commission issued an Award of Compensation which provided Officer Gang recompense "at the rate of \$157.00, payable weekly, beginning October 21, 2011, for a period of 70 weeks" based on an industrial loss of the use of his body, which was attributable to the accidental workplace injury.

Nearly four years later, Officer Gang requested a modification of his prior compensation award, alleging that the rate of his compensation was incorrectly calculated, because he qualified as a "public safety employee" under the Workers' Compensation Act ("Act"), and as such, was entitled to a greater rate of compensation. He also posited that the Commission had the power to amend his previous award because it possessed "continuing jurisdiction" over the previous order pursuant to the Act. Although Respondent, Montgomery County, acknowledged that Officer Gang was entitled to a higher rate of compensation at the time of his injury as a "public safety employee," it disagreed, positing that the Commission could not retroactively modify the rate of compensation Officer Gang had received pursuant to the Act.

The Commission agreed with Officer Gang, and issued an amended award retroactively changing his rate of compensation from \$157.00 to \$314.00 per week, pursuant to its continuing jurisdiction, stating that it could correct an error such as this, particularly if it was a mistake made by the Commission of which none of the parties was aware.

Montgomery County filed a Petition for Judicial Review in the Circuit Court for Montgomery County. The Circuit Court affirmed the decision of the Commission, but on further review, the Court of Special Appeals reversed.

**Held:** Reversed.

The Court of Appeals held that the Commission had the authority to reopen Officer Gang's award of permanent partial disability compensation and retroactively adjust his rate of

compensation because the request for such, which was made within five years from the date of his last compensation payment, was based on a mistake or error. As a public safety employee, Officer Gang was entitled to a greater rate of compensation than that which he received.

The Court also held that Section 9-736(a) of the Labor and Employment Article, the subsection which governs the readjustment of a rate of compensation in cases of aggravation, diminution or termination of disability, does not limit or otherwise restrict the jurisdiction of the Commission to modify its previous findings, orders or awards under Section 9-736(b), provided the modification sought is applied for within five years after the date of the accident, the date of disablement or the last compensation payment.

The Court further held that Officer Gang had not waived his right to request a higher rate of compensation by his failure to appeal, seek judicial review pursuant to Section 9-737 of the Labor and Employment Article, or failing to file a motion for rehearing pursuant to Section 9-726 of the Labor and Employment Article, because the modification had been applied for within the statutory period of limitations. Nor did Officer Gang's failure to strictly comply with the procedures of the Commission for submitting a modification application defeat his ability to seek relief.

Lastly, the Court held that Officer Gang's application for the correction of the rate of compensation which he received from his permanent partial disability award did not impermissibly prolong the statute of limitations because he had applied for the correction before the five-year period of limitations had expired.

# COURT OF SPECIAL APPEALS

*Treston Harris v. Christopher McKenzie*, No. 1761, September Term 2017, filed June 27, 2019. Opinion by Reed, J.

<https://mdcourts.gov/data/opinions/cosa/2019/1761s17.pdf>

ADMINISTRATIVE LAW – PRISONS – EXHAUSTION OF REMEDIES

PRISONS – PLEADINGS

## **Facts:**

Treston Harris is an inmate at a correctional facility located in Allegany County. On March 14, 2015, a fight broke out among inmates in the facility’s cafeteria. Christopher McKenzie, one of the correctional officers then present in the cafeteria, searched the area for a weapon and reportedly located an AC adaptor and electrical cord in a sock near Harris.

As a result, McKenzie prepared a written Notice of Inmate Rule Violation that stated that he had observed Harris attempting to use the seized items to assault another inmate. Following a disciplinary hearing on March 31, 2015, Harris was determined to have committed three charges relating to McKenzie’s report. Harris received sanctions of 90 days of segregation, 45 days of cell restriction, and loss of 30 diminution credits.

Harris appealed to the Inmate Grievance Office (“IGO”) alleging insufficient evidence to support his convictions. The IGO referred Appellant’s grievance to the Office of Administrative Hearings (“OAH”), which scheduled a hearing on August 5, 2015 to assess the merits of the grievance.

Harris also pursued the Department of Correction’s (“DOC”) administrative remedy procedure (“ARP”) and filed a separate Request for Administrative Remedy with the warden of the correctional facility, alleging that McKenzie falsified the Notice of Inmate Rule Violation that resulted in Appellant’s convictions. The warden dismissed that request on March 17, 2015, on the ground that inmates are not permitted to challenge disciplinary procedures or decisions through the ARP.

Harris appealed the dismissal of his Request for Administrative Remedy to the Commissioner of Correction, arguing that the warden had not addressed Appellant's complaint in his rationale for dismissal. On April 23, 2015, the Commissioner dismissed Appellant's claim for the same reason set forth by the warden: that inmates are not permitted to challenge disciplinary procedures or decisions through the ARP.

On May 18, 2015, Harris filed another grievance with the IGO, repeating his allegation that McKenzie had falsified the Notice of Inmate Rule Violation that resulted in Harris's convictions. On June 29, 2015, the IGO "administratively dismissed" that grievance, without prejudice, stating it was "wholly lacking in merit" because Harris had been convicted of rule violations at his March 31, 2015 disciplinary hearing. McKenzie's credibility, the IGO reasoned, necessarily would have been assessed then, and Harris's challenges to the officer's credibility "should not be countenanced in this separate, distinct, and collateral proceeding." The IGO concluded that the findings of Harris's guilt were the subject of his other grievance filed with the IGO still pending before the OAH.

On August 4, 2015, the Executive Director of Field Support Services for the Department of Public Safety and Correctional Services ("DPSCS"), ordered the warden to reverse Harris's convictions and vacate the sanctions imposed upon him **because the video recording of the altercation in the facility's cafeteria did not show McKenzie recovering the weapon or confronting Harris**. In light of McKenzie's statement in his report that he had confiscated the cord and broken adaptor from Harris, the Executive Director found that "these discrepancies were not sufficiently resolved by the hearing officer."

At the scheduled OAH hearing the next day, the DOC moved to dismiss Harris's grievance regarding the sufficiency of evidence as moot based on the ruling reversing and vacating Harris's convictions and sanctions. The Administrative Law Judge granted the motion on August 27, 2015.

On August 19, 2015, Harris requested that the IGO re-open his case against McKenzie on the ground that his convictions had been reversed and vacated. On December 4, 2015, the IGO declined to re-open the matter and determined that Harris had failed to "provide a compelling basis for disturbing that dismissal" because "[t]he analysis of your complaint and its administrative dismissal were entirely correct."

Harris filed a petition for judicial review of the IGO's decision with the Circuit Court for Allegany County on July 17, 2015. After the circuit court affirmed the IGO's decision on May 31, 2016, Appellant filed a notice of appeal with the Court of Special Appeals. On November 2, 2016, the Court of Special Appeals closed the file and returned the record to the circuit court because Harris had failed to file an application for leave to appeal, pursuant to Md. Code, § 10-210(c)(2) of the Correctional Services Article ("CS").

On January 20, 2017, Harris filed civil suit against McKenzie in the circuit court, alleging violations of his procedural due process rights and seeking compensatory damages in the amount of \$85.00 and punitive damages in the amount of \$9000.00. On March 6, 2017, McKenzie

moved to dismiss Harris's complaint on the grounds that: (1) Harris had failed to exhaust his administrative remedies and was therefore not permitted to pursue a civil action; (2) as "State personnel," McKenzie has immunity in civil actions pursuant to common law public official immunity and the Maryland Tort Claims Act ("MTCA"), Md. Code, §§ 12-101-110 of the State Government Article ("SG"); and (3) Harris did not comply with the notice requirements of the MTCA before filing suit. The circuit court granted McKenzie's motion to dismiss, without a hearing, on October 13, 2017.

