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COURT OF APPEALS

Jesse J. Murphy, et al v. Liberty Mutual Insurance Co., Misc. No. 5, September Term 2021, filed April 27, 2022. Opinion by McDonald, J.

<https://mdcourts.gov/data/opinions/coa/2022/5a21m.pdf>

ADMINISTRATIVE AUTHORITY OF CHIEF JUDGE – EMERGENCY POWERS OF CHIEF JUDGE – SEPARATION OF POWERS – PROHIBITION AGAINST SUSPENSION OF LAWS

Facts:

Beginning in April 2020, as the Covid-19 pandemic began to spread rapidly in Maryland and after the Governor had declared a state of emergency, the then-Chief Judge of the Court of Appeals issued a series of Administrative Orders that temporarily tolled various Maryland statutes of limitations during the emergency. At that time, the Governor had issued orders limiting the use of public buildings and the movements of the public, and the Chief Judge had issued other orders that suspended or curtailed many court operations. In issuing the emergency tolling orders, the Chief Judge cited her authority as administrative head of the Maryland Judiciary, as provided by both Article IV, §18(b)(1) of the Maryland Constitution and Maryland Rules 16-1001 *et seq.*, a set of Rules adopted in March 2020 to set forth the Chief Judge’s administrative powers, to be exercised in harmony with the Governor’s lawful directives, in certain emergencies. Among the powers that the Rules grant to the Chief Judge in those emergencies are the powers to “suspend, toll, or otherwise grant relief from time deadlines” imposed by statutes, Rules, or court orders; to suspend non-essential judicial business; to close a court; and to take “other appropriate action” to ensure that the courts effectively handle essential judicial business. Md. Rule 16-1003(a).

The United States District Court for the District of Maryland certified to the Court of Appeals a question concerning the Chief Judge’s power to issue the tolling orders. The defendants in a diversity action pending in that court had moved for dismissal of some of the plaintiff’s claims on the grounds that the claims were time-barred under the applicable Maryland statute of limitations. The plaintiff opposed the motion on the grounds that the claims were timely under

the tolling order that the Chief Judge had issued on April 24, 2020. In reply, the defendants argued that the tolling order exceeded the Court’s authority under Article IV, §18(a) of Maryland’s Constitution to “adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in other courts of the State” and “constituted an unlawful assumption of legislative power.” The federal court asked the Court of Appeals whether Maryland law, including the Maryland Constitution, authorized the issuance of the April 24, 2020, tolling order. In the Court of Appeals, the defendants asserted that the order violated two provisions of the Maryland Declaration of Rights: (1) Article 8, which guarantees the separation of powers of the Executive, Legislative, and Judicial branches of the Maryland State government, and (2) Article 9, which prohibits the suspension of laws.

Held:

The Court of Appeals held that the Chief Judge properly exercised her authority, as granted by the Constitution and Rules 16-1001 *et seq.*, in ordering the temporary tolling of the general statute of limitations for a certain time during the emergency, that the adoption of those Rules fell within the Court’s rule-making power under Article IV, §18(a) of the Maryland Constitution, and that neither the tolling orders nor the emergency Rules violated the Maryland Declaration of Rights.

With regard to the separation of powers principle set by Article 8, the Court noted that the Judicial Branch has long played a role in the procedural aspects of the limitation of causes of action, including matters related to tolling. Therefore, the orders did not usurp a power reserved solely to the Legislative Branch. And, because the orders pertained to the administration of and in the courts and were in harmony with Executive Branch orders pertaining to the use of State buildings and the reduction of interactions among members of the public, they did not usurp a function reserved solely to that branch. Further, the Judiciary’s reports to, and consultations with, representatives of both of the other branches of government throughout 2020 did not evidence an encroachment of any power reserved solely to either of those other branches.

The Court also concluded, for two reasons, that the Rules and tolling orders did not violate Article 9 of the Declaration of Rights, which generally states the principle that the power of suspending laws “ought not” be “exercised, or allowed.” First, Article IV, § 18 more specifically grants to the Chief Judge and the Court of Appeals the authority that they exercised here, and that specific grant of power takes precedence over the general principle stated in Article 9. Second, the Court’s adoption of a Rule that modifies a statute in a way that falls within the Court’s rule-making purview is not a “suspension” of the statute; instead, it is a change in the law.

The appendices to the opinion include a list of the tolling orders issued from April 3, 2020 through March 28, 2022, with links to each.

