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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. David Elliott Frank, Misc. Docket AG No. 2, September Term 2019, filed August 26, 2020. Opinion by Hotten, J.

<https://www.courts.state.md.us/data/opinions/coa/2020/2a19ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel (“Petitioner”), filed a Petition for Disciplinary and Remedial Action (“the Petition”) with the Court of Appeals, alleging that David Elliott Frank (“Respondent”) violated Maryland Attorney’s Rules of Professional Conduct (“MARPC”) Rules 19-301.1 (Competence), 19-301.5 (Fees), 19-301.15 (Safekeeping Property), 19-308.1 (Bar Admission and Disciplinary Matters), Rules 19-404 (Trust Account – Required Deposits), 19-408 (Commingling of Funds), and 19-410 (Prohibited Transactions), and Md. Code Ann., Business Occupations & Professions § 10-306 (Trust Money Restrictions) (“Bus. Occ. & Prof.”). These allegations stemmed from the investigation of a claim by a former client, Teresa Bernhardt (“Ms. Bernhardt”) where the hearing judge found that Respondent misappropriated funds in connection with Ms. Bernhardt and another former client, Arline Cone (“Ms. Cone”). Petitioner recommended that Respondent be disbarred from the practice of law.

As reflected in the findings of fact rendered by the hearing judge in November 2019, during his representation of the two former clients, the hearing judge concluded that Respondent knowingly and intentionally misused his attorney trust account, operating account, and client funds. He commingled personal and client funds in his attorney trust account, used the funds in his attorney trust account for personal and familial financial obligations, failed to disburse Ms. Bernhardt’s settlement funds in a timely manner, and misused those settlement funds. He consistently, and intentionally, misled Ms. Bernhardt to believe that he was actively engaged in recovering her settlement funds. Although Respondent attempted to timely rectify his situation with Ms. Bernhardt, he only paid restitution to Ms. Bernhardt as a result of Petitioner’s investigation. In terms of Ms. Cone, the hearing judge found Respondent allowed his attorney trust account to fall into a negative balance and authorized several transactions for Ms. Cone using funds reserved for Ms. Bernhardt. He also improperly deposited \$5,000.00 of Ms. Cone’s funds into his operating

account, rather than his attorney trust account. Respondent failed to accept responsibility and blamed Ms. Cone for his misconduct. At the conclusion of the hearing, the hearing judge found by clear and convincing evidence that Respondent violated MARPC 19-301.1, 19-301.15, 19-308.1, and 19-308.4, Rule 19-404, 19-408, and 19-410, and Bus. Occ. & Prof. § 10-306. The hearing judge also found that Respondent exhibited several aggravating factors, including a pattern of misconduct, multiple violations of the MARPC, a refusal to acknowledge the wrongful nature of the misconduct, and deceptive practices during the course of Petitioner's investigation. Regarding mitigation, the hearing judge found few mitigating factors, finding that Respondent had no prior disciplinary record, that he attempted to repay Ms. Bernhardt, and that he currently maintains a new attorney trust account that has not fallen into a negative balance.

Held: Disbarred.