**Held:** Affirmed.

The Court of Special Appeals held that the circuit court properly dismissed Appellant's complaint for failing to completely exhaust all administrative remedies available to him prior to filing his complaint. Appellant, a "prisoner" as defined by CJP § 5-1001, may not pursue a civil action until he has fully exhausted all administrative remedies for resolving his complaint or grievance. Because Appellant's initial appeal was dismissed due to Appellant's failure to file an application for leave to appeal with the Court of Special Appeals and thus was not afforded judicial review by the Court, the Court found that Appellant did not fully exhaust all administrative remedies in accordance with CJP § 5-1003.

Though Appellee asserts, *en arguendo*, that he would be immune from Appellant's claim based on the scope of his employment as a correctional officer, the Court refrained from addressing this contention. The circuit court's dismissal of Appellant's claim was proper based solely on Appellant's failure to fully exhaust all administrative remedies available to him prior to filing his claim.

*Marcia Rankin, et al. v. Brinton Woods of Frankford, LLC, et al.*, No. 525, September Term 2017, filed June 27, 2019. Opinion by Sharer, J.

<https://www.courts.state.md.us/data/opinions/cosa/2019/0525s17.pdf>

ARBITRATION AGREEMENTS – NURSING HOME ADMISSION CONTRACTS – HEALTH CARE DECISIONS – THIRD PARTY SIGNERS

ARBITRATION AGREEMENTS – AGENCY – SCOPE OF AUTHORITY

ARBITRATION AGREEMENTS – UNCONSCIONABILITY – REVIEW – FACT FINDING

**Facts:**

Willie Charles, Jr., died following a short stay at Brinton Woods of Frankford, LLC, a nursing facility, where he had developed serious health problems while in its care. His estate and surviving children brought a survival and wrongful death suit against several Brinton Woods entities.

The day before his admission, his daughter, Marcia Rankin, executed an admission contract that contained alternative dispute resolution clauses including an arbitration agreement containing a jury trial waiver clause. Prior to answering the complaint, Brinton Woods filed a motion to compel arbitration, averring that Rankin was acting as Mr. Charles' agent when she executed the admission contract on his behalf, thereby binding him and the Estate to the arbitration agreement.

The Estate disputed that Rankin was her father's agent at the time of his admission into Brinton Woods because he was still competent, and the advance directive was not yet in effect. Further, the Estate challenged the terms of the admission contract, contending that they were unconscionable. Following a hearing, the circuit court granted the motion compelling arbitration, reasoning that it found Rankin to be Mr. Charles' apparent agent when she executed the contract on his behalf, and that the terms of the contract were not unconscionable.

**Held:** Reversed and remanded.

The Court of Special Appeals held that one executing a nursing home admission contracts on behalf of another must be an authorized agent, either actual or apparent, of the patient, with the authority to enter into such an agreement. A nursing home accepting the representations of the signing party as an authorized agent must also determine the scope of a principal-agent relationship, and whether the apparent agent has the authority to bind the patient to the contract containing an arbitration clause.

When determining the existence of a principal-agent relationship and the scope of authority, absent a written agency directive, courts must look to the representations made by the signing party at the time the contract was executed, and whether it would be objectively reasonable for the nursing home to rely on those representations without the need for the principal to later ratify the admission contract containing the binding arbitration agreement.

The Court held that the record did not support a finding that Rankin was the patient's apparent agent, with authority to bind him, and later his estate, because the advance directive was not in effect at the time the admission contract was executed and there was nothing to support that he had been informed that the admission contract contained an arbitration agreement, especially with a jury waiver provision.

The Court concluded on alternative grounds that the terms of the nursing home admission contract, especially the arbitration agreement provisions, on this record, were overbearing and constituted a contract of adhesion. Arbitration agreements that require the contracting parties to waive their right to a jury trial must be conspicuous, if contained within the contract, and the terms must be clear, concise, and comprehensive for the contracting parties. The Court determined that the arbitration agreement contained within the nursing home admission contract for Brinton Woods was not clear or comprehensive and was not conspicuous within the contract. Thus, the Court found the contract to be unenforceable as both procedurally and substantively unconscionable.

*Maryland Board of Physicians, et al. v. Mark R. Geier, et al.*, No. 1979, September Term 2017, and No. 338, September Term 2018, filed June 26, 2019. Opinion by Arthur, J.

<https://mdcourts.gov/data/opinions/cosa/2019/0338s18.pdf>

FEDERAL CIVIL RIGHTS CLAIMS – ABSOLUTE QUASI-JUDICIAL IMMUNITY

MARYLAND TORT CLAIMS – ABSOLUTE QUASI-JUDICIAL IMMUNITY

**Facts:**

In 2011, the State Board of Physicians summarily suspended the medical license of Dr. Mark Geier and charged him with violations of the Medical Practice Act. Subsequently, the Board received information that someone from Dr. Geier’s medical practice had authorized prescription refills during Dr. Geier’s suspension. The Board issued a public order requiring him to cease and desist from the unlicensed practice of medicine.

The cease-and-desist order stated that the Board had received information that Dr. Geier prescribed drugs to himself, his son, and his wife after his license was suspended. The order identified the drugs that Dr. Geier allegedly prescribed and the person to whom each drug was prescribed. It further described medical conditions that the drugs are commonly used to treat. Technical staff posted the document on the Board’s website.

Dr. Geier protested the inclusion of prescription information in a public document. In response, the Board’s deputy director instructed technical staff to remove the order from the website. The Board approved an amended order, which omitted mention of patients, drugs, or medical conditions. Yet even though the amended order was published on the website, the website continued to host the webpage showing the original order.

A few months later, the Board formally charged Dr. Geier with practicing medicine while his license was suspended. The Board eventually dismissed those charges. Nevertheless, the Board upheld the original charges against Dr. Geier for other violations of the Medical Practice Act and revoked his medical license as a penalty. The circuit court and the Court of Special Appeals upheld the Board’s decision to revoke Dr. Geier’s license. *Geier v. Maryland State Bd. of Physicians*, 223 Md. App. 404 (2015).

Three members of the Geier family (Dr. Geier, his wife, and his son) filed suit in the Circuit Court for Montgomery County. The Geiers alleged that the Board personnel maliciously included private medical information in the cease-and-desist order. They sought to recover damages from 25 Board personnel.

The complaint included a claim under 42 U.S.C. § 1983 against the Board personnel, on the theory that the publication of the medical information violated a constitutional right to privacy. The Geiers sought to recover attorneys' fees under 42 U.S.C. § 1988.

In a separate count, the Geiers alleged the tort of invasion of privacy. The Geiers named the Board as a defendant only in that count, pursuant to the Maryland Tort Claims Act.

The defendants moved to dismiss the complaint, arguing that they possessed "absolute quasi-judicial immunity" as to claims for damages arising out of the medical disciplinary proceedings. The court denied their motion.

A contentious and protracted discovery period followed. The court rejected the defendants' reliance on various evidentiary privileges as grounds for withholding information requested by the Geiers. After granting multiple motions to compel and motions for discovery sanctions, the court decided that it would impose a default as to the liability of all defendants as a sanction for the Board's discovery failures.