Mashour Howling v. State of Maryland, No. 35, September Term 2021 & *Funiba Abongnelah v. State of Maryland*, No. 36, September Term 2021, filed April 28, 2022. Opinion by Hotten, J.

<https://www.courts.state.md.us/data/opinions/coa/2022/35a21.pdf>

CRIMINAL LAW – STATUTORY INTERPRETATION – PROHIBITED POSSESSION OF FIREARM AND AMMUNITION

CRIMINAL LAW – JURY INSTRUCTION – PROHIBITED POSSESSION OF FIREARM

Facts:

The Court of Appeals consolidated two separate cases that collectively concerned the possession of a firearm and ammunition by disqualified persons in violation of Md. Code Ann., Public Safety (2018 Repl. Vol.) § 5-133 and § 5-133.1 (“Pub. Safety”). The defendants in each case, Mr. Mashour E. Howling (“Petitioner Howling”) and Mr. Funiba T. Abongnelah (“Petitioner Abongnelah”), possessed a firearm at the time of arrest, while disqualified from doing so. Both cases proceeded separately to jury trials in the Circuit Court for Montgomery County.

At varying points in the proceedings, each Petitioner requested that the respective circuit court adopt the reasoning of *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191 (2019), where the United States Supreme Court held that the federal statute 18 U.S.C. § 922(g) required proof of knowledge of possession of a firearm and proof of knowledge of the defendant’s status as a person prohibited from possessing a firearm. *Id.* at ___, 139 S. Ct. at 2200. Petitioners requested that the circuit court give a jury instruction incorporating the reasoning of *Rehaif*.

The circuit court declined to give the requested jury instruction in each case. Both Petitioners moved for judgment of acquittal at the close of the State’s case and renewed the motion at the close of all evidence. Pertinent to this appeal, Petitioner Abongnelah argued that the State provided insufficient evidence to establish that he knew he was prohibited from possessing a firearm. The circuit court denied both motions in each case. Two separate juries found Petitioners each guilty of possessing a firearm in violation of Pub. Safety § 5-133. Petitioner Howling was also found guilty of possessing ammunition in violation of Pub. Safety § 5-133.1.

The Court of Special Appeals affirmed in separate unpublished opinions. The intermediate appellate court declined to adopt the reasoning of *Rehaif* in either case, and concluded that the State must prove, with respect to the *mens rea* element, only knowledge of possession of a regulated firearm pursuant to Pub. Safety § 5-133 (in both cases) and knowledge of possession of ammunition pursuant to Pub. Safety § 5-133.1 (in Petitioner Howling’s case). Accordingly, the Court of Special Appeals held that the circuit court did not abuse its discretion in declining to

give Petitioners' requested jury instructions. The court also held in Petitioner Abongnelah's case that there was sufficient evidence to establish knowledge of possession of a regulated firearm.

Held: Affirmed.

The Court of Appeals declined to apply the reasoning of *Rehaif* to its interpretation of Pub. Safety § 5-133 and § 5-133.1 because the plain text, legislative history, and relevant case law did not require the State to prove the defendant's knowledge of status as a person prohibited from possessing a firearm and ammunition. The Court found that the General Assembly intended to exclude the element of knowledge of a person's status as a person prohibited from possessing a regulated firearm and ammunition pursuant to Pub. Safety § 5-133 and § 5-133.1.

The Court held that the circuit court did not abuse its discretion by declining to give a jury instruction stating that the State must prove knowledge of prohibited status pursuant to Pub. Safety § 5-133. The circuit court correctly propounded the Maryland Pattern Jury Instruction, which provides that the State must only prove, with respect to the *mens rea* element of Public Safety § 5-133, the defendant's knowledge of possession of a firearm.

The Court also held that the State provided sufficient evidence to convict Petitioner Abongnelah of possession of a prohibited firearm pursuant to Pub. Safety § 5-133. The State entered into evidence a jail call recording in which Petitioner Abongnelah admitted to possessing a firearm on his person at the time of arrest. Petitioner Abongnelah also stipulated to a prior felony conviction, which prohibited possession of a firearm pursuant to Pub. Safety § 5-133. The State did not need to provide evidence that Petitioner Abongnelah also knew that his prior conviction prohibited possession of a firearm pursuant to Pub. Safety § 5-133.

Joel Adam Dickson v. United States of America, Misc. No. 7, September Term 2021, filed April 25, 2022. Opinion by Biran, J.

