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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Mitzi Elaine Dailey, Misc. Docket AG No. 6, September Term 2020, filed July 23, 2021. Opinion by Getty, J.

<https://mdcourts.gov/data/opinions/coa/2021/6a20ag.pdf>

ATTORNEY DISCIPLINE – SANCTION – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland (the “Commission”), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action (“Petition”) with this Court alleging that Mitzi Elaine Dailey had violated the Maryland Attorneys’ Rules of Professional Conduct (“MARPC”) and the Maryland Rules. The Petition concerned Ms. Dailey’s representation of her client, Geoffrey Wolst. For nearly a year, Ms. Dailey failed to communicate with her client and failed to file the appropriate pleadings for an estate administration. In addition, she misrepresented her actions in her responses to Bar Counsel and failed to comply with discovery requests and the disciplinary hearing process.

The Petition alleged that Ms. Dailey violated Rules: 1.1 (Competence); 1.2 (Scope of Representation and Allocation of Authority Between Client and Attorney); 1.3 (Diligence); 1.4 (Communication); 1.5 (Fees); 1.15 (Safekeeping Property); 1.16 (Declining or Terminating Representation); 8.1 (Bar Admission and Disciplinary Matters); and 8.4 (Misconduct). The Petition also alleged violations of the following Maryland Rules: 19-403 (Duty to Maintain Account); 19-404 (Trust Account—Required Deposits); and 19-407 (Attorney Trust Account Record-Keeping).

The Court of Appeals transmitted this matter to the Circuit Court for Baltimore City and designated the Honorable Jeffrey M. Geller to conduct an evidentiary hearing and make findings of fact and recommend conclusions of law. The evidentiary hearing was held remotely via Skype on August 11, 2020. Although Ms. Dailey was sent an email and hard copy of the Scheduling Order, she did not attend the virtual hearing.

The hearing judge found the following pertinent facts. Ms. Dailey was admitted to the Maryland Bar on December 13, 1994. Since then, Ms. Dailey has maintained an office for the practice of

law in the City of Baltimore, primarily providing low-cost services to indigent clients. In early July 2017, Geoffrey Wolst was referred to Ms. Dailey by the Civil Justice Network to seek legal advice concerning the administration of his mother's estate. After retaining Ms. Dailey as counsel, Mr. Wolst paid Ms. Dailey a \$1,500 retainer fee and a \$1,275 expense to obtain a bond for the estate. Ms. Dailey failed to place either the \$1,500 retainer for legal fees, or the expense for the \$1,275 bond in an attorney trust account. Ms. Dailey prepared the appropriate estate documents, including a Regular Estate Petition for Administration, Schedule A ("Estimated Value of Estate and Unsecured Debts"), and List of Interested Persons. However, these forms were never filed with the Office of the Register of Wills of Baltimore City. After speaking with Mr. Wolst via telephone on January 2, 2018, Ms. Dailey did not communicate with Mr. Wolst again for nearly twelve months, failing to update her client on the status of his case.

Mr. Wolst filed a complaint with the Attorney Grievance Commission on November 18, 2018. In her January 4, 2019 response, Ms. Dailey misrepresented to Bar Counsel that she had been attempting to "move the case along" but that Mr. Wolst had failed to return her calls. Throughout the investigation of this matter, Ms. Dailey did not cooperate with Bar Counsel's discovery requests. Ms. Dailey failed to provide requested phone records to Bar Counsel. Ms. Dailey failed to attend her statement under oath and intentionally evaded service of a subpoena. Further, Ms. Dailey failed to provide trust account statements and information to Bar Counsel regarding the receipt and maintenance of Mr. Wolst's \$1,500 and \$1,275 payments. In response to Bar Counsel's request for these financial records, Ms. Dailey asserted that the payments had already been earned and did not need to be placed into an attorney trust account. To support this claim, Ms. Dailey submitted an invoice with false time entries to make it appear as though these payments were earned in prior meetings with Mr. Wolst. Ms. Dailey continued her obstructive conduct in proceedings before the Circuit Court for Baltimore City, failing to respond to scheduling requests, declining to produce discovery, and failing to participate in the disciplinary hearing.

Held:

The Court of Appeals concluded that Ms. Dailey violated Rules 1.1 (Competence); 1.2 (Scope of Representation and Allocation of Authority Between Client and Attorney); 1.3 (Diligence); 1.4 (Communication); 1.5 (Fees); 1.15 (Safekeeping Property); 1.16 (Declining or Terminating Representation); 8.1 (Bar Admission and Disciplinary Matters); and 8.4 (Misconduct). The Court of Appeals also concluded that Ms. Dailey violated Maryland Rules 19-403 (Duty to Maintain Account); 19-404 (Trust Account—Required Deposits); and 19-407 (Attorney Trust Account Record-Keeping).

The Court concluded that disbarment was the appropriate sanction considering Ms. Dailey's numerous violations and dishonest conduct. Ms. Dailey failed to communicate with Mr. Wolst for nearly a year and misappropriated client funds entrusted to her for her own use. Ms. Dailey's intentional misrepresentations to Bar Counsel—including the falsification of an invoice—and her

repeated failure to comply with discovery demonstrated a significant failure to adhere to essential professional standards required of an attorney.

The Court also determined that Ms. Dailey's dishonest motive, multiple offenses, obstruction of the disciplinary process, submission of false evidence, and refusal to acknowledge the wrongfulness of her conduct or make restitution were aggravating factors. Ms. Dailey acted with a selfish or dishonest motive when she misappropriated Mr. Wolst's funds without his consent, and then proceeded to abandon her representation of him. Ms. Dailey failed to comply with Bar Counsel's requests for information, intentionally evaded service of a subpoena, and produced a falsified invoice to conceal her misappropriation of funds. Ms. Dailey wholly failed to acknowledge the wrongfulness of her conduct and demonstrated an indifference to paying restitution to Mr. Wolst. The Court found that Ms. Dailey's lack of prior discipline was the only mitigating factor. Considering Ms. Dailey's fraudulent conduct, misappropriation of client funds, and failure to cooperate with Bar Counsel, the Court of Appeals held disbarment was the appropriate sanction.

Town of Riverdale Park v. Mamoun K. Ashkar, et al., No. 49, September Term 2020, filed July 15, 2021. Opinion by Hotten, J.

<https://mdcourts.gov/data/opinions/coa/2021/49a20.pdf>

CIVIL PROCEDURE – JUDGMENT NOTWITHSTANDING THE VERDICT –
EMPLOYMENT DISCRIMINATION

CIVIL PROCEDURE – REMAND – FURTHER PROCEEDINGS

Facts:

Respondent, Mamoun K. Ashkar, (“Ashkar”) brought suit against Petitioner, the Town of Riverdale Park, Maryland (“the Town”) and members of the Riverdale Park Police Department (“RPPD”) for claims that included intentional discrimination on the basis of national origin, in denying Ashkar a municipal towing contract. Ashkar was the president of Five Star Towing and first approached the RPPD, which administers towing operations on behalf of the Town, about providing towing services in 2011. The RPPD declined Ashkar’s business and stated that the RPPD exclusively employed Greg’s Towing. In 2013, the owner of Greg’s Towing announced his retirement. Ashkar purchased Greg’s Towing in March 2014, and approached the RPPD about continuing to provide towing services. RPPD again refused to work with Ashkar.

Ashkar returned to the RPPD to schedule an appointment to speak with the Chief of Police. While waiting in the lobby, Ashkar overheard RPPD and Town officials discussing how to “get rid of him.” Ashkar heard one of the RPPD officers state that “somebody needs to tell that camel jockey he isn’t towing for Riverdale[,]” and that “this fucking camel jockey doesn’t get the point.” After several additional unsuccessful attempts to contact Town officials, Ashkar filed suit in the Circuit Court for Prince George’s County, resulting in a five-day jury trial from May 14 to May 19, 2018. The Town contended that it declined to employ Greg’s Towing based on its business judgment, specifically that Greg’s Towing was not included on the 2014–15 Prince George’s County Police Department Authorized Tow Services Program (“Tow List”). At the close of Ashkar’s case, the Town moved for judgement on the discrimination claim. The circuit court reserved judgment on the discrimination claim. The jury returned a verdict on the discrimination claim in favor of Ashkar and awarded compensatory damages in the amount of \$244,212 and non-economic damages in the amount of \$15,000.

Following the verdict, the Town filed a motion for JNOV, or in the alternative, the Town requested a new trial. The Town also moved for the circuit court to grant remittitur or reduce judgment to \$200,000 pursuant to the limitation on damages provided in the Local Government Tort Claims Act (“LGTCA”). The circuit court granted the motion for JNOV and determined that there was no direct evidence of discrimination on behalf of the Town. The Court of Special Appeals reversed in a 2-1 decision. Viewing the facts in a light most favorable to Ashkar, the

Court concluded that a jury could come to the reasonable conclusion that the Town provided a pretextual reason for denying Ashkar towing services on the basis of national origin.

Held: Affirmed.

The Court of Appeals applied the three-step, burden-shifting framework articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), and held that the grant of the motion for JNOV should be reversed because evidence of racial slurs directed at Ashkar and made by a Town official overseeing the employment decision was sufficient for a jury to find that the defendant intentionally discriminated on the basis of national origin. Ashkar presented sufficient evidence to establish a *prima facie* case of discrimination, and the Town presented no credible evidence supporting its purported nondiscriminatory reason for denying employment. The Town had never used the Tow List as a hiring criterion until it denied Ashkar employment.

The Court of Appeals also held that the jury verdict was to be reinstated with directions for the circuit court to conduct further proceedings as necessary to resolve two remaining questions of law relating to the Town's alternative motion for a new trial pursuant to Md. Rule 2-533(c) and to the application of the liability "cap" pursuant to the LGTCA, codified at Md. Code Ann., Courts and Judicial Proceedings § 5-303(a)(1) (1974, 2006 Repl. Vol.).

Impac Mortgage Holdings, Inc. v. Curtis J. Timm, et al., No. 18, September Term 2020, filed July 15, 2021. Opinion by McDonald, J.

<https://mdcourts.gov/data/opinions/coa/2021/18a20.pdf>

CORPORATIONS – CHARTER – CONSTRUCTION

CONTRACTS – CONTRACT INTERPRETATION – GENERAL RULES OF CONSTRUCTION – EXISTENCE OF AMBIGUITY

CONTRACTS – CONTRACT INTERPRETATION – CONSIDERATION OF EXTRINSIC EVIDENCE

CONTRACTS – CONTRACT INTERPRETATION – RELEVANT EXTRINSIC EVIDENCE

CONTRACTS – CONTRACT INTERPRETATION – CANONS OF CONSTRUCTION – CONSTRUING LANGUAGE AGAINST DRAFTER

CORPORATIONS – CHARTER – PREFERRED STOCK – VOTING PROVISION

Facts:

Impac Mortgage Holdings, Inc. (“Impac”), a publicly-held Maryland corporation, raised capital during 2004 by selling two issues of preferred stock known as Series B and Series C. Both series ranked ahead of Impac’s common stock in the payment of dividends and claims upon corporate assets in dissolution; the preferred stock had no voting rights except that, if Impac failed to pay dividends on the series for six or more quarters, it would elect two members of Impac’s board of directors.