The Court of Appeals held that Respondent violated MARPC 19-301.1 (Competence) when he failed to properly maintain his attorney trust account for more than a year and made several transactions knowing the account had insufficient funds. The Court held that Respondent violated MARPC 19-301.15 (Safekeeping Property) when he failed to safeguard the funds of Ms. Bernhardt and other clients by authorizing the use of his attorney trust account to satisfy Ms. Cone's expenses and failed to promptly disburse settlement funds to Ms. Bernhardt but quickly disbursed a portion to himself. The Court of Appeals determined that Respondent violated MARPC 19-308.1 (Bar Admission and Disciplinary Matters) by consistently failing to disclose Ms. Cone's identity and contact information to Petitioner upon Petitioner's lawful requests for such information. The Court of Appeals concluded that Respondent violated MARPC 19-308.4 (Misconduct) through violation of several other professional rules, misappropriating client funds on several occasions, failing to safeguard Ms. Bernhardt's funds, failing to remedy the situation promptly and appropriately, and by engaging in conduct that negatively reflected on the legal profession as a whole. The Court of Appeals held that Respondent violated MARPC 19-404 (Trust Account – Required Deposits) when he deposited a \$5,000.00 check from an investor to be used for the representation of Ms. Cone into his operating account rather than his attorney trust account. The Court also concluded that Respondent violated MARPC 19-408 (Commingling of Funds) by depositing familial and personal funds into his attorney trust account to pay for non-client obligations on several occasions, thereby commingling client and personal funds in his attorney trust account. The Court of Appeals also held that Respondent violated MARPC 19-410 (Prohibited Transactions) when he used Ms. Bernhardt's funds for unauthorized purposes, allowed client funds to be applied to the negative balance in his attorney trust account, drew a check for \$900.00 from his attorney trust account payable to cash, and failed to maintain a positive balance in his attorney trust account. Finally, the Court of Appeals determined that Respondent violated Md. Code Ann., Bus. Occ. & Prof. § 10-306 when he knowingly and intentionally misused client funds on several occasions, including using funds reserved for other clients and allowing the funds to be applied towards the negative balance in his attorney trust account.

COURT OF SPECIAL APPEALS

County Council of Prince George's County v. Palmer Road Landfill, Inc., No. 2584, September Term 2018, filed August 27, 2020. Opinion by Leahy, J.

<https://mdcourts.gov/data/opinions/cosa/2020/2584s18.pdf>

COURTS AND JUDICIAL PROCEEDINGS – STATUTORY TIME PRESCRIPTIONS – WAIVER

ADMINISTRATIVE LAW – JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS – ARBITRARY AND CAPRICIOUS

Facts:

Palmer Road Landfill, Inc. and Palmer Road, LLC (together “Palmer Road”) submitted an application, in 2015, for a special exception and variance to continue operating a 175-acre rubble fill site in Fort Washington, Maryland (the “Application”). The County Council of Prince George’s County, sitting as the District Council (the “Council”), denied the Application in 2018 on the ground that certain procedural time limitations contained in § 27-405.1 of the Prince George’s County Code (“PGCC”) were not followed. The applicable ordinance specifies: “[w]ithin one hundred and twenty (120) days after an application . . ., the Zoning Hearing Examiner [“ZHE”] *shall* conduct a public hearing[.]” PGCC § 27-405.01(a)(1) (emphasis added).

Following an initial review, the ZHE advised Palmer Road that it would need to file a “waiver request” because the ZHE could not hold the hearing within 120 days. Palmer Road requested the waiver that same day. The Planning Board approved the Application, and the ZHE held a public hearing and then issued a decision approving the Application with conditions.

Pursuant to its statutory authority, the Council elected to make the final decision on the Application. The Council held oral argument and failed to challenge the Application on the basis of the procedural defects or question Palmer Road on the issue. The issue was first raised in the Council’s final Order of Denial on the stated ground that because the ZHE’s hearing and written decision failed to comply with the procedural requirements of PGCC § 27.405(a)(1), the Application should be denied.

Palmer Road petitioned for judicial review in the circuit court. The court reversed the Council's Order of Denial, determining that "shall" in PGCC § 27-405.1 was directory and not mandatory. The court remanded the matter to the Council with instructions to approve the Application. Following the court's entry of final judgment, the Council voted to appeal, and a timely appeal followed.

Held: Affirmed in part and vacated in part.

The Court of Special Appeals reached three holdings. First, the Court held that PGCC § 27-405.01(a)(1) is a non-jurisdictional time prescription, subject to waiver and forfeiture, and therefore the statute did not present a jurisdictional impediment to the Council's ability to make a final decision on an application. Second, the Court held that the Council's decision to deny the Application based on procedural timeframes that were waived by the government and never raised throughout the entire review and appeal process was arbitrary and capricious. Third, the Court held the circuit court erred when it remanded the matter with instructions to approve Palmer Road's Application, because the Council expressly did not make a determination on the merits. There was no basis for the circuit court to usurp the administrative function in this case where the Council's determination on the merits of the Application remains to be performed. Accordingly, the Court affirmed the circuit court's decision reversing the Council's order denying the Application on procedural grounds and vacated the circuit court's order directing the Council to approve Palmer Road's requests for a special exception and variance.