<https://mdcourts.gov/data/opinions/coa/2022/7a21m.pdf>

CRIMINAL LAW – ROBBERY – THREATS AGAINST PROPERTY AND CHARACTER

Facts:

In United States District Court, Joel Adam Dickson pled guilty to possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g). At Dickson’s sentencing, the parties disputed whether Dickson’s prior Maryland robbery conviction constitutes a crime of violence for purposes of increasing his advisory Sentencing Guidelines range. The federal sentencing court held that Maryland robbery is a crime of violence within the meaning of the federal Sentencing Guidelines. Dickson appealed his sentence to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit subsequently certified the following question to this Court:

Under Maryland law, can an individual be convicted of robbery by means of threatening force against property or threatening to accuse the victim of having committed sodomy?

The resolution of Dickson’s federal appeal turns on the answer to this question.

Held:

Certified question answered “No.”

The Court of Appeals held that, under Maryland law, an individual cannot be convicted of robbery by means of threatening force against property or threatening to accuse the victim of having committed sodomy.

Article 5 of Maryland’s Declaration of Rights provides that “the Inhabitants of Maryland are entitled to the Common Law of England . . . as [it] existed on the Fourth day of July, seventeen hundred and seventy-six . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State.” Md. Const. Declaration of Rights Art. 5(a)(1); *see Gladden v. State*, 273 Md. 383, 389 (1974). Dickson argued that, as of July 4, 1776, it was accepted in English common law that a person could be guilty of robbery if he took a victim’s property not just by using or threatening to use force against the person of the victim, but also by threatening force against the victim’s property or threatening to accuse the victim of sodomy. Thus,

according to Dickson, these two alternative modalities of robbery became part of Maryland's common law through the incorporation of English common law as it existed on July 4, 1776. Dickson further argued that neither the General Assembly nor this Court has ever disclaimed these two modalities of robbery, and that they therefore remain part of Maryland law today.

The Court of Appeals disagreed. After reviewing the relevant jurisprudence, the Court concluded that it was not settled under English common law on July 4, 1776, that a person could commit robbery by threatening the victim's property or by threatening to accuse the victim of sodomy. Moreover, these theories of robbery have never been an accepted component of Maryland robbery. Maryland courts have consistently opined that violence is a core component of robbery, requiring either the use of force or the threat of force against the person of another. Even if the proffered non-violent theories of robbery did become part of Maryland's common law in 1776, it is clear that they did not exist in Maryland law when the General Assembly codified the "judicially determined meaning" of robbery in 2000.

Broadway Services, Inc. v. Comptroller of Maryland, No. 19, September Term 2021, filed April 1, 2022. Opinion by Getty, C.J.

<https://mdcourts.gov/data/opinions/coa/2022/19a21.pdf>

TAX-GENERAL – SALES AND USE TAX

Facts:

Broadway Services, Inc. (“Broadway”), a for-profit business, contracted with three tax exempt hospitals to provide various services, including janitorial management. As a part of Broadway’s Hospital Service Agreement (“HSA”) with each hospital, Broadway purchased cleaning supplies and equipment for use by hospital staff. The supplies were shipped by the vendors directly to the hospitals, and Broadway paid sales tax on those purchases. Costs for cleaning supplies were included, though not itemized, in the annual price that the hospitals paid to Broadway in twelve monthly installments. Any adjustment to the HSAs during the contract period required a written agreement, signed by both parties.

After the Comptroller of Maryland (“Comptroller”) conducted an audit, Broadway requested an offset credit and refund for the total amount of sales tax Broadway paid to vendors on its purchases of cleaning supplies, arguing that it paid excess taxes for the products it purchased for resale. The Comptroller denied Broadway’s request for a refund and assessed additional charges for unpaid sales and use tax. On appeal to the Tax Court, Broadway contended that the cleaning supplies were purchased for resale to tax-exempt hospitals. In its motion for summary judgment, the Comptroller argued that Broadway was not a reseller, and the Tax Court denied the Comptroller’s motion and held an evidentiary hearing. The Tax Court found that Broadway was not a reseller of the cleaning supplies but was an agent of the hospitals and, as such, should not have been charged sales tax on the purchases. The Comptroller appealed the Tax Court’s decision, which the Circuit Court for Anne Arundel County affirmed. The Court of Special Appeals reversed the circuit court’s decision, and the Court of Appeals granted Broadway’s petition for a writ of *certiorari*.

The Court of Appeals considered whether the Tax Court erred in determining that Broadway was exempt from sales and use tax as an agent of the hospitals. The Court of Appeals also considered whether *John McShain v. Comptroller*, 202 Md. 68 (1953), and Md. Code (1988, 2016 Repl. Vol., 2020 Supp.), Tax General Article § 11 2014 provided a basis to conclude that Broadway should not have been charged sales and use tax on the purchases.