Each series was created via amendments to Impac’s corporate charter, called Articles Supplementary, which had been authorized by resolutions of Impac’s board of directors. To sell the shares, Impac entered into an underwriting agreement with a group of investment banks, headed by Bear Stearns & Co., Inc. (“Bear Stearns”), and issued a prospectus supplement with respect to each series informing potential investors of material facts about Impac and the stock. The preferred stock was sold in public offerings, raising \$161,750,000 in equity capital.

In 2009, during the Great Recession, Impac sought to reduce its obligations to shareholders by, among other things, buying back the Series B and Series C shares and eliminating their special rights and preferences via a tender offer and consent solicitation. Shareholders who sold their shares back to Impac thereby consented to an amendment of the Articles Supplementary for each series to eliminate most of the rights and preferences of the preferred stock. Language in the original Series B Articles Supplementary stated that such a charter amendment required the:

affirmative vote or consent of the holders of at least two-thirds of the shares of the Series B Preferred Stock outstanding at the time, given in person or by proxy, either in writing or at a meeting (voting separately as a class with all series of Parity Preferred that the Corporation may issue upon which like voting rights have been conferred and are exercisable)

Similar language appeared in the Articles Supplementary for Series C. During the tender offer, 67.7% of holders of both series, counted collectively, tendered their shares. Measured separately, however, only 66.2% of the Series B shareholders – less than two-thirds – had tendered their shares.

Curtis J. Timm, a Series B and Series C shareholder, filed suit against Impac in the Circuit Court for Baltimore City, on his own behalf and as a class action on behalf of the Series B and Series C shareholders who had not tendered their shares. His complaint contended, among other things, that the 2009 charter amendments were invalid because Impac had not obtained the requisite two-thirds approval from the Series B shareholders, tallied separately from the votes of Series C shareholders.

Impac moved to dismiss Mr. Timm’s complaint. The Circuit Court ruled that the meaning of the language in the Series B Articles Supplementary was ambiguous and that extrinsic evidence of the parties’ intent should be considered.

In June 2013, Camac Fund LP (“Camac”), another Series B and Series C shareholder, successfully intervened as a plaintiff. After a period of discovery, all parties moved for summary judgment. Both sides contended that their respective interpretations of the language entitled them to judgment as a matter of law and submitted various pieces of extrinsic evidence in support of their position. Impac also argued that it, as the seller of the stock, and Bear Stearns, as the initial purchaser of the stock, were “counterparties” to the contract (the Articles Supplementary) and that the language should be construed to effectuate their mutual understanding.

After considering the extrinsic evidence offered by the parties, the Circuit Court concluded that it did not resolve the ambiguity as to whether collective or separate voting was required. The court then construed the provision against the drafter, who it found was Impac, under the canon of interpretation that, when in doubt, an ambiguous contract provision is to be construed against the drafter. It held that separate voting was required.

Impac appealed to the Court of Special Appeals, which affirmed. The intermediate appellate court held that the language was unambiguous in requiring that Impac obtain the approval of the owners of two-thirds of Series B shares, counted separately, to amend the Series B Articles Supplementary. In light of that holding, it affirmed the judgment of the Circuit Court, but the intermediate appellate court did not consider the extrinsic evidence in the record or apply the canon of construction against the drafter.

Held: Affirmed

The Court of Appeals held that the language was ambiguous but that the undisputed relevant admissible extrinsic evidence resolved that ambiguity in favor of requiring separate voting by Series B shareholders. Because fewer than two-thirds of the Series B shareholders consented to the proposed 2009 amendments to the Series B Articles Supplementary, the Court held that those amendments were not validly adopted.

As a threshold matter, the Court explained that a corporate charter is considered to be a contract among the corporation and its shareholders. Thus, principles of contract interpretation are applicable when construing corporate charters. Under those principles, courts initially look only to the “four corners” of the contract and seek to give effect to what a reasonable person in the position of the parties would have thought the plain meaning of the contract was. Only in the event of ambiguity, when the contract is susceptible of more than one meaning, does a court look to extrinsic evidence. Relevant admissible extrinsic evidence must demonstrate the expressed, mutual intent of the parties at the time of contracting rather than unexpressed, subjective, or retrospective views.

The Court held that the language was ambiguous both because it did not unambiguously provide for either separate or collective voting and neither party’s preferred reading of it gave effect to every word without rendering a portion of the language superfluous or meaningless, contrary to a basic rule of contract interpretation. Thus, it was necessary to resort to extrinsic evidence.

Before considering the extrinsic evidence, the Court identified the parties to the contract – *i.e.*, Impac’s corporate charter and the Series B Articles Supplementary. The Court rejected Impac’s arguments that Bear Stearns was a “counterparty” to that contract.

The Court also explained that, because the Series B shareholders had no part in the drafting of the Series B Articles Supplementary, an inquiry into the parties’ intention at the time of the contract would serve no purpose. Rather, the subject of inquiry, and thus the purpose of admissible extrinsic evidence, was to ascertain the reasonable expectations of the Series B shareholders. The Court noted that this approach both approximates Maryland’s objective approach to interpreting contracts and comports with the general principle that an investor may reasonably rely on an issuer’s prospectus and other materials about a securities offering publicly disseminated by a company.

Among the extrinsic evidence, there was one document that addressed the meaning of the language and that was publicly available to investors at the time of the Series B public offering: a prospectus supplement detailing the Series B offering. The summary in that document noted that “the affirmative vote of holders of at least two-third of the outstanding shares of Series B Preferred Stock will be required to” amend Impac’s charter. The Court noted that the summary in the prospectus supplement favored the interpretation that Impac had to obtain two-thirds of the outstanding shares of Series B to amend its charter.

This interpretation was also confirmed by the April 2004 resolution by Impac's board authorizing the Series B Articles Supplementary, which was a contemporaneous expression of the board's intent as to the voting rights of purchasers of the soon-to-be offered Series B stock. That resolution contained the same language as the summary in the prospectus supplement as it related to charter amendments.

The Court held that the April 2004 board resolution established that Impac's expressed understanding of the language at the time it was adopted was consistent with the understanding that a reasonable investor would have gleaned from the prospectus supplement summary. These documents resolved the ambiguity of the language in favor of separate voting by the Series B shareholders. There was no need to resort to the canon of interpretation construing an ambiguous contract against its drafter. However, the Court noted that, even if it were to conclude that the extrinsic evidence did not resolve the ambiguity, it would have reached the same result because Impac was the drafter, not the shareholders.

Kenneth Mahai v. State of Maryland, No. 41, September Term 2020, filed July 20, 2021. Opinion by Getty, J.

<https://mdcourts.gov/data/opinions/coa/2021/41a20.pdf>

CRIMINAL LAW – COURTS AND JUDICIAL PROCEEDINGS – POSTCONVICTION PROCEEDINGS– APPLICATION FOR LEAVE TO APPEAL DENIED

Facts:

Following the fatal stabbing of Jermaine Morrison in October 2005, Kenneth Mahai was arrested and charged with murder. Two months later, a grand jury indicted Mr. Mahai in the Circuit Court for Baltimore City on charges of first-degree murder, carrying a weapon openly with intent to injure, and carrying a concealed dangerous weapon. After a series of postponements spanning from late April to early December 2006 the circuit court denied the State’s final motion for postponement, and pursuant to Maryland Rule 4-247(a), the State entered a *nolle prosequi* on the record thereby terminating the prosecution and dismissing the charges against Mr. Mahai.

In February 2007, Mr. Mahai was arrested and indicted by a grand jury in the Circuit Court for Baltimore City on the same charges for a second time. A three-day jury trial was held in August 2007. The jury found Mr. Mahai guilty on all charges, and the circuit court judge sentenced him to life in prison for first-degree murder and a consecutive three-year term for carrying a weapon openly with intent to injure. Mr. Mahai timely noted an appeal.

On September 8, 2009, in an unreported opinion, the Court of Special Appeals affirmed Mr. Mahai’s murder conviction but reversed his weapon convictions and remanded the weapons charges for a new trial. Additionally, the court held that Mr. Mahai’s right to a speedy trial was not violated and declined to address Mr. Mahai’s claim of ineffective assistance of counsel. Mr. Mahai filed a *pro se* petition for writ of certiorari to this Court, which was denied.

On September 6, 2017, nearly ten years after Mr. Mahai was sentenced for his first-degree murder conviction, he filed a *pro se* petition for postconviction relief, which was later supplemented by postconviction counsel. In pertinent part, the supplemented petition sought a new trial, alleging ineffective assistance of counsel.

The Circuit Court for Baltimore City held a two-day hearing on Mr. Mahai’s postconviction petition in September 2019. In February 2020, the postconviction court entered a written opinion and order denying Mr. Mahai’s petition for relief. The court concluded that all of the issues raised, taken in the aggregate, did not result in any prejudice to Mr. Mahai, and the court accordingly held that Mr. Mahai’s Sixth Amendment right to a speedy trial had not been violated.

On March 17, 2020, Mr. Mahai filed an application for leave to appeal in the Court of Special Appeals. In an order issued on August 14, 2020, the Court of Special Appeals denied Mr. Mahai's application for leave to appeal without explanation.

Subsequently, Mr. Mahai timely petitioned the Court of Appeals for writ of certiorari, which was granted. Four questions were posed, but this Court ultimately only reached the following question:

Does Article IV, § 14A of the Maryland Constitution, which authorizes the Court of Special Appeals to exercise only intermediate appellate jurisdiction, preclude the Court of Special Appeals from exercising final appellate jurisdiction by issuing a summary denial of an application for leave to appeal without addressing the issues raised, which has been held to bar further appellate review under § 12-202 of the Court and Judicial Proceedings Article ("CJ")?

Held: Appeal dismissed.

The Court of Appeals held that CJ § 12-202 is constitutional under Article IV, § 14A of the Maryland Constitution because the phrase "intermediate appellate jurisdiction" in Article IV, § 14A does not create a substantive limit on the Court of Special Appeals' jurisdiction.

After considering both the plain language and the history of the adoption of Article IV, § 14A, the Court of Appeals concluded that Mr. Mahai failed to overcome the presumption of constitutionality that attaches to CJ § 12-202. Therefore, pursuant to CJ § 12-202, the Court of Appeals does not have jurisdiction to review the Court of Special Appeals' discretionary denial of Mr. Mahai's application for leave to appeal in his postconviction proceeding. Accordingly, the Court of Appeals dismissed the appeal for lack of subject matter jurisdiction without reaching the three remaining questions posed.

D'Angelo Wright v. State of Maryland, No. 40, September Term 2020, filed July 13, 2021. Opinion by Biran, J.

<https://mdcourts.gov/data/opinions/coa/2021/40a20.pdf>

CRIMINAL LAW – JURY INSTRUCTION ON FLIGHT OR CONCEALMENT

CRIMINAL LAW – JURY INSTRUCTION ON FLIGHT OR CONCEALMENT – REVIEW FOR ABUSE OF DISCRETION

Facts:

On April 11, 2017, someone shot Eric Tate and immediately fled the scene. Tate’s shooter wore gray sneakers, a black shirt with an indiscernible symbol or logo on the left side of the chest and indiscernible writing on the back, and a red baseball-type cap with the bill of the cap facing backwards at an angle. A video camera located at the Dollar Shop V & Outlet (the “Dollar Shop Video”) captured the shooting and the assailant’s flight from the scene.