William Scott v. State of Maryland, No. 3351 September Term 2018, filed July 29, 2020. Opinion by Eyler, D., J.

<https://mdcourts.gov/data/opinions/cosa/2020/3351s18.pdf>

CONSTITUTIONAL LAW – FOURTH AMENDMENT SEARCH AND SEIZURE –
CONSENT SEARCH – VOLUNTARINESS – ROADSIDE TRAFFIC STOP – SEARCH OF
PASSENGER

Facts:

The defendant was one of two passengers in a minivan lawfully stopped by the police for speeding on a hot summer afternoon on a busy road in Montgomery County. A canine unit was called immediately because a stop of the same minivan three weeks prior had led to heroin trafficking charges against a passenger (who was not in the minivan this time).

Five officers were involved in the stop. For about 13 minutes, the driver, the defendant, and the other passenger sat in the minivan, chatting with two officers. The defendant was hunching over and from time to time complained of feeling hot and of having been overcharged for a hotel room. The atmosphere of the traffic stop was nonconfrontational. When the K-9 unit arrived, the occupants of the minivan were told to get out. Despite being warned he was about to do so, the defendant dropped his phone and wallet when he stood up. He retrieved them and walked, still hunching over, to the median strip next to the minivan. Because that location was too close to the area the canine would be sniffing, an officer told the defendant not to sit there and, when he stumbled, guided him to a place to sit farther down the median strip. The defendant sat down next to another officer, who was standing on the median strip.

The driver was briefly patted down after he revealed knives in his pocket (which the police returned to the minivan) and the other passenger was searched by consent. There was no evidence that the defendant saw either search.

As he sat on the median strip, the defendant began to grab the right front pocket of his shorts. The police officer standing next to him said he did not want him grabbing the pocket and asked, “May I reach inside and get it?” The defendant answered “yes” and nodded his head affirmatively. The officer reached in the pocket and took out some over the counter medicine, a pack of cigarettes, and some money. As he looked through those items, the defendant leaned slightly to his left, and the officer saw the butt of a handgun in his waistband and the gun’s outline. The handgun was seized and the defendant was arrested. In a search incident, an Adderall pill was found in another pocket.

After being charged with various offenses, the defendant moved to suppress the handgun and Adderall pill from evidence, asserting they had been seized in violation of his Fourth Amendment rights. In an evidentiary hearing that included testimony by several officers and

body camera evidence, the officer who searched the pocket stated that he only was able to see the handgun because the items were removed from the defendant's pocket. The court ruled that the defendant voluntarily consented to the search of his pocket and denied the motion. The defendant took a conditional plea to handgun possession and possession of Adderall and noted an appeal, challenging the search.

Held: Affirmed.

Under the Fourth Amendment, as a passenger in a lawful traffic stop, the defendant was detained legally for the period of time needed to fulfill the purpose of the stop. A search of such a detained passenger only would be proper if the criteria of *Terry v. Ohio* or its exceptions were met. One such exception is consent to search, if the consent was given voluntarily. Under *Schneckloth v. Bustamonte*, consent to search is voluntary if, under the total circumstances, consent was freely given and was not the product of duress or coercion, express or implied. The State bears the burden to prove voluntariness by a preponderance of the evidence.

The suppression court's factual findings in support of voluntariness of consent were supported by competent and material evidence in the record and the total circumstances supported the conclusion that consent to search was freely given by the defendant. The stop was on a busy road, in daylight, in full view of rush hour traffic. There were five police officers but three of them had little to no interaction with the defendant. Most of the traffic stop consisted of the occupants of the vehicle engaging in friendly banter with the officers. The officers helped the defendant navigate to a safe area to sit on the median strip. The defendant was not asked any questions at all, and the officers did not seem to have any suspicions that he was engaging in any illegal activity until he started grabbing his pocket. The officers were polite throughout. When the officer who asked for consent to reach into the defendant's pocket did so, he spoke calmly, not in a raised voice, and clearly was requesting permission, not demanding compliance. The defendant knew his handgun was not in the pocket the officer was asking to search. The defendant responded affirmatively, both orally and by nodding.