In an interlocutory appeal, the Court of Special Appeals reversed an order compelling the Board to produce documents relating to Dr. Geier's medical practice partner. *Maryland Bd. of Physicians v. Geier*, 225 Md. App. 114 (2015). On remand, the defendants moved to vacate the order of default and moved for summary judgment on the ground of absolute immunity. The circuit court denied their motions. The defendants took another interlocutory appeal, and the Court of Appeals ruled that audio recordings of the Board's deliberations were not discoverable. *Maryland Board of Physicians v. Geier*, 451 Md. 526 (2017). Both appellate courts concluded, however, that the issue of immunity was not subject to appellate review until a final judgment.

The circuit court permitted the Geiers to withdraw their jury demand on the remaining issue of damages. The court concluded that the Geiers would still need to prove actual malice by clear and convincing evidence to recover punitive damages. The court also ruled that it would draw an "adverse inference" against defendants for asserting their privilege over the audio recordings of the Board's deliberations. The court precluded defendants from testifying about their roles in the deliberations and then refused to permit any defendant to waive their prior assertions of privilege.

After the bench trial, the circuit court issued a 112-page opinion awarding damages based on the defendants' publication of their private medical information. The court found that most of the defendants acted with actual malice, that some defendants acted without malice, and that three defendants acted negligently. The court awarded compensatory damages of \$500,000 to Dr. Geier; \$500,000 to the estate of Dr. Geier's wife; and \$250,000 to Dr. Geier's son. The court awarded punitive damages of \$500,000 to Dr. Geier; \$500,000 to his wife; and \$250,000 to his son. The court allocated punitive damages in different amounts among 17 individual defendants.

In its opinion, the court also granted an unresolved motion for discovery sanctions. The court concluded that defendants had intentionally destroyed or failed to preserve evidence of their

email communications. The court ruled that this finding of spoliation was an independent basis for deeming all defendants in default as to liability.

The defendants filed a notice of appeal immediately after the court issued its opinion. The Geiers promptly petitioned for an award of attorneys' fees under 42 U.S.C. § 1988, based on the success of their claim under 42 U.S.C. § 1983.

In an apparent response to an ex parte email from counsel for the Geiers, the court revised its opinion so that it would include a finding that one of the Board members acted with actual malice.

After an evidentiary hearing, the court awarded \$2,393,931.30 in attorneys' fees under 42 U.S.C. § 1988. The court then issued an order imposing joint and several liability against all defendants for the compensatory damages, attorneys' fees, and litigation costs; and obligating 17 of the defendants to pay punitive damages in specified amounts.

All defendants appealed from the judgment. The Court of Special Appeals consolidated their appeal from the memorandum opinion with their appeal from the judgment.

**Held:** Reversed.

The Court of Special Appeals reversed all damage awards and directed the circuit court to enter judgment in favor of the defendants as to all claims.

As a preliminary matter, the Court explained that the memorandum opinion did not satisfy the requirement that a judgment be set forth on a "separate document." Md. Rule 2-601(a). The memorandum opinion did not provide enough information to discern the amount of each defendant's liability for damages, unlike the subsequent order which directed the clerk to enter final judgment. Consequently, the second notice of appeal was timely as to all issues raised.

The Court answered just of three questions raised on appeal. First, the Board was not liable under 42 U.S.C. § 1983 because the Geiers did not (and could not) name the Board as a defendant to that count. Next, the Board personnel had absolute immunity from both the federal claim and the Maryland tort claim; by extension, the Board could not be liable for their conduct. Finally, the circuit court abused its discretion by sanctioning all defendants with a default.

The Court applied federal law in evaluating the 42 U.S.C. § 1983 claim against the Board personnel. This statute authorizes an action for damages against a "person" acting under color of state law. It does not authorize an action for damages against a state or a state agency, neither of which are considered to be persons within the meaning of the statute. Perhaps recognizing that the Board could not be sued for damages under § 1983, the Geiers did not name the Board as a defendant in that count of their complaint. Because the Geiers did not sue the Board in the § 1983 count, the default order did not make the Board liable under § 1983. Thus, the court had no basis to order the Board to pay attorneys' fees under § 1988.

Applying federal law, the Court concluded that the Board personnel were entitled to absolute immunity from the § 1983 count. State judges and prosecutors have absolute immunity from § 1983 claims based on their performance of judicial or prosecutorial functions. Under *Butz v. Economou*, 438 U.S. 478 (1978), officials who perform either adjudicatory or prosecutorial functions in administrative proceedings have absolute immunity from damage suits alleging constitutional violations, where the proceedings provide adequate safeguards to restrain against unconstitutional conduct by agency officials. Courts applying this doctrine have concluded that officials who perform adjudicative or prosecutorial functions in medical disciplinary proceedings like those of the Board have absolute immunity from being sued for damages under § 1983.

The Court rejected the Geiers' argument that issuing a cease-and-desist order was not an adjudicatory function. The Board's decision to issue a cease-and-desist order was comparable to a judge's decision to issue an injunction or restraining order. Even if the Board erred by issuing an order that violated governing regulations and statutes, the decision was no less a discretionary one.

The Court also rejected the Geiers' argument that the relevant procedural safeguards were inadequate to protect against unlawful conduct by agency officials. The governing regulations afforded Dr. Geier the right to challenge the cease-and-desist order in a contested case under the Maryland Administrative Procedure Act. The availability of judicial review ensured that any errors in the order were ultimately correctable.

The absolute immunity of the Board members for issuing the cease-and-desist order extended to the staff members who allegedly participated in the decision. Likewise, the administrative prosecutor was entitled to absolute immunity for the function of drafting the order in her role as an advocate for the State. The administrative prosecutor performed a function analogous to that of a prosecutor deciding whether to bring criminal charges.

The Court applied Maryland law to the issue of whether the defendants had absolute immunity from the tort claim for unreasonable publicity. The Court was unpersuaded by the defendants' argument that the Court of Appeals already adopted "absolute quasi-judicial immunity" in *Gersh v. Ambrose*, 291 Md. 188 (1981). The defendants' argument inaptly conflated the type of immunity for judicial or prosecutorial functions with the absolute privilege of a witness to make defamatory statements. Because the defendants had not raised the issue of absolute privilege in the circuit court, the Court declined to consider whether the text of the order might qualify for absolute privilege.

The Court observed that the Court of Appeals has never decided whether, under Maryland common law, agency officials should have absolute immunity from tort claims based on their roles in administrative hearings. Nevertheless, given how closely the Maryland law on absolute immunity conformed to the reasoning of *Butz v. Economou*, the Court concluded that it should adopt the holding from that case. The Court held that, under Maryland common law, state officials are absolutely immune from suit for common-law, nonconstitutional torts based on conduct for which those officials would enjoy absolute immunity under federal law. The Maryland version of this doctrine examines the existence of safeguards that tend to reduce the

need for private damages actions as a means of controlling unlawful conduct, as opposed to unconstitutional conduct.

Here, the Board personnel were absolutely immune from the Maryland tort claim based on the same reasons for which the defendants had absolute immunity from the federal claim. Because the Board personnel had absolute immunity, the Geiers could not recover damages from the Board or from the State under the Maryland Tort Claims Act.

The Court rejected the Geiers' additional argument that § 5-715(b) of the Courts and Judicial Proceedings Article should be construed to preempt any common law immunity available to Board personnel. This statute insulates Board members and agents of the Board from civil liability for certain actions taken "without malice" in connection with the Board's proceedings. Without any express statement or clear implication of legislative intent to preempt the common law, the Court interpreted the statute as neither changing nor limiting other defenses that might be available under common law.