When police responded, they found Tate critically injured as a result of bullet wounds to the head and leg. Tate survived the shooting. Police collected and viewed the Dollar Shop Video as well as video footage taken approximately 45 minutes before the shooting from cameras located inside and outside the nearby Miami Chicken store (the “Miami Chicken Video”), which showed a man dressed in the same clothing as the man who had the altercation with and eventually shot Tate. A detective who had become familiar with Petitioner D’Angelo Wright saw still photos taken from the Miami Chicken Video that were included in a flyer circulated throughout the Baltimore Police Department asking for assistance in identifying the man pictured in the black shirt and red cap. He believed that the man shown in the still photos was Wright.

On May 24, 2017, a grand jury in Baltimore City returned an indictment charging Wright with attempted first-degree murder, use of a firearm in a crime of violence, and related offenses in connection with Tate’s shooting. At trial, after the State concluded its presentation of evidence, the trial court proposed to give an instruction on “flight or concealment of a defendant” to the jury. The text of the trial court’s proposed instruction quoted verbatim the pertinent Maryland pattern jury instruction:

A person’s flight immediately after the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide there is evidence of flight you then must decide whether this flight shows a consciousness of guilt.

MPJI-Cr 3:24. Wright’s counsel objected to the instruction on the grounds that it improperly implied that “Wright was the one that ran.” The court overruled the objection, asserting that there was sufficient evidence generated by the State to conclude that Wright was the person in the video running from the scene. Wright was convicted of attempted murder in the first degree, use of a handgun in the commission of a crime, and wearing, carrying or transporting a handgun.

On appeal, Wright argued that the trial court erred in instructing the jury on flight. In a reported opinion, the Court of Special Appeals affirmed his convictions. *Wright v. State*, 247 Md. App. 216, 230 (2020). Relying on *Thompson v. State*, 393 Md. 291 (2006), the intermediate appellate court concluded that “[i]t is not the law in Maryland that a flight instruction is categorically impermissible when identity is the sole issue at trial,” *id.* at 233, and declined to adopt a *per se* rule. *Id.*

Held: Affirmed.

The Court of Appeals held that the trial court did not abuse its discretion in instructing the jury on flight because Wright’s counsel did not make a timely, express, and unequivocal statement that the sole contested issue in Wright’s trial was his identity as the person who shot Tate and fled. In *Thompson v. State*, the Court held that MPJI-Cr 3:24 is a correct statement of Maryland law, and rejected the contention that a flight instruction impermissibly emphasizes one piece of circumstantial evidence over the remainder of the prosecution’s case. 393 Md. at 303, 306. Additionally, the Court held that a flight instruction should not be given unless the jury can reasonably draw a chain of four inferences from the evidence at trial:

- (i) that the behavior of the defendant suggests flight; (ii) that the flight suggests a consciousness of guilt; (iii) that the consciousness of guilt is related to the crime charged or a closely related crime; and (iv) that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Id. at 312.

Unlike the defendant in *Thompson*, Wright disputed that he was the person who fled the scene of the crime, and argued that because his identity was the sole issue in dispute, it was error to give the flight instruction. The Court held that, in general, it is error to give the flight instruction where the defense does not contest that whoever fled the scene is guilty of the charged offense, and instead contends only that the State failed to prove that the defendant was the fleeing offender.

However, in order for this limitation on the flight instruction to be applicable, defense counsel must expressly and unambiguously state – prior to the jury charge – that the defense solely contests the identity of the defendant as the fleeing offender. Here, because Wright’s counsel did

not make such a timely and unequivocal statement, the trial court did not abuse its discretion by instructing the jury on flight.

Angel Enterprises Limited Partnership, et al. v. Talbot County, Maryland, et al., No. 45, September Term, 2020, filed July 9, 2021. Opinion by Booth, J.

<https://www.courts.state.md.us/data/opinions/coa/2021/45a20.pdf>

IMPOSITION OF CIVIL PENALTIES – ORIGINAL JURISDICTION OVER
ADJUDICATION OF PENALTIES IN THE MARYLAND COURTS – JURISDICTION OF
BOARD OF APPEALS ESTABLISHED BY CHARTER COUNTY

Facts:

In September 2002, Angel Enterprises Limited Partnership (“Angel”) purchased an unimproved lot located in Talbot County, Maryland (the “County”). Though the lot was located along Maryland Route 33 (Route 33), a deed restriction prohibited Angel from constructing a driveway with direct access to Route 33 unless approved by the Maryland State Highway Administration, the Talbot County Department of Planning and Zoning, and the Talbot County Public Works Department. After obtaining a building permit to construct a residence on the property, Angel tried, without success, to obtain the approval necessary to build a driveway with direct access to Route 33. Undeterred, Angel decided to construct the driveway anyway and hired a contractor to clear trees and build a driveway.

The project did not go unnoticed. Not long after construction began, the Maryland Department of the Environment (“MDE”) learned of the project and alerted the County. Shortly thereafter, the County Chief Code Compliance Officer (“CCCO”) mailed Angel two administrative abatement orders for conduct related to the unapproved construction project. The abatement orders identified two types of violations: one for cutting trees outside the Critical Area, and the other for cutting trees in the Critical Area. Notably, the abatement orders directed Angel to remediate and restore the property and advised Angel that failure to comply with the abatement orders could result in the assessment of civil penalties under the Talbot County Code (the “Code”) of up to \$1,000 per calendar day. The abatement orders also stated that Angel had the right to appeal the CCCO’s decision to issue abatement orders to the Talbot County Board of Appeals (the “Board”). Angel opted to appeal the abatement orders to the Board, who affirmed the CCCO’s decision to issue abatement orders.

After the Board affirmed the CCCO’s decision, but prior to Angel filing a petition for judicial review of the Board’s decision to affirm the abatement orders, the CCCO issued six penalty assessment notices to Angel, each of which advised Angel that a civil penalty had been assessed for violations of the Code. The assessments indicated that fines would accrue daily until such time the violations of the Code were brought into compliance. Like the abatement orders, the assessments provided Angel with a right to appeal each assessment to the Board.

Angel ultimately decided to appeal the CCCO’s penalty assessments, though the appeal was stayed by agreement, pending resolution of the abatement order appeal. Once the stay was lifted,

the Board conducted several evidentiary hearings on the civil penalties assessed by the CCCO's notices. During the Board hearings, Angel's counsel made several legal arguments challenging the County's process for imposing civil penalties. At the conclusion of the evidentiary hearing, the Board determined that the CCCO had the authority to issue the civil assessments under the Code and found Angel's due process rights were not violated by the County's procedure for adjudicating civil fines. However, the Board determined that, under the applicable provisions of the Code, the daily accrual of fines was stayed when Angel appealed the CCCO's penalty assessments.

After the County filed a petition for judicial review of the Board's decision that the daily accrual of fines was stayed during the pendency of the appeal, the circuit court reversed that portion of the Board's determination and entered an order authorizing the County to enforce the civil assessments "in the amount of \$713,400[.]" Unsurprisingly, Angel filed an appeal to the Court of Special Appeals. The intermediate appellate court agreed with the circuit court that, under the plain language of the Code, the Board erred in concluding that the penalties were stayed upon the filing of the administrative appeal. The Court of Special Appeals further determined that, because this case was an administrative appeal and the Board did not "mak[e] a factual finding that [Angel] owed \$713,400[.]" the circuit court erred in making such a factual finding. Accordingly, the Court of Special Appeals vacated the portion of the judgment providing that Angel owed \$713,400, concluding that the amount owed "is a determination to be made in a separate proceeding." The Court of Special Appeals also remanded the case to the Board for the Board to consider additional issues pertaining to the County's authority to assess penalties for daily violations of the particular code in question.

Held: Vacated and remanded with instructions to dismiss.

The Court of Appeals vacated the judgment entered by the circuit court, but for reasons different from those expressed by the Court of Special Appeals.

Under the authority granted to charter counties by the Express Powers Act, charter counties, like Talbot County, only possess those powers conferred upon it by the General Assembly. And while the Express Powers Act authorizes charter counties to enact local laws on any matter authorized by the Express Powers Act and provides the requisite authority to enforce such laws by civil or criminal fines, the Legislature has conferred exclusive, original jurisdiction over the adjudication of such fines in the courts rather than county boards of appeal. It follows that because Talbot County established a procedure for the administrative imposition and adjudication of civil fines by assessment notices issued by a CCCO, with a right to an administrative appeal to the Talbot County Board of Appeals, Talbot County expanded the jurisdiction of its Board beyond the jurisdictional limits established by the General Assembly. Because Talbot County lacked the authority to vest the Board with the authority to review civil penalties, the Board lacked subject matter jurisdiction over the assessment appeal. The Court of Appeals further observed that because the adjudication of civil penalties fell within the jurisdiction of the courts, the assessment notices issued by the CCCO that purported to assess

civil penalties subject only to administrative review by the Board of Appeals were facially invalid and unenforceable as were any provisions of the Code that established a process for the administrative assessment of civil penalties that were inconsistent with the applicable provisions of State law.

RDC Melanie Drive, LLC v. Mark R. Eppard, et al., No. 48, September Term 2020, filed July 15, 2021. Opinion by Hotten, J.

<https://mdcourts.gov/data/opinions/coa/2021/48a20.pdf>

CIVIL PROCEDURE – RES JUDICATA – COLLATERAL ESTOPPEL

PROPERTY LAW – RESTRICTIVE COVENANTS – CONSTRUCTION AND OPERATION

PROPERTY LAW – RESTRICTIVE COVENANTS – CONSTRUCTION AND OPERATION

Facts:

Petitioner, RDC Melanie Drive, LLC (“RDC”) purchased Lot 6 in Swan Point Subdivision in Talbot County, Maryland for the purpose of converting the lot into a commercial driving range. Respondent, Mark Eppard, *et al.* (“Homeowners”) represented four of the other five property owners in Swan Point who opposed RDC’s proposed plan. In 2017, RDC applied for zoning variances and exceptions from the Talbot County Board of Appeals (“the Board”) to modify the boundary of Lot 6 and to construct the commercial driving range. The Homeowners opposed the variance, contending that a restrictive covenant, applicable to all lots within Swan Point Subdivision, prevented the construction of the commercial driving range. The Board did not address the issue of the restrictive covenant, but granted the zoning variance for RDC. In response, the Homeowners amended the restrictive covenant to specifically prohibit a commercial driving range on any lot within Swan Point Subdivision.

The Homeowners also sought a declaratory judgment in the Circuit Court for Talbot County that the applicable restrictive covenants prohibited the development of a commercial driving range. The circuit court agreed and entered a declaratory judgment. The parties cross-appealed to the Court of Special Appeals, which affirmed. The Court held that the issue of whether the original restrictive covenant prohibited a driving range was not precluded by collateral estoppel and that the Homeowners’ amended restrictive covenant validly prohibited a driving range. RDC timely appealed to the Court of Appeals and the Homeowners filed a cross-petition.

Held: Affirmed.

The Court of Appeals held that the issue of whether restrictive covenants prohibited a commercial golf driving range on any lot within a residential subdivision was neither barred by res judicata nor collateral estoppel. *Res judicata* did not apply because the issues litigated in the previous matter before the Board and the current matter were distinct. The former concerned a zoning variance and the latter concerned the application of a restrictive covenant. Collateral estoppel did not apply because the Board in the first matter expressly declined to consider the

issue of restrictive covenants, which prevented the issue from being “actually litigated and determined by a valid and final judgment[.]” *Cosby v. Dep’t of Hum. Res.*, 425 Md. 629, 639, 42 A.3d 596, 602 (2012).