Although the defendant mentioned Article 26 of the Maryland Declaration of Rights in his brief, he did not raise it below and did not make an argument about it on appeal.

Baltimore City Police Department v. David Esteppe, et al., No. 3128, September Term 2018, filed August 27, 2020. Opinion by Fader, C.J.

<https://mdcourts.gov/data/opinions/cosa/2020/3128s18.pdf>

LOCAL GOVERNMENT TORT CLAIMS ACT – SCOPE OF EMPLOYMENT – PROCEEDINGS TO ESTABLISH LIABILITY OF LOCAL GOVERNMENT TO PAY JUDGMENT

LOCAL GOVERNMENT TORT CLAIMS ACT – SCOPE OF EMPLOYMENT – ACTIONS BY LAW ENFORCEMENT OFFICERS

Facts:

After David Esteppe ended a romantic relationship with a woman, a Baltimore City police officer, who was friends with the woman, falsified an affidavit to obtain a search warrant for drugs at Mr. Esteppe’s house. In executing the warrant, officers did not uncover any illegal drugs but found firearms. Mr. Esteppe was arrested and charged for unlawful possession of a firearm. The State later learned that the officer had falsified the affidavit. The State dropped the charges against Mr. Esteppe and charged the police officer with perjury and misconduct in office, among other offenses.

Mr. Esteppe filed a civil complaint for damages against the officer, the Baltimore Police Department, the City, and the State. The court dismissed all parties from the case except for the officer, and ultimately awarded Mr. Esteppe a money judgment against the officer. Mr. Esteppe then filed in the same case a “Motion for Declaratory Relief to Enforce Judgment” against the Department, arguing that (1) despite its dismissal from the case, the Department was responsible to pay the judgment under the LGTCA, and (2) the officer’s conduct was within the scope of his employment because it involved routine police work that benefited his employer. The Department argued that that motion was improper procedurally, contending that Mr. Esteppe should have brought a separate enforcement action against it. The Department also argued that it was not obligated to pay the judgment because the officer had acted outside the scope of employment.

The motions court ruled that the Department was liable for the judgment under the LGTCA, and that the officer acted within his scope of employment. The Department appealed.

Held: Reversed and remanded.

First, the Court stated that when a plaintiff seeks to establish a local government’s liability and enforce a judgment under the LGTCA, it must bring an action directly against that local government. In initiating such a proceeding, the plaintiff must (1) join the local government as a

party and (2) give the local government an opportunity to litigate whether the tortfeasor acted within the scope of employment. The Court determined that if those conditions are met, the plaintiff may bring an enforcement proceeding either within the underlying tort action or as a separate action. Although Mr. Esteppe's enforcement motion did not satisfy all of those conditions—because he did not join the Department as a party—the Department participated in the proceeding without objecting on that basis and, therefore, waived that objection.

Second, the Court concluded that the motions court erred in ruling that the police officer's conduct fell within the scope of his employment as a matter of law. The Court discussed the Court of Appeals's recent decision in *Baltimore City Police Department v. Potts*, 468 Md. 265 (2020). In *Potts*, the Court of Appeals reaffirmed a “two-pronged test” for determining whether an employee acted within the scope of employment: (1) “whether the employee's actions were in furtherance of the employer's business” and (2) “whether the employer ‘authorized’ the employee's actions.” *Id.* at 271. The *Potts* court stressed that this test requires a case-specific analysis to determine whether an officer's conduct is within the scope of employment. Applying the test in *Potts* to the officer's conduct in this case, the Court concluded that (1) the only evidence in the record was that the officer was motivated by personal reasons, and (2) the record was devoid of any evidence that the officer's tortious conduct was in any way in furtherance of the Department's interests. The Court therefore concluded that the motions court erred in ruling that the officer had acted within the scope of employment as a matter of law. The Court reversed the judgment and remanded for further proceedings.