The Court held that, in the procedural context of this case, the defendants were entitled to rely on absolute immunity as ground for judgment in their favor. The defendants properly raised the issue in their preliminary motion to dismiss and in their motion for summary judgment. The circuit court erred in denying those motions.

After rejecting their absolute immunity claim on the merits, the circuit court also gave a procedural explanation for refusing to recognize any immunity. The court believed that it need not consider any immunity, in light of the decision to impose the discovery sanction of a default as to the liability of the defendants. The Court of Special Appeals nevertheless held that the sanction itself also needed to be reversed as an abuse of discretion. The circuit court had unjustifiably sanctioned all individual defendants based on discovery failures attributed to the Board alone. Later, the court refused to vacate the order of default, based on the court's erroneous finding that the defendants had waived their objection to being sanctioned for the Board's discovery failures.

The Court rejected the additional argument that the circuit court's post-trial decision to impose additional sanctions based on the spoliation of email evidence somehow vitiated any earlier errors. To the contrary, the earlier errors left the circuit court with an incorrect view of the defendants' discovery obligations when it imposed that sanction.

Finally, the Board was entitled to benefit from the judgment in favor of its personnel even if the Board was in default for its discovery failures. Under Maryland law, no judgment can be entered against a defaulting defendant if a judgment in favor of a non-defaulting defendant logically precludes the liability of the defaulting defendant. Because the sole basis for the Board's liability was the conduct of its employees, the judgment in favor of the employees inured to the benefit of the Board even in default.

Accordingly, the individual defendants and the Board were entitled to judgment in their favor as to the federal § 1983 claim and as to the Maryland tort claim.

*State of Maryland v. Larry Daniel Bratt*, No. 874, September Term 2018, filed May 30, 2019. Opinion by Fader, C.J.

<https://mdcourts.gov/data/opinions/cosa/2019/0874s18.pdf>

SENTENCING – ILLEGAL SENTENCE – CREDIT FOR TIME SERVED

SENTENCING – CORRECTION OF COMMITMENT RECORD

SENTENCING – MOTION TO CORRECT ILLEGAL SENTENCE

**Facts:**

In 1983, Larry Bratt was found guilty of two counts of first degree murder and was sentenced to two life sentences to be served consecutively. In 1992, Mr. Bratt requested credit for pretrial incarceration for (1) ten months served at the Anne Arundel County Detention Center and (2) three months served at a jail in Georgia. Mr. Bratt claimed to have been incarcerated since July 16, 1982 but provided no supporting documentation. The court denied his request.

In 1995, after the Maryland Division of Corrections identified that Mr. Bratt had been detained at the Anne Arundel County Detention Center before his conviction, the court directed that his commitment record be amended to reflect that his sentence began on the first day of his detention in Anne Arundel County, October 26, 1982.

In October 2017, Mr. Bratt filed a petition for pre-trial incarceration credit, in which he asserted that he was incarcerated for 102 days in Georgia before being transferred to Anne Arundel County, requested that the court issue an amended commitment record indicating that his sentence began on July 16, 1982, and requested a hearing pursuant to Rule 4-345. On November 3, 2017, without a hearing, the court granted the petition. An amended commitment record was entered reflecting a start date of July 16, 1982 for Mr. Bratt’s sentence.

In January 2018, Mr. Bratt filed a motion to correct an illegal sentence, in which he claimed that because he had not received a hearing before the court granted his 2017 petition, (1) the 2017 order was “of no legal force or effect,” and (2) his original sentence, which had been imposed without affording him full credit for time served, was still in effect and illegal. The court granted the motion to correct an illegal sentence. The court agreed with Mr. Bratt that the 2017 order “was not sufficient to correct the illegal sentence as a hearing in open court was required,” and, therefore, that Mr. Bratt’s sentence was then illegal. As a result, in open court, the court struck the existing sentence and resentenced Mr. Bratt to a sentence that was identical to the one that was reflected in the commitment order as amended in 1997. The State timely appealed, and Mr. Bratt moved to dismiss the appeal as not allowed by law.

**Held:** Reversed.

The Court of Special Appeals first addressed Mr. Bratt’s motion to dismiss, in which he argued that the State had no right of appeal pursuant to § 12-302 of the Courts and Judicial Proceedings Article. Under § 12-302(c), “[t]he State may appeal from a final judgment if the State alleges that the trial judge: . . . [i]mposed or modified a sentence in violation of the Maryland Rules.” Md. Code Ann., Cts. & Jud. Proc. § 12-302(c)(3)(ii). The Court observed that the circuit court, after concluding that Mr. Bratt’s existing sentence was illegal, expressly struck that sentence and imposed a new, albeit identical, one. Because the State contended that court did so in violation of the Maryland Rules, the Court found the motion to dismiss was without merit.

The Court next observed that the parties agreed that the correct start date for Mr. Bratt’s sentence was July 16, 1982, but disputed whether a motion to correct an illegal sentence can be premised on the failure to provide proper credit for time served. The Court found that under § 6-218(b) of the Criminal Procedure Article, a defendant must be credited upon conviction for time he or she has served in custody because of that crime. The Court discussed that the effect of a failure to provide such credit would be to leave an inmate incarcerated beyond the legally permitted term. This, the Court concluded, would result in a substantive illegality that is the proper subject of a motion to correct an illegal sentence.

In this case, however, the Court found that the motion to correct an illegal sentence was improper. The Court observed that the sole issue raised in 2017 was regarding the proper amount of time to credit, which the 2017 order had corrected. Although Mr. Bratt asserted that a hearing under Rule 4-345 was necessary to provide credit for time served, the Court found that the circuit court validly amended the commitment record under Rule 4-351 to reflect the correct start date. Mr. Bratt’s sentence thus was legal at the time he filed the 2018 motion to correct an illegal sentence and, therefore, the court had erred in granting the motion.

*Antonio Gantt v. State of Maryland*, Case No. 902, September Term 2018, filed June 4, 2019. Opinion by Moylan, J.

<https://mdcourts.gov/data/opinions/cosa/2019/0902s18.pdf>

POST-CONVICTION HEARING – INEFFECTIVE ASSISTANCE OF COUNSEL – THE SELECTION OF APPELLATE ISSUES

**Facts:**

On September 24, 2007, and October 31, 2007, the appellant, Antonio Gantt, robbed the Lexington Park branch of the Maryland Bank and Trust. Gantt was apprehended shortly after having committed the second robbery. He was convicted of three counts of armed robbery, and was sentenced, as a subsequent offender, to concurrent terms of life imprisonment without parole for each robbery. Gantt appealed his convictions, contending that the court had violated Rule 4–215 by permitting him to discharge defense counsel without informing him that he was facing life without parole. The Court of Special Appeals reversed Gantt’s convictions and remanded for a new trial.

Gantt was retried in September 2011. Having discharged his public defender, Gantt proceeded pro se. During jury selection, the State exercised one of its peremptory challenges against an African American woman. After Gantt exercised the last of his peremptory strikes, the court asked him whether he was satisfied with the jury. Gantt answered that he was not, citing the lack of racial diversity among the jurors. Gantt continued: “I don’t think [the prosecutor] should have struck an African American female because there was no reason for him to do that.” The court responded that it was the State’s prerogative to employ its peremptory strikes as it wished, and indicated that it would proceed with the jury before it. Gantt replied, “[F]or the record, ... I never said I had a problem with my jury. I said I had a problem with the State’s Attorney striking an African American from the jury.” After the court had sworn in the jury, the prosecutor explained, *sua sponte*, that he had struck the African American female juror in order to seat another juror whose appearance the prosecutor found impressive, leading him to believe that that juror would be favorable to the State. The trial proceeded, and the jury convicted Gantt the following day.