The Court of Appeals also held that the original restrictive covenant unambiguously intended to preserve the residential character of a small, single-family home community by applying a “reasonable construction” of a restrictive covenant as first articulated by the Court in *Belleview Construction Co. v. Rugby Hall Community Ass’n*, 321 Md. 152, 158, 582 A.2d 493, 496 (1990) (citation and internal quotation omitted). The Court also concluded that a majority of homeowners within the residential community validly amended the original restrictive covenant by prohibiting a commercial golf driving range on any of the lots within the community. The amendment clarified a preexisting and uniform restriction on all of the lots that prevented offensive or noxious trades or activities and any activity that may become an annoyance or nuisance.

Finally, the Court of Appeals held that the original restrictive covenant unambiguously permitted the realignment of the Lot 6 boundary line. The original restrictive covenant prohibited the creation of new lots through subdivision but expressly permitted the “adjustment or realignment of boundary lines[.]” RDC permissibly realigned the boundary of Lot 6 pursuant to the plain language of the restrictive covenant.

COURT OF SPECIAL APPEALS

Alexander Dejarnette v. State of Maryland, No. 2316, September Term 2019, filed July 6, 2021. Opinion by Zarnoch, J.

<https://mdcourts.gov/data/opinions/cosa/2021/2316s19.pdf>

STATUTES – STATUTORY INTERPRETATION – COMPLIANCE WITH STATE COMAR REGULATIONS

ADMINISTRATIVE AGENCIES – SEPARATION OF POWERS – ADMISSIBILITY OF EVIDENCE AT TRIAL

STATE COMAR REGULATIONS – COMPLIANCE – OBSERVATION PERIOD

STATE COMAR REGULATIONS – COMPLIANCE – ADMISSIBILITY OF EVIDENCE

Facts:

In April 2019, Dejarnette was arrested for suspected driving under the influence of alcohol. The arresting officer searched Dejarnette’s mouth and pockets, then drove him to the barracks. Upon arrival, the arresting officer again searched Dejarnette, then escorted him to the processing room. While in the processing room, the arresting officer spent the next fifteen minutes advising Dejarnette of his rights. At no point in time did the arresting officer witness Dejarnette eat, drink, smoke, or put anything in his mouth. Approximately thirty-three minutes after his arrest, Dejarnette agreed to submit to an alcohol concentration breath test. The results of the test indicated a .094% blood alcohol concentration.

Prior to trial, Dejarnette filed a motion in limine arguing that the results of the breath test should be excluded at trial because the quality of the police observation was insufficient. The court disagreed and determined that Dejarnette was observed for at least twenty minutes prior to the administration of the breath test, and no officers observed any behavior that would invalidate the test. Dejarnette was convicted of driving under the influence of alcohol per se and driving while impaired by alcohol. This timely appeal followed.

Held: Affirmed.

The Court of Special Appeals held that Md. Code § 10-309(a)(1)(ii) is unambiguous and does not require strict compliance with COMAR regulations. The statute provides that evidence of a breath test in a prosecution for violation of § 21-902 of the Transportation Article is inadmissible “if obtained contrary to the provisions of this subtitle.” The provisions of the subtitle require identification of the technician as a “qualified person,” a statement that approved equipment was used, and a statement that the results of the test are as stated in the report.

A relevant COMAR regulation states that “[f]or at least 20 minutes before a breath sample is taken,” an individual is not permitted to eat, drink, smoke, or have any foreign substance in the mouth. Md. Code Regs. 10.35.02.08(G). The individual must be observed and the mouth must be checked prior to administration of a breath test. The Court determined that the statutory exclusionary rule of § 10-309 does not include a requirement of strict compliance with related COMAR regulations, nor does its language impose a twenty-minute observation period prior to the administration of the breath test.

In the alternative, violation of a State regulation does not trigger the exclusionary rule, meaning the violation of a State regulation that posits a twenty-minute observation period prior to the administration of a breath test does not result in the breath test being inadmissible evidence that must be excluded at trial.

The Court rejected Dejarnette’s argument that other states have held that non-compliance with an observation period results in the inadmissibility of the breath test. To the contrary, the Court notes numerous jurisdictions have adopted a less demanding definition of what qualifies as an “observation” prior to the administration of a breath test, and other jurisdictions require less than a twenty-minute observation period, suggesting a shorter period of observation is sufficient.

Further, the Doctrine of Separation of Powers inhibits an agency’s attempt to unilaterally impose an exclusionary rule applicable to a judicial proceeding. The power to determine whether evidence is admissible at trial lies with a court or the legislature; an executive agency would not likely be authorized to determine what evidence is admissible at court, nor could it unilaterally create an exclusionary rule that is binding on a court.

The Court determined that the record supported a factual finding that the officers complied with the observation period. Thirty-three minutes elapsed between the time Dejarnette was arrested and the administration of the breath test, and he was searched numerous times and in the proximity of police officers for the duration of that period of time. Officers in Dejarnette’s presence testified that he did not eat, drink, smoke, belch, vomit, or put anything in his mouth between the time he was arrested and the breath test. The circuit court also made factual findings that the police officers sufficiently complied with the COMAR regulations.

The Court also concluded that compliance with the twenty-minute observation period outlined in the COMAR regulation goes to the weight of the evidence, not the admissibility of the evidence. Defendants are given the opportunity to offer evidence challenging the reliability of test results,

but “less compelling indicia of unreliability places the admissibility of chemical breath test results within the discretion of the trial judge.” *Casper v. State*, 70 Md. App. 576, 592 (1987).

Clayton Daman Colkley v. State of Maryland, No. 833, September Term 2019, filed July 2, 2021. Opinion by Reed, J.

<https://mdcourts.gov/data/opinions/cosa/2021/0833s19.pdf>

CRIMINAL LAW – CROSS-EXAMINATION AND IMPEACHMENT

CRIMINAL LAW – JUDICIAL NOTICE

CRIMINAL LAW – OTHER MISCONDUCT BY ACCUSED

CRIMINAL LAW – EVIDENCE FROM PRIOR PROCEEDINGS

Facts:

This case stems from a shooting that occurred on the 1700 block of Port Street in Baltimore on May 28, 2003 (the “Incident”). During the Incident, four individuals were shot, one of whom was fatally wounded. In 2003, the State of Maryland (the “State”) indicted Clayton Colkley (“Appellant”) for his alleged involvement in the Incident. The charges against Appellant included, *inter alia*, attempted first-degree murder of William Courts, conspiracy to murder William Courts, and first-degree murder of James Bowens. The jury found Appellant guilty of attempted first-degree murder of William Courts, conspiracy to murder William Courts, and carrying a handgun. Appellant timely appealed his convictions to the Court of Special Appeals. This case involves a procedural history that raises several rarely presented hearsay issues, and follows two prior published opinions and five trials.

Held: Affirmed

In his first issue raised on appeal, Appellant challenged the trial court’s refusal to take judicial notice of an unavailable hearsay declarant’s prior impeachable conviction. Under Md. Rule 5-806(a), “[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.” The hearsay at issue involved a witness’s (Qonta Waddell) prior testimony to police in 2003. Because Waddell was deceased at the time of the present trial, the hearsay – Waddell’s 2003 testimony with police – was admitted under the hearsay exception for unavailability. However, this left the defense no opportunity to raise Waddell’s prior impeachable conviction at trial, aside from having the prior conviction judicially noticed. This Court held that the trial court abused its discretion by refusing to take judicial notice of the *per se* impeachable conviction, without having weighed the probative value against the prejudicial effect of admitting the conviction. Nonetheless, the Court of Special Appeals held that the error was harmless beyond a reasonable doubt because there was

sufficient additional evidence available to the jury which undermined Waddell's credibility. The jury heard recorded testimony from Waddell in which he: admitted to being high on cocaine during his 2003 interview; professed his lack of credibility and reliability; and stated that he had motive to lie to police during his 2003 interview because he would have done anything to get out of jail so he could "continue using."

Appellant's second issue raised on appeal concerned testimony from Eric Horsey – a large-scale Baltimore drug supplier turned State witness. Specifically, Appellant contended that the trial court erred in allowing Horsey to testify about Appellant's involvement in two additional murders: (1) the murder of David Courts, William Courts's brother; and (2) the murder of Edwin Boyd, a witness to the Incident who was killed before he could testify at trial. Horsey testified that he placed a bounty on the "Courts brothers" (William Courts and David Courts), which Appellant sought to collect by shooting William Courts on the night of the Incident. However, Horsey testified that he did not pay Appellant for the shooting of William Courts because William Courts survived. Conversely, Horsey paid Appellant \$10,000 for killing *David Courts*, in a separate incident, upon confirmation of David Courts's death. The Court of Special Appeals held that Appellant's involvement in David Courts's murder was relevant to show Appellant's motive for attempting to kill William Courts – i.e. to receive the bounty Horsey placed on William Courts. Horsey also testified about Appellant's involvement in the killing of Edwin Boyd. Boyd was with Appellant the night of the Incident. Horsey testified that, when Appellant learned that Boyd was being interviewed by police, Appellant told Horsey that they had to "get rid" of Boyd. Appellant argued that Horsey's testimony was inadmissible because it implicated his involvement in Boyd's subsequent death. The Court of Special Appeals held that Appellant's statements to Horsey about getting rid of Boyd were admissible to establish Appellant's consciousness of guilt for the crimes alleged. Accordingly, the Court of Special Appeals held that the Circuit Court did not err in allowing testimony which implicated Appellant's connection to the murders of David Courts and Edwin Boyd.

In Appellant's third issue raised on appeal, Appellant challenged the trial court's denial of Appellant's request to redact the phrase "ladies and gentlemen of the jury" from Horsey's recorded testimony from a prior trial. The recording was nearly 2 hours long and the phrase was used six times. Appellant argued that allowing jurors to hear the phrase was prejudicial because it revealed that Appellant was a defendant in a prior jury trial for the same offense. The Court of Special Appeals held that the trial court did not abuse its discretion in allowing the jury to view footage of prior testimony without redacting the phrase "ladies and gentlemen of the jury." The Court reasoned that although the video did reveal that the defendant had been previously tried for the same offense, admission of the recording was not an abuse of discretion because the jurors would not have known that the defendant had been previously *convicted*. See *Brown v. State*, 153 Md. App. 544, 569-70 (2003).

Additionally, the Court of Special Appeals held that: (IV) the trial court did not abuse its discretion by allowing a detective to testify about statements made to him by an unavailable witness because the defense had opened the door to the testimony; (V) the trial court did not abuse its discretion by allowing the State prosecutor to comment on witness testimony during closing argument/rebuttal; and (VI) the trial court did not abuse its discretion by declining to

propound Appellant's proposed voir dire question asking whether prospective jurors had strong feelings about illegal drugs because Appellant was not charged with drug related crimes.

Nicholas Jabbar Williams v. State of Maryland, No. 1403, September Term 2019, filed July 7, 2021. Opinion by Ripken, J.

<https://mdcourts.gov/data/opinions/cosa/2021/1403s19.pdf>

CRIMINAL LAW – VERDICT – LEGAL INCONSISTENCY

EVIDENCE – OPINION EVIDENCE – EXAMINATION OF EXPERTS

Facts:

Nicholas Williams was charged with the shooting death of Cameron Townsend in the Circuit Court for Charles County. Williams moved to exclude, under *Frye-Reed* and Maryland Rule 5-702, the State’s firearms examiner’s expert testimony that ammunition components recovered from Williams’ car matched ammunition components recovered from the victim’s body and the scene of the shooting. Following an initial hearing, at which the expert did not testify, the circuit court denied Williams’ motion to exclude and declined to hold a *Frye-Reed* hearing.