Trina Moore v. Donegal Mutual Insurance Company, No. 788, September Term 2019, filed September 30, 2020. Opinion by Graeff, J.

<https://mdcourts.gov/data/opinions/cosa/2020/0788s19.pdf>

SETTLEMENT CONTRACTS – OFFER AND ACCEPTANCE – LAPSE

Facts:

During settlement talks in the underlying negligence claim filed by Ms. Moore, appellant, against Belmont Hospitality, Inc. (“Belmont”), the insurance adjustor for Donegal Mutual Insurance Co. (“Donegal”), appellee, offered \$18,000 to settle the case. After trial began, counsel for Ms. Moore told the insurance adjustor that she would be willing to settle the case for \$21,500. The adjustor stated that Donegal was willing to pay only \$18,000, but when asked, she stated that the \$18,000 offer was “still on the table.” The case proceeded to trial, and after Belmont moved for summary judgment, Ms. Moore’s counsel advised Donegal that she wanted to accept the \$18,000 offer. The adjustor stated, however, that the offer made two hours earlier was no longer available.

After Belmont’s motion for summary judgment was denied and the jury returned a verdict finding that Belmont was not negligent, Ms. Moore filed a complaint against Donegal, seeking \$18,000 due to Donegal’s alleged breach of the settlement agreement. Both parties filed motions for summary judgment, arguing that there was no dispute of material fact. At a hearing on the motion, Donegal argued that summary judgment should be granted, *inter alia*, because the offer had lapsed when Belmont had made its motion and Ms. Moore knew she had presented insufficient evidence. The circuit court denied Ms. Moore’s motion for summary judgment, but it granted Donegal’s motion, finding as a matter of law, that the offer had lapsed because a reasonable amount of time had passed when the trial advanced to a different procedural posture.

Held: Reversed and remanded.

An offer is a conditional promise, and the offeree has the power to accept the offer and create a contract. When an offer provides no specified time for acceptance, it must be accepted within a time reasonable under the circumstances or else it will lapse and can no longer be accepted. In the context of a settlement offer, as long as the trial is still proceeding and the offer does not specify a time for acceptance, the issue of whether the offer was accepted in a reasonable amount of time generally is an issue of fact to be determined by the trier of fact. Here, that general rule applies where the offer was accepted prior to final judgment, within approximately two hours after the offer was stated to be still on the table. Because the issue of whether Ms. Moore accepted the offer within a reasonable time is a question of fact, the circuit court erred in

granting Donegal's motion for summary judgment based on its finding, as a matter of law, that the offer lapsed.

Marquis Ellos Lang Foster v. State of Maryland, No. 462, September Term 2019, filed September 30, 2020. Opinion by Arthur, J.

<https://www.mdcourts.gov/data/opinions/cosa/2020/0462s19.pdf>

CRIMINAL PROCEDURE – VOIR DIRE – PRESERVATION

Facts:

Marquis Foster was charged in the District Court of Maryland for Anne Arundel County with driving without a license and other offenses. Foster demanded a jury trial. The case was transferred to the Circuit Court for Anne Arundel County.

At trial, Foster requested that the court ask whether any venireperson could not follow an instruction not to consider a defendant’s exercise of the Fifth Amendment right not to testify as evidence of guilt. The court declined to ask the question. Defense counsel objected. At the conclusion of jury selection, defense counsel accepted the jury without qualification.

In May 2019, the jury found Foster guilty on the charge of driving without a license. The court imposed a 90-day sentence. Foster appealed.

Held: Reversed.

In *Kazadi v. State*, 467 Md. 1 (2010), the Court of Appeals held that, on request, during voir dire, a trial court must ask whether any prospective jurors are unwilling or unable to comply with jury instructions on the presumption of innocence, the State’s burden of proof, and the defendant’s right not to testify. *Id.* at 35-36. The Court stated that that its holding applied to any other case pending on appeal when the *Kazadi* opinion was filed, where the question was preserved for appellate review. *Id.* at 54.