Represented by counsel, Gantt again appealed his convictions, raising five contentions. Among those contentions, Gantt claimed that the court erroneously imposed multiple sentences of life imprisonment without parole. This Court vacated the enhanced sentences for two of Gantt’s three robbery convictions but otherwise affirmed the convictions.

On December 13, 2013, Gantt filed a Petition for Post-Conviction Relief. In that petition, Gantt claimed, *inter alia*, that appellate counsel had been inadequate in having failed to appeal the denial of his ostensible *Batson* challenge. The court denied Gantt post-conviction relief for the alleged ineffective assistance of counsel. Gantt appealed from that ruling.

**Held:** Affirmed.

The Court of Special Appeals held that the post-conviction court properly denied Gantt’s claim of ineffective assistance of counsel, concluding that counsel could not be found ineffective for declining to raise the *Batson* issue where (i) far more persuasive contentions were available, (ii) the contention was both unpreserved and waived, and (iii) the contention lacked substantive merit.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both (i) that counsel’s representation was so deficient as to undermine the adversarial process and (ii) that counsel’s ineffective assistance prejudiced the defendant. In order to satisfy the first “performance” prong, a defendant must rebut the presumption that counsel’s performance was *reasonably* effective. In assessing whether counsel was reasonably effective, courts measure counsel’s performance against prevailing professional norms. To satisfy the second “prejudice” prong, a defendant “must show that there is a substantial possibility that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Oken v. State*, 343 Md. 256, 284 (1996).

The selection of which issues to raise on appeal is one entrusted to the strategic judgment of counsel. In order to render effective assistance, appellate counsel need *not* raise every non-frivolous claim. To the contrary, effective appellate practice often requires counsel to be judicious in selecting issues, raising only those which maximize the likelihood of success on appeal.

During Gantt’s second appeal, counsel contended that the court erred in: (i) imposing multiple sentences of life imprisonment without parole; (ii) denying Gantt’s motion to have the court appoint counsel for him; (iii) advising Gantt with respect to his right to testify; (iv) denying Gantt’s request to summon defense witnesses or, in the alternative, denying his motion to postpone the trial; and limiting Gantt to ten peremptory juror challenges. Each of these contentions had solid merit—the first so much so that that it ultimately prevailed. Counsel’s decision to forego the *Batson* issue on appeal constituted a sound strategic choice whereby to prevent diluting the force of the five stronger arguments that he chose to raise. Counsel’s performance did not, therefore, fall below an objective standard of reasonableness.

The ostensible *Batson* challenge, moreover, entailed several inherent procedural weaknesses that would have made it imprudent for counsel to appeal it. First, Gantt’s mere reference to a possible *Batson* issue, without more, was insufficient to preserve the issue for appellate review. Second, by expressing satisfaction with the jury ultimately chosen, Gantt waived the issue.

In addition to having been procedurally infirm, the *Batson* issue lacked substantive merit. In evaluating a *Batson* challenge, courts follow a three-step process.

First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, ... the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

*Hernandez v. New York*, 500 U.S. 352, 358 (1991).

Although a trial judge ordinarily must determine whether a *prima facie* case of discrimination has been made, where, as here, the proponent of the strike offers an explanation for the strike *sua sponte*, this first step is bypassed. Given that the prosecutor's explanation for the strike in this case—to wit, for the purpose of seating a more desirable juror—was *facially neutral*, the court properly proceeded to step three. Finally, court's finding that the defendant did not carry the burden of proving intentional discrimination was not clearly erroneous.

*Aaron Dwayne Holly v. State of Maryland*, No. 1720, September Term 2017, filed June 26, 2019. Opinion by Berger, J.

<https://mdcourts.gov/data/opinions/cosa/2019/1720s17.pdf>

CRIMINAL PROCEDURE – CONSTITUTIONAL LAW – SENTENCING – PAROLE – JUVENILE OFFENDERS – LIFE SENTENCES

**Facts:**

Aaron Dwayne Holly was convicted of first-degree premeditated murder, first degree felony murder, and use of a handgun in the commission of a crime of violence. He was seventeen years old at the time he committed the offense. Holly was originally sentenced to life imprisonment without parole. Following the United States Supreme Court’s decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that the Eighth Amendment forbids mandatory life without parole sentences for juvenile offenders convicted of homicide, Holly filed a motion to correct what he alleged to be an illegal sentence. The circuit court denied Holly’s motion.

While Holly’s appeal was pending, the Supreme Court issued its opinion in *Montgomery v. Louisiana*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 718 (2016), holding that *Miller* applies retroactively. Before the Court of Special Appeals, the State agreed that Holly’s life without parole sentence should be vacated. The Court of Special Appeals reversed and remanded for resentencing. On remand, Holly was sentenced to life imprisonment with parole. Holly again appealed.

**Held:** Judgment of the Circuit Court for Baltimore County Affirmed.

Holly argued on appeal that his life sentence with parole was unconstitutional because it did not afford him a meaningful opportunity for release. Holly contended that certain procedural rights are required in order for there to be a meaningful opportunity for release. Specifically, Holly asserted that there was no meaningful opportunity for release under Maryland law because Maryland’s parole system does not provide a right to state furnished counsel at parole hearings, public funds for experts, or judicial review of parole decisions. Holly asserted that without these rights, his sentence of life with parole constitutes an unconstitutional *de facto* life without parole sentence. The Court of Special Appeals considered whether there was any foundation for the rights asserted by Holly under federal or state law, ultimately holding that there was not.

The Court first observed that the Court of Appeals expressly held in *Carter v. State*, 461 Md. 295, 307 (2018), *reconsideration denied*, October 4, 2018, that juvenile homicide offenders’ life sentences with parole are legal because “the laws governing parole of inmates serving life sentences in Maryland, including the parole statute, regulations, and a recent executive order

adopted by the Governor, on their face allow a juvenile offender serving a life sentence a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’”

The Court of Special Appeals considered whether the procedural rights sought by Holly had a foundation in the United States Constitution and the Supreme Court’s decisions in *Graham v. Florida*, 560 U.S. 48 (2010) (holding that the Eighth Amendment bars a sentence of life in prison without parole for juvenile offenders convicted of any crime other than homicide), *Miller*, and *Montgomery*. The Court emphasized that *Graham*, *Miller*, and *Montgomery* were concerned with sentencing and addressed the issue of what constitutes a meaningful opportunity for release only in a limited context. The Court of Special Appeals observed that the *Graham* Court expressly explained that “[i]t is for the State[s], in the first instance, to explore the means and mechanisms for compliance” with the meaningful opportunity for release requirement. 560 U.S. at 75.

The Court did not definitively determine whether *Graham*, *Miller*, and *Montgomery* established a due process liberty interest in parole for juvenile offenders sentenced to life in prison. The Court explained that, assuming arguendo that juvenile homicide offenders have a due process liberty interest in parole, the laws governing parole in Maryland provide far greater protections for inmates than the minimal protections held to be sufficient by the United States Supreme Court in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979). The Court of Special Appeals, therefore, rejected Holly’s contentions that the procedural rights he sought were mandated by the United States Constitution.