A jury convicted Williams of second-degree murder, possession of a firearm by a person under twenty-one, and transporting a handgun in a vehicle. The jury acquitted Williams of first-degree assault based on the use of a firearm and use of a firearm in commission of a felony. Before the jury was hearkened, Williams objected to the verdicts, arguing that the acquittal for first-degree assault was legally inconsistent with the conviction for second-degree murder.

During the pendency of Williams’ appeal, the Court of Appeals decided *Rochkind v. Stevenson*, announcing that courts must analyze all expert testimony under Rule 5-702, with guidance from the reasoning and factors of the federal *Daubert* standard. *Rochkind* held that the new standard is applicable to all pending appeals presenting challenges to the admissibility of expert testimony.

Held: Remanded for further proceedings regarding the admissibility of the expert testimony.

The Court of Special Appeals held that the jury verdicts were not legally inconsistent because first-degree assault based on the use of a firearm is not a lesser-included offense of second-degree murder. Although Williams’ charges stem from a single act, any inconsistency in the jury verdicts is factual, and not legal.

Next, the Court of Special Appeals determined that it was necessary to remand to the circuit court for additional proceedings regarding the admissibility of the expert’s testimony. The *Rochkind* standard requires that the trial court consider the reliability of an expert’s methodology without sole reliance on prior judicial acceptance of that methodology. On remand, the circuit court shall consider the reliability of firearms examination generally and as applied in this case

without giving undue weight to prior judicial decisions admitting firearms examination testimony.

Dawnta Harris v. State of Maryland, No. 1515, September Term 2019, filed July 28, 2021. Opinion by Graeff, J.

<https://mdcourts.gov/data/opinions/cosa/2021/1515s19.pdf>

CRIMINAL LAW – FELONY MURDER – PREEMPTION – JUVENILE SENTENCING – INDIVIDUALIZED CONSIDERATION – CRUEL AND UNUSUAL PUNISHMENT – GROSSLY DISPROPORTIONATE

Facts:

On May 21, 2018, appellant struck and killed a Baltimore County Police officer with a stolen car during the commission of a burglary with three other individuals. As he was attempting to flee the scene, the officer blocked his path and got out of her car. Appellant testified that he shut his eyes and “hit the gas,” striking and killing the officer. He was subsequently convicted by a jury in the Circuit Court for Baltimore County of first-degree felony murder, first-degree burglary, and theft less than \$25,000. On August 21, 2019, the court sentenced appellant to life in prison with the possibility of parole on the conviction of first-degree felony murder, 20 years on the conviction for first-degree burglary, and five years for theft.

Held: Affirmed.

Relying on *State v. Gibson*, 4 Md. App. 236 (1969), and *Blackwell v. State*, 34 Md. App. 547 (1977), appellant first argues that his conviction for felony murder should be vacated because the manslaughter by vehicle statute, now codified as Md. Code Ann., Criminal Law Article § 2-209 (2012 Repl. Vol.), preempts a charge of common law felony murder when a motor vehicle is involved. *Gibson* and *Blackwell* found preemption in situations involving unintended homicides resulting from the operation of a motor vehicle.

Felony murder, however, is not an unintended homicide. To be sure, intent to kill is not a required element of felony murder. For a homicide to constitute murder, however, the homicide must be committed with malice, a mental state that includes an intent to do the “death-producing act in the course of the commission, or attempted commission, of a felony.” Under the felony-murder rule, “the malice involved in the underlying felony is permitted to stand in the place of the malice that would otherwise be required with respect to the killing.” Felony murder is not, therefore, within the scope of an unintended homicide. Accordingly, felony murder is not preempted by the manslaughter by automobile statute when the homicide involves a motor vehicle. We, therefore, reject appellant’s argument that his felony murder conviction should be vacated.

Pursuant to this Court's decision in *Hartless v. State*, 241 Md. App. 77 (2019), a sentencing court is not required to conduct an individualized hearing to consider a defendant's "youth and all of its attendant circumstances" before imposing a sentence of life imprisonment with the possibility of parole on a juvenile convicted of felony murder.

Appellant's sentence of life with parole was not grossly disproportionate and did not constitute cruel and unusual punishment where his conduct, in driving over a person while fleeing the scene of a burglary, caused the person to lose her life.

Darrelled Westley v. State of Maryland, No. 2474, September Term 2019, filed July 2, 2021. Opinion by Fader, C.J.

<https://mdcourts.gov/data/opinions/cosa/2021/2474s19.pdf>

SEXUAL OFFENSES – EVIDENCE – RAPE SHIELD STATUTE – APPLICATION TO NONCONSENSUAL CONDUCT

SEXUAL OFFENSES – EVIDENCE – RAPE SHIELD STATUTE – EXCEPTIONS

SEXUAL OFFENSES – CONSTITUTIONAL RIGHTS – DUE PROCESS AND CONFRONTATION CLAUSE – SEXUAL INNOCENCE INFERENCE THEORY

Facts:

Darrelled Westley was charged with multiple counts of sexual abuse of a minor and other sex and assault offenses against his wife’s then-12-year-old niece (“Victim”). At his trial, Mr. Westley sought to admit evidence of Victim’s prior sexual abuse by a different perpetrator, which he contended was necessary to rebut a jury’s natural presumption that Victim, at her young age, would not have possessed sufficient sexual knowledge to fabricate her allegations against him. In a pretrial motion in limine, the circuit court ruled that the evidence was inadmissible. Although the court did not find that the evidence fell within the scope of Maryland’s Rape Shield Statute, Crim. Law § 3 319, the court concluded that the evidence was not relevant to Mr. Westley’s defense and was more prejudicial than probative. The court also rejected Mr. Westley’s two subsequent attempts to admit the same evidence based on his arguments that the State had opened the door and pursuant to the doctrine of verbal completeness. The jury convicted Mr. Westley of multiple sexual offenses.

Held: Affirmed.

The Court of Special Appeals first analyzed whether the Rape Shield Statute’s limitation on the introduction of evidence of specific instances of a victim’s “prior sexual conduct” applied to unwilling conduct. The Court began by looking to the plain text, viewing it in context of the statutory scheme, and concluded that the term “prior sexual conduct” was not limited to only willing sexual conduct. To confirm that interpretation, the Court reviewed the legislative history of the Rape Shield Statute. Finally, the Court reviewed this Court’s decision in *Shand v. State*, 103 Md. App. 465, 480-81 (1995) (“*Shand I*”), which Mr. Westley contended stands for the proposition that only willing sexual conduct falls within the scope of the Rape Shield Statute. Considering that decision and the Court of Appeals’s subsequent decision in *Shand v. State*, 341 Md. 661 (1996) (“*Shand II*”), the Court disagreed.

Next, the Court held that the Rape Shield Statute prohibited the introduction of evidence of Victim's prior abuse because it did not fit any of the statute's exceptions applicable to specific instances evidence. The Court then considered Mr. Westley's argument that he nonetheless had a constitutional right to admit the evidence despite the Rape Shield Statute, because it was necessary to his defense under the so-called sexual innocence inference theory. After surveying caselaw from other states that have considered the sexual innocence theory, the Court concluded that trial courts should consider such claims on a case-by-case basis and should admit such evidence only if the facts of the case actually give rise to a presumption of sexual innocence, the proffered evidence actually rebuts such a presumption, and the inflammatory nature of the evidence would not outweigh its probative value. With respect to Mr. Westley's case, the Court held that the circuit court properly excluded the evidence because the facts of the case did not support a presumption of sexual innocence.

The Court also concluded that the trial court did not err in rejecting Mr. Westley's arguments at trial that: (1) the State had opened the door to the admission of evidence of the prior sexual abuse of Victim; and (2) evidence of the prior abuse was admissible under the doctrine of verbal completeness. Finally, the Court rejected Mr. Westley's contention that the evidence was not sufficient to convict him of child sexual abuse by a person responsible for supervising a minor. Reviewing the record, the Court determined that the evidence was sufficient for a jury to conclude that Victim's mother had voluntarily entrusted both Mr. Westley and his wife with Victim's care and that Mr. Westley had consented to the arrangement.

Shelton Alexander v. Tamara Alexander, No. 1320, September Term 2020, filed July 28, 2021. Opinion by Salmon, J.

<https://mdcourts.gov/data/opinions/cosa/2021/1320s20.pdf>

FAMILY LAW – CUSTODY AND VISITATION

Facts:

Shelton Alexander (“Father”) and Tamara Alexander (“Mother”), after a ten-year marriage, were divorced on July 28, 2014. They were the parents of a son, S., who was born in August of 2006. After their divorce, litigation followed, most of it concerning custody and visitation issues. In September 2019, the Circuit Court for Frederick County filed a final custody order that granted Mother sole legal and primary physical custody of S. Father was granted access to S. every other weekend from after school on Friday until Monday morning plus every Wednesday evening from 6:30 p.m. to 8:15 p.m. so that S. could attend a church youth group. Father was the youth pastor who was in charge of that youth group.

Father appealed the final custody order, but while that appeal was still pending, Mother, on March 18, 2020, advised Father that because S. suffered from type 1 diabetes, which made him vulnerable to serious complications from COVID-19 if he were exposed to it, she planned to keep him at her house until the “CDC corona virus guidelines are lifted and schools are back in session.” Father objected and took the position that Mother had no right to disobey the court’s visitation order and that obeying the visitation order would not endanger S.’s health because his diabetes was being well-managed. Mother, on the other hand, maintained that because she had been given the authority to make medical decisions for S., she had the right to ensure his safety by halting, temporarily, Father’s right to visitation during the pandemic.

Although the parties exchanged emails over a period of nine days, the matter was not resolved and as a consequence, Father, on March 27, 2020, filed an “Emergency Motion to Enforce Court’s Order Regarding Access During COVID-19 Pandemic” (“the emergency motion”). In his motion, Father alleged that almost immediately after the final custody order was docketed, Mother curtailed “Wednesday evening access” and had also, starting March 20, 2020, denied him visitation to which he was entitled. Mother, by counsel, filed an opposition in which she alleged that she was justified in withholding visitation because of the risk to S.’s health presented by the COVID-19 pandemic. She maintained that “since the public schools were closed after March 13, 2020,” neither “[she] nor [S.] ha[d] left their residence and no other individuals had entered the residence.” She also stressed that on March 30, 2020, the Governor of Maryland had issued an executive order that required, except for the performance of essential activities, all citizens to remain in their homes.

On May 18, 2020, Governor Hogan announced that he was relaxing the shelter in place order. Mother notified Father on that date that she would allow S. to resume visitation with Father on

Friday, May 15, 2020. She also told Father at that time that because he had missed 18 days of access to S., she would allow him to have 18 straight days of visitation, i.e., from May 15, 2020 until June 8, 2020. Father rejected that offer and said he would let the court decide the make-up time issue. He made no counter-offer. In his emergency motion, Father complained that Mother had failed to deliver S. to the youth group meetings at 6:30 p.m. on Wednesdays.

The issues raised in the motion for an emergency order were heard in the Circuit Court for Frederick County on September 30, 2020. The motions judge was the same judge who had conducted an 11-day hearing that resulted in the September 3, 2019 final custody order. In regard to the major issue presented, Father contended that he should be awarded attorney's fees in regard to the litigation concerning "make-up time." Moreover, because he had been unjustly denied visitation rights, he asked the court to award him access to S. for ten weekends straight (rather than every other weekend), plus access to S. for Easter 2021. Mother testified that although she had offered Father make-up time back in May of 2020, she no longer thought that make-up time should be granted.