The Court of Special Appeals held that, in this case, the defendant adequately preserved the issue of whether the court erred in refusing to ask the requested voir dire question. Here, defense counsel objected to the court’s refusal to ask whether any venireperson could not follow an instruction not to consider a defendant’s exercise of the Fifth Amendment right not to testify as evidence of guilt. The defendant did not waive that objection through his unqualified acceptance of the empaneled jury.

A criminal defendant’s objection to a trial court’s refusal to ask a requested voir dire question is sufficient to preserve the issue for appellate review even when that defendant subsequently accepts the empaneled jury without qualification upon the conclusion of jury selection.

Victoria Regina Trapasso v. Elliot N. Lewis, Personal Representative of the Estate of Thomas Edwin Kramer, No. 2843, September Term 2018, filed September 29, 2020. Opinion by Beachley, J.

<https://mdcourts.gov/data/opinions/cosa/2020/2843s18.pdf>

MARRIAGE – UNLICENSED MARRIAGE – VALIDITY

Facts:

In 2003, husband and wife, without obtaining a marriage license, executed a “Marriage Agreement” and participated in a religious marriage ceremony, thereafter holding themselves out as married. They thereafter purchased property as tenants by the entireties. In 2015, wife executed a deed purportedly transferring her interest in the property to a trust. After wife’s death, the trustee filed a petition to quiet title to the property, alleging that the property was held as tenants in common because the unlicensed marriage was not valid under Maryland law. Husband alleged that the marriage was valid and that, as the surviving tenant, he was the sole owner of the property.

Following a bench trial, the circuit court determined that the parties were validly married and, accordingly, that husband was the sole owner of the property by virtue of the tenants by the entireties deeds. The trustee noted this appeal in which she claims the circuit court erred because Section 2-401 of the Family Law Article invalidates marriages obtained without a license.

Held: Affirmed.

Following *Feehley v. Feehley*, 129 Md. 565 (1916), the Court held that the parties’ failure to obtain a marriage license as required by Section 2-401 of the Family Law Article did not nullify the parties’ marriage where they executed a “Marriage Agreement” evidencing their intent to be married and participated in a marriage ceremony officiated by their priest. Accordingly, wife’s deed purportedly transferring her interest in tenants by the entireties property was void and her interest in the property transferred to husband by operation of law on her death.

Carlton Green v. State of Maryland Commission on Judicial Disabilities, No. 3467 & No. 2799, September Term 2018, filed September 30, 2020. Opinion by Graeff, J.

<https://mdcourts.gov/data/opinions/cosa/2020/2799s18.pdf>

JUDICIAL MISCONDUCT – STANDING – DUE PROCESS INTEREST

Facts:

In 2017, appellant filed a complaint with the Maryland Commission on Judicial Disabilities against a judge in Prince George’s County. The Commission dismissed the complaint without a hearing. Appellant then filed two complaints in the Circuit Court for Prince George’s County, one seeking judicial review of the dismissal and the other seeking a declaratory judgment that the Commission’s procedure denied appellant due process. The circuit court dismissed both complaints, finding that appellant lacked standing to challenge the Commission’s decision.

Held: Affirmed.

The purpose of the Maryland Commission on Judicial Disabilities is “to maintain public confidence in the integrity, independence, and impartiality of judges and the judicial system.” Maryland Rule 18-401(b)(1). Because the purpose of the judicial disciplinary system is to protect the public and maintain public confidence in the judiciary, not to vindicate any individual person’s interest, a person who files a complaint with the Commission has no standing to seek judicial review of the Commission’s resolution of the complaint.

Baltimore City Police Department v. Andre Robinson, No. 764, September Term 2019, filed September 30, 2020. Opinion by Graeff, J.