The Court further considered whether there was any foundation for the asserted rights under Articles 24 and 25 of the Maryland Declaration of Rights. The Court rejected Holly’s assertion that Article 25 should be read as providing broader protections than the Eighth Amendment, emphasizing that Maryland appellate courts have routinely interpreted Article 25 to be *in pari materia* with the Eighth Amendment. The Court of Special Appeals further rejected Holly’s Article 24 argument, explaining that it is the risk of incarceration that triggers the right to counsel under Article 24. The Court was not persuaded by Holly’s analogy to *DeWolfe v. Richmond*, 434 Md. 444, 464 (2013) (*DeWolfe II*), in which the Court of Appeals held that “under Article 24 of the Maryland Declaration of Rights, an indigent defendant is entitled to state-furnished counsel at an initial hearing before a District Court Commissioner.” The Court emphasized that unlike arrested individuals appearing before District Court Commissioners, Holly was convicted of a crime and sentenced to a period of incarceration as a result.

Finally, the Court addressed Holly’s reliance on the Massachusetts case of *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E. 3d 349, 354-55 (Mass. 2015) (*Diatchenko II*), in which the Supreme Judicial Court of Massachusetts held that juvenile homicide offenders sentenced to life imprisonment were entitled to the same procedural rights sought by Holly. The Court observed that the *Diatchenko II* Court’s holding was premised on the Massachusetts Declaration of Rights. Having already articulated why there is no basis for the rights sought by Holly in the Maryland Declaration of Rights, the Court declined to adopt the reasoning of the Supreme Judicial Court of Massachusetts.

*Zeynab Abdullahi v. Gianni Zanini*, No. 2390, September Term 2017, filed June 26, 2019. Opinion by Graeff, J.

<https://mdcourts.gov/data/opinions/cosa/2019/2390s17.pdf>

ACQUIESCENCE RULE – MONETARY AWARD – DISSIPATION – CONTRIBUTION – MARITAL SHARE OF A PENSION

**Facts:**

On September 4, 2017, the Circuit Court for Montgomery County granted Zeynab Abdullahi (“Wife”), appellant, an absolute divorce from Gianni Zanini (“Husband”), appellee. The circuit court also divided the marital assets and granted Wife a monetary award. On appeal, Wife contended that the circuit court abused its discretion in granting the monetary award, in dividing marital property, in declining to award her attorneys’ fees, and in granting the absolute divorce on the ground of a one-year separation rather than on the ground of adultery. Husband filed a motion to dismiss Wife’s appeal, contending that, because Wife had accepted title to the Nissan Murano and partial payment of the monetary award, she had acquiesced in the judgment.

**Held:** Affirmed in part, vacated in part. Remanded for further proceedings.

The general rule is that a party may not acquiesce in a judgment and accept its benefits while attacking the judgment on appeal. There are, however, exceptions to this general rule. One exception exists where the judgment is ““for less than the amount or short of the right claimed.”” Additionally, where Husband told Wife that he would not raise the acquiescence rule, Husband waived any right to argue that the acquiescence rule requires dismissal of this appeal.

In assessing whether to grant a monetary award, a court must determine the value of all property. In assessing the value of marital bank accounts, the court errs in dividing accounts listed in one party’s name because that constitutes an improper transfer of ownership.

With respect to 529 college accounts in one party’s name, where there is nothing to suggest custodian of the funds, which are held for the benefit of a child’s college education, will use the funds for another purpose, it is improper to consider the funds as assets of that parent in determining a monetary award.

Where the parties disagree on the value of property, and owner of property presents evidence that the property has no value, the circuit court errs in accepting another party’s bald assertion of value in the Joint Statement, which is unsupported by any reasoning supporting that value.

Proof that a spouse made large withdrawals from bank accounts under his or her control, here \$39,000 in one year, was sufficient to establish a prima facie case of dissipation. This shifts the burden to spouse to show that the expenditures were appropriate.

Generally, one co-tenant who pays the mortgage, taxes, and other charges of jointly owned property is entitled to contribution from the other. In the absence of an ouster (or its equivalent) of the nonpaying spouse, a married, but separated, cotenant is, entitled to contribution for the expenses the paying spouse has paid. The circuit court did not abuse its discretion in ordering that the parties share the costs of any liens on the property and any necessary repairs pending the sale of the home, at which time the proceeds would be divided equally.

In the absence of value of the pensions or agreement by the parties, the court cannot properly set off one pension with another, and the division of the pension must, therefore, be pursuant to the *Bangs* “if, as, and when,” method.

*Joan Floyd v. Baltimore City Council, et al.*, No. 1687, September Term 2017, filed June 4, 2019. Opinion by Kenney, J.

<https://www.courts.state.md.us/data/opinions/cosa/2019/1687s17.pdf>

LEGISLATIVE PRIVILEGE – MOTION TO QUASH SUBPOENAS

ONLINE VIDEO RECORDINGS NOT IN EVIDENCE

OPEN MEETINGS ACT – NOTICE AND MINUTES REQUIREMENT – LUNCHEON

OPEN MEETINGS ACT – WILLFUL VIOLATION – OTHER RELIEF

**Facts:**

Appellant challenged comprehensive rezoning legislation enacted by Baltimore City, alleging that the City Council and Land Use Committee had violated the Open Meetings Act with respect to several meetings conducted near the time of the bill’s passage. Before the trial, the circuit court granted the City’s motion to quash subpoenas for two City Council members based on legislative privilege. Appellant argued that legislative privilege should be applied in an Open Meetings Act violation case.

At trial, appellant and a legislative staff member testified. There were portions of video recordings of Council and Committee meetings, produced and maintained online by the City, that appellant wanted the trial court to view, but the trial court did not do so.

With regard to the Land Use Committee meeting of October 20, 2016, appellant contended that it violated the minutes requirement of the Act. She argued that the minutes only reflected one vote on whether to recommend the bill to the Council, but not the “hundreds of amendments” and “over forty roll call votes” at that meeting.

With regard to the Council’s “luncheon” on October 24, 2016, appellant contended that it violated both the notice and minutes requirements of the Act. The City responded that there was sufficient notice for the luncheon, and the staff member testified that the bill was not formally discussed at the luncheon. Citing *Community and Labor United for Baltimore Charter Committee v. Baltimore City Bd. of Elections*, 377 Md. 183 (2003), appellant argued that the entire legislation should be declared void based on violations of the Act.

**Held:** Affirmed in part and remanded.

Judgment of the Circuit Court for Baltimore City affirmed in part and remanded for consideration of an award of fees and expenses.

The trial court did not abuse its discretion in granting a motion to quash subpoenas for the two City Council members based on legislative privilege. Based on a proffer, appellant sought to ask questions related to why certain actions were taken by Council members in regard to the passage of the legislation. Such questions were for actions within the sphere of legitimate legislative activity and were protected by legislative privilege, but appellant was able to pursue questions related to compliance with the Open Meetings Act with a legislative staff member.

In a bench trial, the court may not rely on facts that are not in the record. The litigant has the burden to introduce evidence into the record for the court's consideration in a manner that it could be preserved for the possibility of appeal. It was not an error for the court, when asked to do so, to decline to go onto an external website to view video recordings.

The minutes reflecting that the Land Use Committee recommended the bill "favorable with amendments" satisfied the requirements, under Md. Code Ann., General Provisions § 3-306(c), that the minutes reflect each "item" considered, each "action" taken, and each "vote" that was recorded. The City Council Rules require that a Committee report to the Council on bills on which it has taken action, and that the report must be either favorable, favorable with amendments, unfavorable, or without recommendation. The report on the bill was the "item" under consideration in the Committee meeting, and the minutes reflect the Committee's action on that bill.