The trial judge ruled that it was not in S.'s best interests to make an award of make-up time, even though Mother, at one point, was willing to acquiesce in such an award. Additionally, the court did not agree with Father's contention that Mother had violated his visitation rights by bringing S. to the youth group meetings at the time the meetings actually started rather than at 6:30 p.m. According to Mother's testimony, sometimes the meetings started at 6:45 p.m. and at other times started at 7:00 p.m. and that is when she delivered S. The trial judge agreed with Mother that there had been no violation because the purpose of the provision in the final custody order concerning the Wednesday night youth group meeting was to make sure that S. attended those meetings – the purpose was not for Father to have extra visitation.

The trial judge denied both parties request for attorney's fees. Those fees had been requested pursuant to Md. Code Annotated (2019 Repl. Vol.), Family Law Article, § 12-103. The reason for the denial was that both parties had had a long history of litigiousness caused by a failing to communicate. In the court's view, Father had acted unreasonably when he turned down Mother's offer of 18 days make-up time without even making a counter-offer.

Held: Affirmed.

The Maryland Court of Special Appeals ruled that under the plain wording of the statute (Family Law Article, § 9-105), the trial court has discretion as to whether to grant make-up time. Such a grant may only be made if it is in the best interests of the child. Here, the trial judge voiced the opinion, which was not clearly erroneous, that allowing make-up time, some four months after court ordered visitation had resumed, would not be in the best interest of S. The court also rejected appellant's argument that the trial judge was clearly erroneous when she denied Father attorney's fees request. Under the statute, Family Law Article § 12-103, the trial judge may deny attorney's fees even if a party was justified in filing a motion to enforce a decree of custody or visitation. The court held, citing *Petrini v. Petrini*, 336 Md. 453, 468 (1994), that whether to

award attorney's fees under § 12-103(a) is a decision that rests in the discretion of the trial court or motions judge. Here, the court, in denying attorney's fees to Father, stressed that Father had prolonged the litigation by not even making a counter-offer to Mother's offer to grant make-up time. Instead, in the trial judge's view, Father was interested in "continuing the fight" with Mother rather than compromising. There was ample evidence in the record to show that both Father and Mother put the urge to fight one another in court over S.'s best interests – and for that reason, the judge was not clearly erroneous in denying both parties their attorney's fees request.

Karunaker Aleti, et ux. v. Metropolitan Baltimore, LLC, et al., No. 459, September Term 2020, filed July 6, 2021. Opinion by Fader, C.J.

<https://mdcourts.gov/data/opinions/cosa/2021/0459s20.pdf>

LANDLORD AND TENANT – LOCAL LICENSING ORDINANCE – FAILURE TO LICENSE RENTAL PROPERTY – PRIVATE RIGHT OF ACTION

LANDLORD AND TENANT – ACTION FOR MONEY HAD AND RECEIVED

DECLARATORY JUDGMENT – REQUIREMENT TO ISSUE DECLARATION OF RIGHTS AND OBLIGATIONS

Facts:

Article 13, § 5-4(a)(2) of the Baltimore City Code prohibits a landlord from charging, accepting, retaining, or seeking to collect rent for a rental property unless the property is properly licensed. Karunaker and Chandana Aleti (the “Aletis”) brought an action in the Circuit Court for Baltimore City against the owner and the property manager of an apartment building (collectively, “Metropolitan”), alleging that for a period of approximately ten months while they were tenants of the building, Metropolitan did not hold an active rental license and therefore violated § 5-4(a) by charging them rent, related fees, and legal fees. The Aletis, on behalf of themselves and a class of other similarly situated tenants, sought: (1) damages in the amount of all rent and payments made to Metropolitan during the unlicensed period for its violation of § 5-4(a); (2) damages for breach of contract; (3) restitution of rent, related fees, and legal fees under the common law cause of action for money had and received; and (4) a declaratory judgment that Metropolitan may not file court actions or collect legal fees, rent, or other amounts for the period when the property was unlicensed. Metropolitan did not dispute that it was unlicensed during the relevant period but moved to dismiss the complaint.

The circuit court dismissed all counts of the complaint. The court determined that § 5-4(a) did not provide the Aletis with a private right of action to recover amounts paid during the period when Metropolitan was unlicensed, that the Aletis had not properly alleged a breach of contract claim, and that the claim for money had and received failed because the Aletis did not plead with specificity “that they paid more than what they would have paid” but for the violation of § 5-4(a). The court then declined to issue a declaratory judgment, reasoning that because the substantive counts were dismissed, no justiciable controversy remained. The Aletis appealed.

Held: Affirmed in part and reversed in part.

The Court of Special Appeals first analyzed whether § 5-4(a)(2) provides tenants with an implied private right of action to collect a refund of rent and other fees voluntarily paid to a landlord who was unlicensed during a portion of a rental term. Interpreting the provision's language, legislative history, and legislative intent, the Court found that § 5-4(a)(2) was enacted for the purpose of coercing landlords to become licensed, not for the purpose of providing tenants with a benefit in the form of rent-free housing in unlicensed properties. The Court thus held that § 5-4(a)(2) did not provide a private right of action. Based on that conclusion, the Court also held that the circuit court had properly dismissed the Aletis' breach of contract claim, which was premised on the contract's incorporation of the terms of § 5-4(a).

The Court next held that circuit court properly dismissed the claim for money had and received to the extent that the Aletis sought to recover rent based only on Metropolitan's lack of a license. The Court explained that a claim for money had and received lies when a defendant has obtained possession of money that, in equity and good conscience, the defendant should not be allowed to retain. Here, Metropolitan had provided the Aletis all that was bargained for under the lease, and so they could not recover rent and related amounts paid based on Metropolitan's lack of licensure. However, the Court held that the circuit court erred in dismissing the claim for money had and received to the extent that the Aletis sought restitution of legal fees that Metropolitan had collected in pursuing court actions against them for failure to pay rent during the unlicensed period. The Court observed that the Aletis had alleged that Metropolitan was required to hold an active rental license to bring such court actions and made false representations concerning its licensure status in filing those actions. The Court concluded that those allegations were sufficient to state a claim for money had and received.

Finally, the Court held that the circuit court erred in not issuing a declaratory judgment setting forth the rights and obligations of the parties for two reasons. First, a ruling on substantive counts brought as part of an action in which a plaintiff also seeks a declaratory judgment does not render the declaratory judgment claim moot or non-justiciable. Second, in this case, the ruling on the substantive counts of the Aletis' complaint did not actually resolve the dispute for which the Aletis sought a declaratory judgment.

Comptroller of Maryland v. James R. Myers, et al., No. 95, September Term 2020, filed July 1, 2021. Opinion by Graeff, J.

<https://mdcourts.gov/data/opinions/cosa/2021/0095s20.pdf>

TAXATION – INCOME TAXES – PAYMENT – RECOVERY OF TAXES PAID – STATUTE OF LIMITATIONS – EVIDENCE OF TIMELY FILING

Facts:

James and Monica Myers, appellees, prepared amended tax returns seeking a refund for tax years 2007, 2008, 2009, 2010, 2011, 2012, and 2013. After the limitations period expired for the 2008, 2009, and 2012 amended tax returns, the Comptroller informed appellees that it did not have their amended returns for those years. In 2017, appellees sent the amended returns for 2008, 2009, and 2012 once more, but the Comptroller denied refunds for those tax years, alleging that appellees had failed to file their amended returns for those years within the applicable limitations period, as set forth in Md. Code Ann., Tax-General Article (“TG”) § 13-1104(c)(1).

Appellees appealed the Comptroller’s decision to the Tax Court, arguing that they mailed amended returns for the 2008, 2009, and 2012 tax years within the limitations period. The Comptroller argued that federal income tax law, which the Tax Court was required to apply, required appellees to show proof of mailing through a return receipt of certified mail, and because appellees did not show timely mailing by such evidence, they were not entitled to a refund.

The Tax Court disagreed and, based on the testimony of appellees that they timely mailed the amended returns, concluded that appellees mailed the amended returns within the limitations period. Accordingly, it reversed the Comptroller’s decision and ordered refunds for the 2008, 2009, and 2012 tax years. The Circuit Court for Anne Arundel County affirmed the decision of the Tax Court.

Held: Reversed.

The Tax Court erred by allowing the appellees to prove timely mailing through testimony, and the circuit court erred in affirming the Tax Court. The limitations period in Md. Code Ann., Tax-General Article (“TG”) § 13-1104(c)(1) is inextricably keyed to § 6511 of the Internal Revenue Code (“I.R.C.”), and therefore, pursuant to TG § 10-107, the Comptroller and Tax Court must apply administrative and judicial interpretations of § 6511, including Treas. Reg. § 301.7502-1 and I.R.C. § 7502. Accordingly, in a situation where a taxpayer mails a claim for a refund, but the Comptroller does not receive the claim within the limitations period, the taxpayer can show

timely filing only by a receipt of registered mail or other proof permitted pursuant to Treas. Reg. § 301.7502-1 and I.R.C. § 7502.

WAMCO, Inc. v. Northeast 400, LLC, et al., No. 2271, September Term 2019, filed July 1, 2021. Opinion by Gould, J.

<https://mdcourts.gov/data/opinions/cosa/2021/2271s19.pdf>

FORECLOSURE ACTIONS – NOTICE REQUIREMENTS

Facts:

Northeast 400, LLC (“Northeast”) was the owner of the real property located in Cecil County (the “Property”). Northeast failed to pay its property taxes, prompting a tax sale by Cecil County, Maryland. WAMCO, Inc. (“WAMCO”) purchased the Certificate of Sale for the Property and sent notice to Northeast of its right to redeem the Property, as required by statute.

WAMCO filed a complaint in the Circuit Court for Cecil County to foreclose Northeast’s right to redeem the Property. Northeast did not timely redeem the Property and the court entered the order foreclosing Northeast’s right to redeem the Property (the “Foreclosure Order”). Northeast filed a motion to reconsider and vacate the Foreclosure Order, which WAMCO opposed.

The Sambol Family Foundation, Inc. (the “Foundation”) then moved to intervene, alleging that it held a loan secured by the Property and was entitled to notice of the right of redemption pursuant to §Section 14-836(b)(4)(i)(1) of the Tax Property Article (“TP”) of the Maryland Annotated Code (1986, 2019 Repl. Vol.) The Foundation further alleged that WAMCO committed constructive fraud because it did not comply with this notice requirement. WAMCO opposed the Foundation’s motion, alleging that the Foundation had no interest in the Property and was therefore not entitled to notice. WAMCO contended that the Foundation had only an interest in the “right, title and [i]nterest” in Northeast held by one of Northeast’s members, not an interest in the Property.

The court held a hearing on Northeast’s motion to reconsider and the Foundation’s motion to intervene. The court granted the Foundation’s motion and vacated the Foreclosure Order. The court also found that WAMCO committed constructive fraud when it failed to send the Foundation notice of the sale. The court also found that Northeast’s motion was moot.

Held:

The circuit court erred in vacating the Foreclosure Order. The Foundation did not possess any interest in the Property, only an economic interest in Northeast. As such, it was not entitled to notice or the right to intervene.