Held: Affirmed.

First, the Court of Appeals held that, as a matter of law, the Tax Court erred in its implied agency analysis, which involved assessing the following three factors: (1) the agent's power to alter the legal relations of the principal; (2) the agent's duty to act primarily for the benefit of the principal; and (3) the principal's right to control the agent. The Court of Appeals held that all three factors weighed against finding that an agency relationship existed between Broadway and the hospitals.

With respect to the first factor, no evidence before the Tax Court showed that Broadway could have altered the hospitals' legal relations with third parties. The Tax Court erroneously considered Broadway's relationship with the hospitals, instead of Broadway's ability to alter the hospitals' legal relations with third parties. Concerning the second factor, the Tax Court erred when it failed to address whether Broadway owed a legal duty to the hospitals. Lastly, the Tax Court erred in determining that the hospitals exercised sufficient control over Broadway. Accordingly, the Court of Appeals determined that the Tax Court erred in its agency analysis and affirmed the Court of Special Appeals.

Second, the Court of Appeals held that *McShain* could not serve as a basis to affirm the Tax Court because *McShain* was not encompassed in the Tax Court's final decision. Although the *McShain* issue was not properly before the Court of Appeals, the Court reached the issue and held that neither *McShain* nor Md. Code (1988, 2016 Repl. Vol., 2020 Supp.), Tax General Article § 11-204 supported a conclusion that Broadway's purchases should have been exempt from sales and use tax. The Court of Appeals emphasized that the holding in *McShain* is narrow and applies to cases where an intermediary contractor purchases tangible personal property, and the items are incorporated into the realty of the tax-exempt organization.

Mayor and City Council of Baltimore v. Thornton Mellon, LLC, et al., No. 6, September Term 2021, filed April 28, 2021. Opinion by Booth, J.

Watts, Biran and McDonald JJ., dissent.

<https://mdcourts.gov/data/opinions/coa/2022/6a21.pdf>

TAX SALES – FEE SIMPLE TITLE CONVEYED BY DEED – ASSIGNMENT OF TAX CERTIFICATE – JUDGMENTS – ASSIGNABILITY – CIRCUIT COURT’S REVISORY POWER OVER ITS JUDGMENT

Facts:

On May 15, 2017, Thornton Mellon, LLC (“Thornton Mellon”) was the successful bidder at a tax sale involving a certain property located in Baltimore City. The Baltimore City Director of Finance (“Director”) subsequently issued a tax sale certificate to Thornton Mellon. On February 26, 2018, after the original property owner failed to redeem the property within the statutory redemption period, Thornton Mellon filed a complaint to foreclose the right of redemption. On July 10, 2019, the Circuit Court for Baltimore City entered a judgment in favor of Thornton Mellon foreclosing the right of redemption. In accordance with Section 14-844 of the Tax-Property Article (“TP”) of the Maryland Code, the judgment ordered that Thornton Mellon be vested with an absolute and indefeasible fee simple title and ordered the Director to execute and deliver a deed to Thornton Mellon, following Thornton Mellon’s successful payment of the remaining bid surplus price and any taxes, liens, or penalties incurred from the sale.

On July 11, 2019—one day after the judgment was entered—Thornton Mellon executed a one-page assignment that purported to assign both the tax sale certificate and the judgment foreclosing the right of redemption to Ty Webb, LLC (“Ty Webb”). Adhering to TP § 14-847, Thornton Mellon prepared and submitted to the Director a tax sale deed for the property reflecting that the property was to be conveyed by the Director to Ty Webb as the assignee. On behalf of the City, the Director refused to execute the tax sale deed reflecting the assignment to Ty Webb arguing that the assignment was invalid because it was executed after the judgment foreclosing the right of redemption was issued. The City believed that the proper way for Thornton Mellon to transfer the property to Ty Webb was to first take title to the property in a tax sale deed as the grantee and, second, to convey the property by deed from Thornton Mellon, as grantor, to Ty Webb, as grantee. After the Director refused to execute the deed, Thornton Mellon filed a notice of substitution in the tax sale case, stating that its interest had been assigned to Ty Webb and requesting that Ty Webb be substituted as plaintiff in the action. Ty Webb, as substitute plaintiff, filed a “Motion for an Order Directing the City to Issue a Tax Deed to Assignee.” The City filed two motions including a “Motion to Strike” and a “Motion to Strike, or in the Alternative, Response to Motion for Order Directed to the City of Baltimore to Issue a Tax Deed to an Assignee.” The City argued that (1) the tax sale certificate was no longer

assignable after the entry of the judgment foreclosing the right of redemption, (2) the judgment itself was not assignable, and (3) upon the entry of the judgment, the only way Thornton Mellon could transfer the property to Ty Webb was by obtaining the deed from the Director, and then executing a new deed transferring title to Ty Webb.