<https://mdcourts.gov/data/opinions/cosa/2020/0764s19.pdf>

PUBLIC SAFETY – LAW ENFORCEMENT OFFICERS’ BILL OF RIGHTS – DISPOSITION OF ADMINISTRATIVE ACTION – PENALTY RECOMMENDATION – NOTICE AND DISCLOSURE REQUIREMENTS

Facts:

The Baltimore City Police Department (“BPD”) initiated disciplinary action against Officer Andre Robinson after he returned suspected CDS to an arrestee instead of submitting it for testing in accordance with BPD policy. Following a hearing, the administrative hearing board (the “Board”) recommended that Officer Robinson be given a severe letter of reprimand and lose 15 days of leave. The Board transmitted its recommendation to the BPD Commissioner’s office on September 25, 2018, but the Commissioner did not receive it until October 2, 2018, as evidenced by a document from the Commissioner’s office internal document tracking system. On review, the Commissioner increased Officer Robinson’s penalty to termination. On appeal, the circuit court reversed the Commissioner’s penalty increase and ordered that Officer Robinson be reinstated, with full back pay and benefits, on the basis that the Commissioner’s final order exceeded the statutory deadline and the Commissioner failed to follow mandatory notice requirements.

Held: Reversed and remanded.

The Law Enforcement Officers’ Bill of Rights (“LEOBR”), Md. Code Ann. (2018 Repl. Vol.), §§ 3-101–113 of the Public Safety Article (“PS”), guarantees law enforcement officers procedural safeguards before disciplinary action. The final decision of the head of a law enforcement agency (in this case, the “Commissioner”) must be issued within 30 days after receipt of a recommendation by the disciplinary hearing board (“Board”) regarding a proposed penalty for a law enforcement officer. The trigger for the 30-day deadline is when the Commissioner receives the recommendation, i.e., when he or she has actual physical possession of it, not when it was issued or sent by the Board. In this case, although the Board transmitted the recommendation to the Commissioner’s office on September 25, 2018, there was substantial evidence supporting a factual finding that the Commissioner did not receive the recommendation until October 2, 2018. Accordingly, the final decision issued on October 30, 2018, was within the 30-day deadline.

PS § 3-108(d)(5) of the LEOBR requires the Commissioner to take certain procedural steps before he or she may increase the recommended penalty of the Board. In particular, PS § 3-

108(d)(5)(iii) provides that the Commissioner must disclose and provide “in writing to the law enforcement officer, at least 10 days before the meeting, any oral or written communication not included in the record of the hearing board on which the decision to consider increasing the penalty is wholly or partly based[.]” Although “communication” is not defined in the LEOBR, we interpret the plain meaning of the word to require the transmission of information or ideas from one person to another.

In this case, the officer’s disciplinary records, which were not included in the Board’s record, did not constitute the transmission of information or ideas from another person because they were part of the internal record maintained by the Department that the Commissioner was authorized, and in fact required, to review and consider pursuant to PS § 3-108(d)(4). Even if the disciplinary records were a “communication” within the meaning of the statute, they did not form the basis of the Commissioner’s “decision to consider increasing the penalty[.]” PS § 3-108(d)(5)(iii). That the Commissioner ultimately relied on the disciplinary records in his ultimate decision does not mean that this was something on which the decision “to consider” increasing the penalty was based. To interpret PS § 3-108(d)(5)(iii) to require disclosure of all the materials relied on by the Commissioner in making the ultimate decision ten days in advance of the meeting would be an illogical construction of the statute because it would not permit the consideration of any new information that may come to light at the meeting, thus diluting the purpose of the meeting and opportunity to be heard. PS § 3-108(d)(5)(ii).

Linda Thomas v. David Shear, No. 2669, September Term 2018, filed August 27, 2020. Opinion by Leahy, J.