With regard to the Council's luncheon, the purported notice did not comply with § 3-302(b) of the Act because it did not state the time or place of the luncheon. And, it was undisputed that no minutes were kept or posted for it.

The violations of the Act related to the luncheon did not rise to the level of a willful violation that would permit voiding the legislation. And, the circuit court did not clearly err in finding that the only evidence presented at trial showed that Council members did not discuss the bill at the luncheon. Because the circuit court may assess reasonable counsel fees and other litigation expenses in an Act enforcement claim, remand to the circuit court was appropriate to determine whether any fees and expenses should be awarded in this case and, if so, the amount of any award.

*Margaret Shilling v. Nationwide Insurance Company*, No. 1154, September Term 2017, and No. 515, September Term 2018, filed June 4, 2019. Opinion by Beachley, J.

<https://mdcourts.gov/data/opinions/cosa/2019/0515s18.pdf>

## INSURANCE – UNDERINSURED MOTORISTS COVERAGE – STATUTE OF LIMITATIONS

### **Facts:**

Margaret Shilling was involved in a motor vehicle accident with an underinsured tortfeasor. The tortfeasor's insurance company offered Ms. Shilling the maximum amount of coverage available under its policy—\$20,000. On April 23, 2013, Ms. Shilling's insurance provider, Nationwide, waived its subrogation rights against the tortfeasor and agreed to the proposed settlement. On February 3, 2014, Ms. Shilling signed a release whereby she accepted \$20,000 and released the tortfeasor and the tortfeasor's insurance company from liability.

On January 26, 2015, Ms. Shilling began settlement negotiations with Nationwide regarding damages in excess of \$20,000 pursuant to her underinsured motorist coverage with Nationwide. On September 23, 2016, Ms. Shilling filed a complaint against Nationwide, seeking those damages. Nationwide moved to dismiss the complaint, arguing that it was barred by the statute of limitations. Nationwide argued that limitations began to run on April 23, 2013, the date Nationwide consented to settlement and waived subrogation. The circuit court agreed with Nationwide and dismissed Ms. Shilling's claim.

### **Held:** Reversed.

The *earliest* date for commencing limitations for coverage under an underinsured motorist contract is the date the insured/injured party accepted the tortfeasor's insurance company's policy limits offer and executed a release in favor of the tortfeasor. This rule protects the insured/injured party's absolute statutory option of initially bringing a contract action against the underinsured motorist carrier or of initially bringing a tort action against the tortfeasor and thereafter bringing a contract action against the underinsured motorist carrier.

*ConAgra Foods RDM, Inc. v. Comptroller of the Treasury*, No. 1940, September Term 2015, filed June 27, 2019. Opinion by Woodward, J.

<https://mdcourts.gov/data/opinions/cosa/2019/1940s15.pdf>

TAXATION – INCOME TAX – CORPORATION INCOME TAX – TAXATION OF NON-DOMICILIARY CORPORATION – CONSTITUTIONAL REQUIREMENTS

TAXATION – INCOME TAX – CORPORATION INCOME TAX – TAXATION OF NON-DOMICILIARY CORPORATION – CONSTITUTIONAL REQUIREMENTS – LACK OF ECONOMIC SUBSTANCE AS A SEPARATE ENTITY

TAXATION – INCOME TAX – CORPORATION INCOME TAX – APPORTIONMENT OF MARYLAND MODIFIED INCOME – 3-FACTOR FORMULA – MODIFICATION BY COMPTROLLER – USE OF BLENDED APPORTIONMENT FORMULA

TAXATION – INCOME TAX – INTEREST – WAIVER OF INTEREST AND PENALTIES BY THE TAX COURT

**Facts:**

Appellant, ConAgra Foods RDM, formerly known as ConAgra Brands, Inc. (“Brands”), was incorporated in 1996 in Nebraska as a direct and indirect wholly owned subsidiary of ConAgra Foods, Inc, formerly known as ConAgra, Inc. (“ConAgra”). Brands issued 2,207 shares of common stock to ConAgra and three other wholly owned subsidiaries. In exchange, Brands acquired numerous trademark groups from these entities. Brands then entered into license agreements with ConAgra and the three subsidiaries under which Brands was paid royalties.

From 1996 to 2003, ConAgra and some of its subsidiaries filed Maryland tax returns, but Brands did not. After an audit, the Comptroller of the Treasury (“Comptroller”) sent Brands a “Notice and Demand to File Maryland Corporation Income Tax Returns” in 2007. When Brands did not respond, the Comptroller issued a “Notice of Assessment” for the tax years of 1996 to 2003 for a total of \$2,768,588 in back taxes, interest, and penalties as of August 30, 2007. An administrative appeal was held, after which the Comptroller issued a “Notice of Final Determination” on January 23, 2009, concluding that Brands then owed \$3,053,222 in back taxes, interest, and penalties. In its assessments, the Comptroller utilized a blended apportionment factor, which was derived from the apportionment factors used by ConAgra and its subsidiaries doing business in Maryland and paying Brands royalties.

Brands filed a timely Petition of Appeal to the Tax Court on February 23, 2009. On February 24, 2015, the Tax Court issued its opinion upholding the Comptroller’s assessment. The Tax Court determined that, under the evidence before it and the Court of Appeals’ decisions in *Comptroller v. SYL, Inc.*, 375 Md. 78, *cert. denied*, 540 U.S. 984 and *cert. denied*, 540 U.S. 1090

(2003) and *Gore Enter. Holdings, Inc. v. Comptroller*, 437 Md. 492 (2014), Brands lacked economic substance as a business entity separate from ConAgra and thus was subject to taxation by Maryland. The Tax Court additionally held that the Comptroller's use of a blended apportionment factor was permissible. Finally, the Tax Court abated all interest accruing from the date of the filing of Brands's appeal to the Tax Court until the date of the Tax Court's decision, and all penalties.

Brands filed a petition for judicial review in the Circuit Court for Anne Arundel County on March 17, 2015. The Comptroller filed a cross-petition challenging the Tax Court's decision to abate interest. On October 30, 2015, the circuit court issued an opinion and order affirming the Tax Court in all respects, except that it reversed the latter's abatement of interest accruing from the date of the issuance of the *Gore* opinion, March 24, 2014. This timely appeal followed.

**Held:** Affirmed in part and reversed in part.

The case was remanded to the circuit court for the entry of a judgment affirming the Tax Court.

First, the Court held that Brands was subject to taxation by Maryland, because there was substantial evidence to support the Tax Court's conclusion that Brands lacked economic substance as a business entity separate from ConAgra. The Court synthesized *SYL* and *Gore* to articulate the four factors that courts should consider when conducting this inquiry: (1) how dependent the subsidiary is on its parent company for income; (2) whether there is a circular flow of money from the parent company to the subsidiary and then back to the parent; (3) how much the subsidiary relies on the parent for its core functions and services; and (4) whether the subsidiary engages in substantive activity that is in any meaningful way separate from the parent.

The Court rejected several arguments made by Brands to challenge the Tax Court's conclusion that it lacked economic substance separate from ConAgra. The Court determined that royalty payments to Brands from third-parties did not create the required economic substance because the vast majority of Brands's income was derived from ConAgra and its subsidiaries. The Court rejected Brands's assertion that there was no circular flow of money between Brands and ConAgra because Brands did not make loans or pay dividends to ConAgra, noting that ConAgra's cash management system produced the same result. The Court also rejected Brands's argument that its activity in promoting and defending its trademark brands gave it the necessary economic substance, highlighting the Tax Court's findings that there was functional integration and control by ConAgra through stock ownership, as well as common employees, directors, and officers. Finally, the Court rejected Brands's argument that the existence of twenty-three Brands employees during the tax period in question showed economic substance, stressing that Brands never adduced evidence demonstrating the nature of the employees' duties or compensation and that, according to the Tax Court, Brands relied on ConAgra for most, if not all, of its administrative functions.