The circuit court issued a memorandum opinion and order granting Ty Webb's Motion and directing the City to execute the deed to Ty Webb as assignee. The circuit court reasoned that the plain language of TP § 14-821 does not limit the assignability of tax sale certificates or a judgment foreclosing redemption, and further, the judgment could be assigned as a chose in action. The City appealed the decision to the Court of Special Appeals, which affirmed the circuit court's holding. Agreeing with the circuit court that both the tax sale certificate and the judgment were freely assignable and the judgment could be assigned as a chose in action, the intermediate appellate court also reasoned that Thornton Mellon's motion to direct the deed to Ty Webb was essentially a motion to revise the judgment, although not captioned as such. The City filed a petition for a writ of *certiorari* to the Court of Appeals, which was granted.

Held: Affirmed.

The fundamental legal issue in this case is when fee simple title vests in real property that has been sold at a tax sale under the provisions of the Maryland tax sale statute, set forth in Title 14, Subtitle 8 of the Tax-Property Article of the Maryland Code (1985, 2019 Rep. Vol., 2021 Supp.) ("TP").

The City contended that under the plain language of TP § 14-844(b), the *judgment itself* vests fee simple title to real property in the certificate holder as a matter of law without any further action by the certificate holder or the tax collector. Under the City's theory, because the judgment transfers fee simple title and extinguishes all prior liens and encumbrances, the certificate holder's tax sale certificate is extinguished upon the entry of judgment and is therefore no longer assignable.

Thornton Mellon disagreed, pointing out that under the plain language of the statute, the collector is required to execute a deed to the certificate holder conveying fee simple title upon the performance of certain conditions, including the payment of the surplus bid price, post-judgment taxes, and any penalties and interest owed.

After considering the plain language of the statute, as well as the statutory scheme, and the definitions of "fee simple title" and "marketable title" under the common law, as well as the Court's jurisprudence concerning tax sales generally, the Court agreed with Thornton Mellon, and held that fee simple legal title to real property sold at a tax sale vests in the tax sale certificate holder upon the collector's execution and delivery of the deed.

The Court held that upon the entry of the circuit court’s judgment foreclosing the right of redemption, the certificate holder acquires an equitable title, or the right to acquire legal title, which may be exercised by satisfying the statutory conditions necessary for a conveyance of fee simple title by deed. The Court determined that the language of TP § 14-844(b)—which states that if the court finds for the plaintiff in an action to foreclose redemption, the “judgment vests in the plaintiff an absolute and indefeasible title in fee simple in the property”—cannot be read in a vacuum without considering the plain language of other provisions of the tax sale statute. The Court pointed out that TP §14-847 requires that the court’s judgment *also* “direct the collector to execute a deed to the holder of the certificate of sale in fee simple,” upon “payment to the collector of the balance of the purchase price, due on account of the purchase price of the property, together with all taxes and interest and penalties on the property that accrue after the date of sale.” The Court observed that other provisions of the statute prohibit the certificate holder from obtaining legal title by deed if the certificate holder does not satisfy the post-judgment obligations. *See* TP § 14-818(a)(2). In addition, where the certificate holder does not comply with the terms of the final judgment within 90 days by paying the amounts required for the execution and delivery of the deed, the statute permits the judgment to be stricken on motion of an interested party for good cause shown. *See* TP § 14-847(d).

The Court held that the circuit court’s entry of a judgment foreclosing the owner’s right of redemption in a tax sale proceeding does not vest fee simple title in the certificate holder. Instead, the judgment grants equitable title to the certificate holder, or the right to acquire legal title upon the performance of certain statutory conditions. Legal title does not pass until the certificate holder pays the balance of the purchase price, post-sale taxes, interest and penalties, and the collector executes a deed conveying fee simple title.