<https://mdcourts.gov/data/opinions/cosa/2020/2669s18.pdf>

COURTS AND JUDICIAL PROCEEDINGS – MEDICAL MALPRACTICE STATUTE OF LIMITATIONS – BURDENS OF PROOF

MOTION FOR SUMMARY JUDGMENT – GENUINE DISPUTE OF MATERIAL FACT – CONTRADICTORY AFFIDAVIT OR STATEMENT

Facts:

Linda Thomas alleged that David Shear, M.D., committed medical negligence by placing a surgical clip on her right ureter during a surgical procedure performed on May 2000 at Greater Baltimore Medical Center (“GBMC”). Sixteen years later, she filed a Statement of Claim before the Health Care Alternative Dispute Resolution Office and, in June 2017, filed a complaint in the circuit court.

More than a year later, after deposing plaintiff’s experts, Dr. Shear moved for summary judgment on the ground that Ms. Thomas’s claim was barred by the statute of limitations under Maryland Code (2006, 2013 Repl. Vol.), Courts and Judicial Proceedings Article (“CJP”), § 5-109. Dr. Shear asserted that any alleged medical injury occurred on the date of the surgery in 2000 or, alternatively, in 2006 when Ms. Thomas visited GBMC and was diagnosed with hydronephrosis, a condition that occurs when urine cannot drain out of the kidney due to blockage or obstruction of the ureter.

Ms. Thomas countered that, although Dr. Shear’s negligent act of placing the surgical clip occurred in 2000, her injury did not occur until 2014 when she was admitted to Northwest Hospital Center with severe abdominal pains. In support of her opposition to summary judgment, Ms. Thomas submitted two affidavits in which her expert witnesses renounced their earlier deposition testimony that her 2006 hydronephrosis was caused by the surgical clip. Instead, they newly opined that the hydronephrosis in 2006 was caused by kidney stones. Ms. Thomas also tendered the deposition testimony of Dr. Shear’s experts—that he did not negligently cause her harm in 2000, 2006, or 2014—in support of her experts’ revised opinions that the injury did not occur in 2006. Dr. Shear moved to strike the affidavits on the basis that they were materially inconsistent with the experts’ prior sworn statements.

At a hearing on Dr. Shear’s motion, the court agreed with Dr. Shear that the affidavits were materially inconsistent and granted his motion for summary judgment on the basis that Ms. Thomas’s claim was barred by the statute of limitations. Ms. Thomas timely noted an appeal.

Held: Affirmed.

The Court of Special Appeals reached three holdings. First, the Court held that the circuit court correctly determined that the affidavits were materially inconsistent and should be disregarded. Specifically, the deposition testimony from Ms. Thomas' experts that the surgical clip caused Ms. Thomas's 2006 hydronephrosis was explicitly opposite to their affidavit statements that kidney stones, and not the surgical clip, caused the hydronephrosis. Second, the Court held that the trial court properly disregarded the plaintiff's attempt to create a genuine dispute of material fact with the defense experts' testimony in order to avoid summary judgment. Because Ms. Thomas could not adopt the defense experts' testimony to avoid the statute of limitations without concomitantly sinking her prima facie case, her submission of the defense experts' testimony did not preclude the circuit court from granting summary judgment in favor of the defendant. Third, the Court held the trial court correctly granted Dr. Shear's motion for summary judgment because she failed to file her claim by 2005, or within "[f]ive years of the time the injury was committed." CJP § 5-109(a)(1). Viewing the evidence in the light most favorable to the plaintiff, the record demonstrated that the health care provider negligently placed a clip on her right ureter during a procedure in 2000. Plaintiff's experts proved that the harm to the plaintiff was contemporaneous with the negligence and she thus suffered an "injury" in 2000, even though she may not have experienced pain at that time.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated September 2, 2020, the following attorney has been
disbarred by consent:

GEORGE CARLOS NIER

*

By an Order of the Court of Appeals dated September 17, 2020, the following non-admitted
attorney is excluded from exercising the privilege of practicing law in this State:

GEORGE R. ADAMS

*

By an Order of the Court of Appeals dated September 24, 2020, the following attorney has been
indefinitely suspended:

OLADIPO AKINWUNMI AKIN-DEKO

*

This is to certify that the name of

FRANCIS A. POMMETT, II

has been replaced upon the register of attorneys in this State as of September 24, 2020.

*

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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