Second, the Court held that the Comptroller did not err or abuse its discretion in utilizing a blended apportionment factor to calculate the income tax owed by Brands to Maryland on royalty payments received from ConAgra and its subsidiaries arising out of their business in Maryland. The Court noted that Tax General § 10-402(d) allowed the Comptroller to alter the apportionment formula “[t]o reflect clearly the income allocable to Maryland.” Because utilizing the traditional three-factor formula would have resulted in an apportionment factor of zero, the Court held that the Comptroller had adequately demonstrated the need to alter the formula. The Court further held that it was permissible for the Comptroller to use a blended apportionment factor derived from the apportionment factors of ConAgra and its subsidiaries doing business in Maryland and paying royalties to Brands.

Third, the Court, noting that the term reasonable cause is not defined in the Tax General Article, held that the Tax Court may properly find that reasonable cause exists for the abatement of interest where there is uncertainty in the state of the case law when applied to the circumstances of a particular taxpayer. Therefore, the Court reversed the circuit court to the extent that the court’s order made Brands responsible for interest accruing from the date of the issuance of the *Gore* opinion until the date of the issuance of the Tax Court’s opinion, and remanded the case with instructions for the circuit court to enter a judgment affirming the Tax Court’s decision in its entirety.

*Martin Reiss v. American Radiology Services, LLC, et al.*, No. 1570, September Term 2017, filed June 26, 2019. Opinion by Arthur, J.

<https://mdcourts.gov/data/opinions/cosa/2019/1570s17.pdf>

## MEDICAL MALPRACTICE – DEFENSE OF NON-PARTY MEDICAL NEGLIGENCE

### **Facts:**

In 2011 Martin Reiss was diagnosed with renal cell carcinoma and an enlarged lymph node near the diseased kidney. A urological surgeon from Chesapeake Urology removed the kidney, but did not remove the enlarged lymph node.

After the surgery, Reiss came under the care of an oncologist. The oncologist concluded that the enlarged lymph node was cancerous.

From 2012 to 2014, the oncologist ordered periodic CT scans of the area near the enlarged lymph node. Two radiologists from American Radiology Services interpreted the scans as showing no disease of the lymph node.

In 2015, a different physician found evidence of an enlarged or diseased lymph node. A biopsy confirmed that it was cancerous.

Reiss filed a medical malpractice complaint in the Circuit Court for Baltimore City against: the urological surgeon, Chesapeake Urology, the two radiologists, and American Radiology. Reiss alleged that the urological surgeon breached the standard of care by failing to remove the lymph node in 2011. Reiss alleged that the two radiologists breached the standard of care by failing to alert the oncologist of growth in the lymph node.

Reiss dismissed his claims against the urological surgeon and Chesapeake Urology prior to trial, leaving the two radiologists and American Radiology as sole defendants.

At trial, the jury heard testimony from various medical experts. Reiss presented expert testimony that a surgeon could have removed the lymph node before 2015 and that Reiss's probability of survival would have been significantly enhanced had the lymph node been removed before 2015. The radiologists argued that their interpretations of the CT scans were within the standard of care.

During trial, no expert witness testified, to a reasonable degree of medical probability, that the standard of care required the urological surgeon to remove the enlarged lymph node when he removed Reiss's cancerous kidney in 2011. Nor did any expert witness testify, to a reasonable degree of medical probability, that the standard of care required the oncologists to refer Reiss to a surgeon to remove the potentially cancerous lymph node or to order a biopsy of the lymph node. During closing argument, however, the radiologists argued that Reiss's injuries resulted

from the conduct of the non-party physicians (the surgeon and oncologists), and not from acts or omissions by the radiologists.

Over Reiss's objection, the court included a question on the verdict sheet asking whether "a negligent act or acts" of the non-party physicians had been "a substantial factor" in causing Reiss's injuries. The verdict sheet directed the jury to answer that question only if they found that one or both of the radiologists breached the standard of care.

The jurors did not follow the directions on the verdict sheet. Although they found that neither radiologist breached the standard of care, they nonetheless proceeded to decide that "a negligent act or acts" by non-party physicians had been "a substantial factor" in causing Mr. Reiss's injuries. The jury awarded Reiss over \$4.8 million in damages, even though the actual defendants in the case (the radiologists) had been found liable for nothing.

The court informed the jurors that they had reached an inconsistent verdict. Over Reiss's objection, the court sent the jurors back to deliberate with another copy of the same verdict sheet. The jury eventually returned a second verdict in which it found (again) that neither of the two radiologists breached the standard of care. This time, however, the jury answered no additional questions.

Reiss appealed.

**Held:** Reversed and remanded.

The Court of Special Appeals reversed the judgment in favor of the defendants and remanded for a new trial.

Two Maryland cases have recognized the defense of non-party medical negligence in medical malpractice cases. Under both *Martinez ex rel. Fielding v. Johns Hopkins Hosp.*, 212 Md. App. 634 (2013), and *Copsey v. Park*, 453 Md. 141 (2017), defendants generally may introduce evidence of a non-party's medical negligence to prove that those defendants were not negligent or that their negligence did not cause the plaintiff's injuries. Further, defendants generally may introduce evidence of a non-party's medical negligence to prove that the non-party's acts or omissions were a superseding cause that cut off the chain of causation running from the defendants' negligence. Neither case expressly addresses whether expert testimony is required when a defendant seeks to generate the issue about non-party medical negligence.

Maryland law ordinarily requires expert testimony, expressed to a reasonable degree of probability, to generate a factual issue about whether a physician breached a standard of care. Although some witnesses here made critical comments about the care rendered by the non-party physicians, no expert testified, to a reasonable degree of medical probability, that the non-party physicians breached their respective standards of care. Absent such testimony, the radiologists did not generate a triable issue as to the negligence of non-party physicians. The court should

not have submitted the question about non-party negligence to the jury where there was no evidence to support it.

The Court rejected the defendants' argument that the jury's finding that the radiologists were not negligent made it unnecessary to decide whether the trial court erred by submitting the question of non-party negligence to the jury. The Court further concluded that the trial court's error was prejudicial. The manner in which the jurors completed the initial verdict sheet showed that the jurors did indeed consider the issue of non-party medical negligence and showed that they were obviously confused by the verdict sheet. The Court could not rule out the strong possibility that, in finding that the radiologists were not negligent, the jurors may have been improperly influenced by the unfounded assertions that the non-party physicians were negligent.

# ATTORNEY DISCIPLINE

\*

By an Order of the Court of Appeals dated June 5, 2019, the following attorney has been placed on inactive status by consent:

CHARLES JEROME WARE

\*

By an Order of the Court of Appeals dated May 28, 2019, the following attorney has been indefinitely suspended by consent, effective June 7, 2019:

ALEX BENEDICT LEIKUS

\*

By an Order of the Court of Appeals dated June 20, 2019, the following attorney has been placed on inactive status by consent:

KATHRYN ALICIA ROBERTSON

\*

By an Order of the Court of Appeals dated June 24, 2019, the resignation from the further practice of law in this State of

EUGENE ALOYSIUS WALSH

has been accepted.

\*

# 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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