Notice of a foreclosure action must be sent to “all persons having a recorded interest, claim, or lien, including a judgment, who have not been made a defendant in the proceeding[.]” TP § 14-836(b)(4)(i)(1).

The Foundation argued that it held such an interest in the Property pursuant to a Partial Assignment in which a member of Northeast assigned to Richard Sambol an interest in the Property described as “a 16-2/3% *pari passu* interest in the Property.” The Foundation argued that this clause meant that Mr. Sambol was the assignee of an “interest in the Property.” And, as a successor to Mr. Sambol’s “interest in the Property,” the Foundation contended that it was entitled to the notice required by statute.

The Partial Assignment did not purport to operate as an assignment. Instead, it confirmed Northeast’s consent to an assignment of a specific interest and unambiguously described the member’s economic interest in Northeast as the object of the assignment. The use of that phrase “*pari passu*” meant that Northeast was consenting to an assignment of an interest that stood on equal footing, without preference, as the interest retained by its member, which was a membership interest in Northeast. This interpretation was confirmed by the rest of the Partial Assignment, which described the “*pari passu* interest in the Property” as “representing” the member’s interest “in and to all distributions made and to be made by Northeast” for the “sale of the Property and/or the sale of Northeast[.]” The Foundation also claimed its interest was supported through UCC filings, but those also failed to confirm any interest held by the Foundation in the Property.

Our interpretation of the Partial Assignment aligns with the relevant provisions of the Maryland Limited Liability Company Act, codified in Title 4A of the Corporations and Associations Article (“CA”) of the Maryland Annotated Code (1974, 2014 Repl. Vol.). The owners of an LLC are called members, CA § 4A-101(n), and their interests are called “membership interests.” CA § 4A-101(o). A membership interest is personal property, CA § 4A-602, and consists of two types of interests: an economic interest and a non-economic interest. CA § 4A-101(o). An economic interest is defined as “a member’s share of the profits and losses of a limited liability company and the right to receive distributions from a limited liability company.” CA § 4A-101(i). Unless otherwise agreed by the members, only an economic interest is assignable. CA § 4A-603(a)(1). Thus, Northeast’s member, as owner of a 33-1/3% membership interest in Northeast, had both economic and noneconomic interests in the LLC, but only his economic interest in the LLC was assignable. And that’s precisely what the Partial Assignment accomplished.

Notice of the right of redemption is required to be sent only to those who hold an interest in the subject property, not to those who maintain an economic interest in the entity that owns the property. TP § 14-836(b)(4)(i)(1). As the interest acquired by the Foundation was an economic interest in Northeast, the Foundation was not entitled to notice. Because the Foundation was not entitled to notice, the court erred in permitting the Foundation to intervene and in finding that WAMCO committed constructive fraud by failing to provide notice to the Foundation. Accordingly, we found that the court erroneously vacated the Foreclosure Order. We

additionally found that Northeast's motion for reconsideration was without merit and did not provide an alternative basis to affirm.

Shelter Senior Living IV, LLC v. Baltimore County Maryland, et al., No. 1276, September Term 2019, filed July 1, 2021. Opinion by Gould, J.

<https://mdcourts.gov/data/opinions/cosa/2021/1276s19.pdf>

TAXATION – PROPERTY TAX – MARYLAND RECORDATION TAX – MARYLAND TRANSFER TAX – BALTIMORE COUNTY TRANSFER TAX – MONTGOMERY COUNTY TRANSFER TAX – CALCULATION

Facts:

Brightview Rockville, LLC, Brightview Towson, LLC, and Brightview White Marsh, LLC (collectively, “Sellers”) contracted to sell three senior living facilities located in Montgomery and Baltimore Counties. The three transactions were governed by separate contracts. The sales price for each transaction was broken down into three asset categories: real property, tangible personal property, and intangible personal property, which were all transferred through separate instruments.

Sellers presented the deeds to Baltimore County, Montgomery County, and the Clerks of Court for Baltimore County and Montgomery County (collectively, the “Taxing Authorities”) for recording. The consideration stated on the deeds was the portion of the sales price that the parties had allocated to the real property. The Taxing Authorities refused to record the deeds based on the consideration stated therein. Instead, they insisted that the transfer and recording taxes needed to be calculated based on the total sales price, less the amount attributable to tangible personal property.

Sellers paid the taxes in order to record the deeds and then filed refund requests with the Directors of Finance for both Baltimore and Montgomery Counties, seeking reimbursement for the recordation and transfer taxes paid on the consideration exchanged for the intangible personal property. The requests for reimbursement were denied, and the Sellers subsequently appealed to the Maryland Tax Court. The Tax Court upheld the Taxing Authorities’ refund denial, reasoning that “State law and the relevant county codes permit the State and local tax collectors to impose transfer and recordation tax based on the total amount of consideration paid, including any consideration paid for assets categorized by the buyer or seller as intangible property.”

Sellers sought judicial review of the Tax Court’s decision in the Circuit Court for Baltimore County and thereafter assigned their claims to appellant Shelter Senior Living IV, LLC (“Shelter”). The circuit court affirmed the Tax Court’s decision, and Shelter filed a timely notice of appeal.

Held:

The Tax Court made a legal error in its determination that “State and local tax collectors” are permitted “to impose transfer and recordation tax based on the total amount of consideration paid, including any consideration paid for assets that are categorized by the buyer or seller as intangible property.” In determining the “total amount of consideration paid,” the tax collectors must calculate the tax on the consideration paid only for the subject real property and must exclude consideration paid for other types of assets, such as intangible property, that are not subject to such taxes.

Section 12-102 of Tax-Property Article of the Maryland Annotated Code, imposes a state recordation tax on “an instrument of writing,” which is defined for relevant purposes as a written instrument that “conveys title to . . . real property[.]” Md. Code Ann, Tax-Prop (“TP”) § 12-101(j)(1) (1986, 2019 Repl. Vol.). The tax is calculated as a percentage of the “consideration payable . . . for an instrument of writing.” TP § 12-103(a)(1). “[C]onsideration” is defined as “the amount of any mortgage or deed of trust assumed by the grantee,” but otherwise “includes only the amount paid or delivered in return for the sale of the property[.]” TP § 12-103(a)(2). It is evident from the plain language of these provisions and the statutory scheme as a whole that the “consideration payable” for the “property” refers to only the consideration exchanged for real property.

Our analysis of the parallel provisions in the state and county transfer tax provisions produces the same result. *See generally* TP §§ 13-202 to 13-204; Baltimore County Code §§ 11-3-201(1), 11-3-203(a)-(b); Montgomery County Code § 52-31. As with the recordation tax, the consideration stated in the deed is the relevant number for calculating the transfer taxes, and the value of the intangible property conveyed in the underlying transaction is not part of the equation.

In this case, the instruments of writing at issue are the three deeds pursuant to which title to the real property was conveyed, and thus, the recordation tax should have been calculated as a percentage of the consideration stated in each of the three deeds.

We do not suggest or imply that the tax collectors must blindly accept the consideration stated by the parties. The county clerks are empowered to look through the stated consideration on the deed to the facts and circumstances of the underlying transaction to ascertain the actual consideration paid for the real property when calculating taxes owed. *See Dean v. Pinder*, 312 Md. 154, 162 (1988); *Pritchett v. Kidwell*, 55 Md. App. 206, 213-14 (1983). If county clerks have reason to second-guess the consideration stated in the instrument of writing, they are statutorily permitted to base the calculation of the tax on the fair market value of the real property. Baltimore County Code § 11-3-207(d); Montgomery County Code § 52-36(b). We presume these options reflect a belief by county legislative bodies that the clerks have the requisite knowledge and expertise to make sure the actual consideration exchanged for the real property serves as the basis on which the taxes are imposed. In any event, if resources or expertise are lacking, that is a matter for the legislative bodies to address.

Mary Paone Latz v. Jacob Parr, No. 977, September Term 2019, filed July 6, 2021. Opinion by Kenney, J.

<https://mdcourts.gov/data/opinions/cosa/2021/0977s19.pdf>

ANIMALS – INJURIES TO PERSONS – DUTIES AND LIABILITIES IN GENERAL

NEGLIGENCE – BREACH OF DUTY – VIOLATIONS OF STATUTES AND OTHER REGULATIONS

STATUTES – CONSTRUCTION – IN GENERAL – RULES, PRINCIPLES, MAXIMS, AND CANONS OF CONSTRUCTION IN GENERAL

STATUTES – CONSTRUCTION – IN GENERAL – PURPOSE – POLICY BEHIND OR SUPPORTING STATUTE

STATUTES – CONSTRUCTION – IN GENERAL – INTENT

STATUTES – CONSTRUCTION – IN GENERAL – CONSTRUCTION BASED ON MULTIPLE FACTORS

ANIMALS – INJURIES TO PERSONS – DOGS – PERSONS LIABLE FOR INJURIES IN GENERAL

Facts:

When a dog chased a cat into the apartment of Mary Paone Latz, the cat’s owner and appellant, Ms. Latz was injured in her effort to protect the cat. She sued Jacob Parr, appellee, and Vicki Nichols, Mr. Parr’s longtime girlfriend, in the Circuit Court for Howard County for negligence and strict liability. After Ms. Nichols filed for bankruptcy, Ms. Latz dismissed the claims against Ms. Nichols. On the second day of the two-day jury trial, the circuit court granted Mr. Parr’s motion for judgment at the close of Ms. Latz’s case.

In her timely appeal, Ms. Latz argued that the “circuit court erred when it granted the defense motion for judgment dismissing [her] claims for negligence and strict liability against Parr” for four reasons: (1) “it adopted an erroneous definition of ‘owner’”; (2) “concluded – as a matter of law – that a rational trier of fact could not find that the dog – running loose – was under the dual or joint authority of both Parr and Nichols when they took the dog for a walk . . . off leash immediately prior to” injuring her; (3) it failed to view the evidence in the light most favorable to her and concluded that the dog’s flight occurred off the Parr property; and (4) when it failed to apply the statutory presumption under Md. Code Ann. (1973, 2013 Repl. Vol., 2019 Supp.), Cts. & Jud. Proc. Article (“CJP”) § 3-1901(a).

Held: Reversed and Remanded.

Prior to April 1, 2012, recovery for injuries caused by a dog could be pursued under theories of both negligence and strict liability. As explained in *Slack v. Villari*, 59 Md. App. 462, 470 (1984), “negligence that exposes an animal owner who is unaware of the animal’s dangerous propensities” is the “failure to control the [dog] or prevent the harm caused by it.” *See also Moura v. Randall*, 119 Md. App. 632, 644 (1998).

Local animal control statutes have been looked to in determining whether a particular defendant’s conduct was evidence of negligence. *See, e.g., Moura v. Randall*, 119 Md. App. 632, 647 (1998) (considering whether the defendant violated Montgomery County Code 5-26, which prohibited an owner from permitting a dog to “run at large”); *Hammond v. Robins*, 60 Md. App. 430, 437 (1984) (“appellant violated the Carroll County Animal Ordinance by not keeping the dog under restraint and by allowing the dog to leave the property unattended and unrestrained”). With few exceptions, local animal control ordinances include, as did the common law, those who harbor, keep, or possess an animal within the definition of “owner.”

Looking at CJP § 3-1901 in light of the General Assembly’s “stated intent,” we are not persuaded that the legislation was intended to change the common law related to strict liability for personal injury beyond the creation of the rebuttable presumption the owner knew or should have known of the dog’s propensities and precisely when the court can rule on whether that presumption has been rebutted as a matter of law. For that reason, the General Assembly may have rejected the inclusion of a proposed amendment defining “owner” as one who “keeps or harbors a dog” because it was clear under common law that liability extended to them. For example, both the majority and dissenting opinions in *Tracey v. Solesky*, 427 Md. 627, 638 (2012), discussed owning or keeping a dog with respect to strict liability. *See also Twigg v. Ryland*, 62 Md. 380, 385 (1884) (stating that “[t]he owner or keeper of the dog or other domestic animal must be shown to have had knowledge of its disposition to commit such injury). Merely permitting a dog to remain on one’s property may not be enough to establish ownership. But, exercising some degree of care and control of a dog on one’s premises may be sufficient to establish liability.

Kathleen Ford, et al. v. Edmondson Village Shopping Center Holdings, LLC, No. 1656, September Term 2019, filed July 2, 2020, opinion by Eyler, D., J.

<https://mdcourts.gov/data/opinions/cosa/2021/1656s19.pdf>

NEGLIGENCE – PREMISES LIABILITY – DUTY OF CARE – CRIMINAL ACTS OF THIRD PERSONS ON LEASED PREMISES – STATUS OF EMPLOYEE OF TENANT ON LEASED PREMISES – MOTION TO DISMISS.

Facts:

The appellants' decedent was killed during a robbery inside a retail store while he was working as the store manager. The store was in a strip mall in Baltimore, where there was a long history of criminal activity on the parking lot including a murder committed the month before. The decedent's widow and children brought survival and wrongful death claims in negligence against the owner of the shopping center, alleging that it knew about the criminal activity and had a duty to hire security guards and take other measures on common areas of the shopping center to protect occupants of leased premises from foreseeable criminal acts of third persons committed inside those premises.

The appellee filed a motion to dismiss asserting that it did not owe a duty of care to the decedent, as a matter of law. The circuit court granted the motion, ruling that the decedent occupied the status of tenant (not business invitee) at the time of the murder and that the shopping center did not owe a duty to protect him from the criminal acts of third persons committed on the store's leased premises. This appeal followed.

Held: Vacated and remanded.

When working inside the Dollar General store, the decedent occupied the status of tenant, not the status of business invitee. Cases concerning whether a landlord has a duty to protect a tenant from the criminal acts of third persons control. Ordinarily, when a landlord has knowledge of criminal activity on common areas that pose a risk of harm to tenants on those areas, it has a duty to take reasonable measures to eliminate conditions contributing to the criminal activity. In *Hemmings v. Pelham Wood Ltd. Partnership*, 375 Md. 522 (2003), the Court held that when a landlord knew of conditions in the common areas that had led to criminal acts inside tenants' leased premises, and took steps to correct them but failed to maintain the corrections, a duty arose to protect the tenants from the criminal acts of third persons inside leased premises that could have been averted had the corrections been maintained.

Except for one case decided on certified questions, the Maryland cases addressing whether a duty of care arose on the part of a landlord to protect a tenant from the criminal acts of third

persons have been decided on summary judgment or trial records, where the facts have been fully developed. The factual record must be developed before the legal question of duty can be answered because whether such a duty arose will depend upon the factual circumstances, and in particular upon whether similar crimes had been committed and the landlord's knowledge of such crimes. Although the landlord tenant relationship can give rise to such a duty, whether the duty in fact arose is fact dependent. At this stage of the litigation in this case, when the factual record has not been developed, the legal question whether a duty of care was owed cannot be answered

Scott Wadsworth, et al. v. Poornima Sharma, M.D., et al., No. 1703, September Term 2019, filed July 1, 2021. Opinion by Salmon, J.

<https://mdcourts.gov/data/opinions/cosa/2021/1703s19.pdf>

NEGLIGENCE – WRONGFUL DEATH – SURVIVORSHIP ACTION

Facts:

Scott Wadsworth, as personal representative of his late wife, Stephanie Wadsworth, filed a survivorship action in the Circuit Court for Baltimore County against Dr. Poornima Sharma and her employer. A wrongful death claim was also filed by Scott Wadsworth, Stephanie Wadsworth's father, Joseph Eline, Jr. and two of Mrs. Wadsworth's children. They contended that in February of 2013, Dr. Sharma, an oncologist, had negligently failed to discover that Mrs. Wadsworth was suffering from Stage IV metastatic breast cancer. In February 2016, the cancer was discovered by another healthcare provider. During discovery, an oncologist testified that the defendant, Dr. Sharma, was negligent in failing to discover the cancer in April of 2013. According to the expert, if the cancer had been discovered in April of 2013, it would have been incurable; nevertheless, if it had been discovered at that point, Mrs. Wadsworth would have had a life expectancy of six and one-half years or eighty months. After the cancer was discovered by another healthcare provider, in late February 2016, she received the same medical treatment that she would have received if the cancer had been discovered earlier but she died in June of 2017. According to plaintiffs' expert, due to Dr. Sharma's negligence, the decedent's life expectancy was reduced by thirty months.

A motion for summary judgment was filed by Dr. Sharma and her employer. They took the position, and the motions judge agreed, that to succeed in a case brought under Maryland's wrongful death statute, the plaintiff must prove that the defendant's negligence caused the death. Because it was undisputed that as of February 2013 (the date of the alleged failure to diagnose) Mrs. Wadsworth's cancer was incurable and therefore Dr. Sharma did not cause her death, the motions judge granted movants' motion for summary judgment on the wrongful death count.

Additionally, the defendants filed a motion for summary judgment on the survivorship claim brought by the personal representative. Movants' asserted as to that claim that the personal representative could not recover under the survivorship count unless he could prove that Dr. Sharma's negligence caused the death of the decedent. For that proposition, movants relied on *Fennell v. Southern Maryland Hosp. Center, Inc.*, 320 Md. 776 (1990). The motions judge agreed with defendants and granted the plaintiffs summary judgment as to the survivorship count.

Held: Affirmed as to the wrongful death count; reversed and remanded as to the survivorship action.

The court ruled that in a wrongful death action, the plaintiff must prove that the defendant's tortious actions caused the decedent's death. It was not enough to proffer, as plaintiffs-appellants did, that they could prove that Dr. Sharma's negligence actions caused the decedent's life to be shortened by 30 months. As to the survivorship action, the court ruled that even if the defendants' negligence did not cause the decedent's death, the personal representative could nevertheless recover for any lost wages, conscious pain and suffering and medical bills that came about due to the delayed diagnosis of the cancer. The court noted that in regard to the claim for lost wages, no recovery could be made for any wages lost after the date of the decedent's death. The court also ruled, citing *Rhone v. Fisher*, 223 Md. 224, 229-30 (1961), that on remand, the personal representative would not be allowed to seek recompense for the shortening of Mrs. Wadsworth's life, if the jury found that the defendants' negligence caused such shortening. The personal representative could recover, however, for any mental anguish that the decedent may have suffered through knowledge or contemplation of the shortening of her life.

Patrick Spevak v. Montgomery County, Maryland, No. 893, September Term 2020, filed July 28, 2021. Opinion by Beachley, J.

<https://mdcourts.gov/data/opinions/cosa/2021/0893s20.pdf>

WORKERS' COMPENSATION – LE § 9-610 OFFSET FOR “SIMILAR BENEFITS” – EMPLOYEE’S SERVICE-CONNECTED TOTAL DISABILITY RETIREMENT OFFSETS ANY PERMANENT TOTAL OR PERMANENT PARTIAL WORKERS’ COMPENSATION BENEFITS

Facts:

Patrick Spevak, appellant, was employed by Montgomery County as a firefighter from 1979 to 2010. He sustained a back injury during his employment and, as a result of that injury, retired in 2010 after being granted a service-connected total disability retirement. Since 2010, Mr. Spevak has been receiving retirement benefits amounting to approximately 70% of his highest salary.

Mr. Spevak’s hearing subsequently deteriorated, and in 2016 he filed a workers’ compensation claim based on occupational hearing loss. In 2017, the Workers’ Compensation Commission found that Mr. Spevak’s hearing loss was causally related to his employment and awarded him permanent partial disability benefits as a result of a 21% hearing loss in his left ear. However, the Commission determined that Mr. Spevak’s permanent partial benefits were completely offset pursuant to Section 9-610(a) of the Labor and Employment Article because his total disability retirement and his permanent partial workers’ compensation benefits were “similar benefits” under the statute. The Circuit Court for Montgomery County affirmed the Commission’s decision.

Held:

When an employee who is subject to the provisions of LE § 9-610(a)(1) receives a service-connected total disability retirement from his or her employer, the LE § 9-610 offset applies to any permanent total or permanent partial workers’ compensation benefits the employee is awarded for injuries or diseases related to that same employment. Because Mr. Spevak’s service-connected total disability retirement compensates for any and all work-related injuries he sustained in his employment with Montgomery County, he may not also receive a permanent partial workers’ compensation award.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated June 4, 2021, the following attorney has been suspended for 45 days by consent, effective July 6, 2021:

CHRISTIAN L. SIMPSON

*

By an Order of the Court of Appeals dated July 8, 2021, the following attorney has been temporarily suspended:

JONATHAN ROBERT SCHUMAN

*

This is to certify that the name of

SCOTT BRIAN BLUMENFELD

has been replaced upon the register of attorneys in this State as of July 9, 2021.

*

By an Order of the Court of Appeals dated May 11, 2021, the following attorney has been indefinitely suspended by consent, effective July 12, 2021:

ZIONNE AKPAN

*

By an Opinion and Order of the Court of Appeals dated July 23, 2021, the following attorney has been disbarred:

MITZI ELAINE DAILEY

*

*

This is to certify that the name of

SAMUEL SPERLING

has been replaced upon the register of attorneys in this State as of July 29, 2021.

*

JUDICIAL APPOINTMENTS

*

On June 14, 2021, the Governor announced the appointment of **KRYSTIN JANE RICHARDSON** to the District Court – Baltimore County. Judge Richardson was sworn in on July 12, 2021 and fills the vacancy created by the retirement of the Hon. Sally C. Chester.

*

On June 14, 2021, the Governor announced the appointment of **SUSAN CHAMBERS ZELLWEGER** to the District Court – Baltimore County. Judge Zellweger was sworn in on July 12, 2021 and fills the vacancy created by the elevation of the Hon. Stacy A. Mayer to the Circuit Court for Baltimore County.

*

On June 25, 2021, the Governor announced the appointment of **BRIAN LEE DELEONARDO** to the Circuit Court for Carroll County. Judge DeLeonardo was sworn in on July 15, 2021 and fills the vacancy created by the retirement of the Hon. Thomas F. Stansfield.

*

RULES ORDERS AND REPORTS

*

A Rules Order pertaining to the 207th Report of the Standing Committee on Rules of Practice and Procedure was filed on July 8, 2021.

<http://mdcourts.gov/sites/default/files/rules/order/ro207.pdf>

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UNREPORTED OPINIONS

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

<https://mdcourts.gov/appellate/unreportedopinions>

	<i>Case No.</i>	<i>Decided</i>
A		
A.U. v. E.P.	1198	July 9, 2021
A.U. v. E.P.	1457	July 9, 2021
Adams, Anthony v. State	0012	July 14, 2021
Addo, Hugh Nii-Nue v. State	1933 *	July 29, 2021
Administrative Office of the Courts v. Abell Foundation	1955 *	July 1, 2021
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I		
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K		
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M		
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