The Court’s holding follows the Legislature’s express directive in TP § 14-832 that the tax sale statute should be construed to ensure a balance between the due process and redemption rights of persons who have an interest in the property and the public policy of providing marketable title to property that is sold at a tax sale. It is also consistent with Maryland general title conveyance law providing that with limited exception, the only means by which legal title to real property is transferred is by recording a deed in the land records of the county where the property is situated. It is also in accord with Maryland case law in which the Court has repeatedly stated that the position of a certificate holder in a tax sale proceeding to foreclose the right of redemption is analogous to that of a mortgagee in a foreclosure proceeding—the Court’s interpretation treats the benchmarks for establishing equitable and legal title the same in both proceedings. Finally, the Court’s holding is consistent with Maryland jurisprudence spanning 100 years, which describes the delivery of the tax deed as creating a new title granted by the sovereign authority.

The Court held that the judgment foreclosing the right to redemption does not extinguish the tax sale certificate or otherwise affect its assignability. TP § 14-821 expressly says that the certificate is freely assignable and does not contain any provision limiting the assignability only to that period prior to the entry of judgment. If the Legislature had intended to limit the certificate’s assignment to the period prior to judgment, it would have said so. To hold that the judgment extinguishes the tax sale certificate would frustrate the public policy of providing

marketable title to property sold at a tax sale. The Court concluded that until the deed is executed, the tax sale certificate is not extinguished and is assignable pursuant to TP § 14-821.

The Court also agreed with the Court of Special Appeals that the judgment itself was assignable. The judgment grants a certificate holder only equitable title to the property. The Court agreed that the judgment foreclosing redemption is a chose in action, which is freely assignable because the tax sale statute also imposes no prohibition on the assignability of the judgment.

Finally, the Court concluded that, even if it had determined that the certificate and judgment were not assignable, the Court would nonetheless have upheld the circuit court's entry of the order directing the City to execute the deed to Ty Webb. The Court determined that the circuit court was within its broad discretion, under its revisory power, to permit the assignee to be substituted as a party, to consider the substituted plaintiff's motion filed within 30 days of the judgment, and to order the City to issue a tax deed to them.

COURT OF SPECIAL APPEALS

Green Healthcare Solutions, LLC v. Natalie M. LaPrade Maryland Medical Cannabis Commission, No. 766, September Term 2021, filed April 28, 2022.
Opinion by Graeff, J.

<https://mdcourts.gov/data/opinions/cosa/2022/0766s21.pdf>

ADMINISTRATIVE LAW – EXHAUSTION OF REMEDIES – ADMINISTRATIVE
MANDAMUS

Facts:

In 2019, Green Healthcare Solutions (“GHS”) submitted an application with the Maryland Medical Cannabis Commission for a medical cannabis processor license, which the Commission denied. GHS filed a Petition for a Writ of Mandamus, or in the alternative, for a Declaratory Judgment in the Circuit Court for Anne Arundel County. The court dismissed GHS’s petition on two alternate grounds: (1) failure to exhaust an available administrative remedy; and (2) failure to state a claim upon which relief can be granted.

Held: Vacated and remanded.

The General Assembly gave the Medical Cannabis Commission broad authority to regulate the medical cannabis industry. Although there is no explicit statutory language providing an administrative remedy for high-ranking applicants to challenge the denial of a grower or processor license, the broad language of the statute gives the Commission implied authority to set up an administrative review remedy. If the Commission had adopted regulations to provide for such a remedy, it could have created a requirement that the administrative remedy be exhausted prior to instituting judicial action. The Commission did not, however, enact a regulation providing for an administrative remedy for unsuccessful applicants for a processor license. Where no administrative review remedy was authorized by statute or regulation, there was no exhaustion requirement. The circuit court erred in finding that GHS’s petition should be dismissed for failure to exhaust administrative remedies.

Administrative mandamus involves judicial review of a quasi-judicial order or action of an administrative agency where such review is not expressly authorized by law. In concluding that the request for administrative mandamus failed to state a claim upon which relief could be granted, the circuit court improperly focused on the availability of administrative review instead of whether judicial review of the Commission's actions was expressly authorized by law.

Cherington Condominium v. Heather Kenney, No. 157, September Term 2021, filed March 31, 2022. Opinion by Leahy, J.

<https://mdcourts.gov/data/opinions/cosa/2022/0157s21.pdf>

CORPORATIONS & ASSOCIATIONS – DIRECTORS – INTERESTED DIRECTORS – BUSINESS JUDGMENT RULE

Facts:

The Cherington Condominium Association (the “Association”), appellant, governs a community of 99 residential units in Montgomery County. Eighty-seven of the units are townhouses, and the remaining twelve are “garden style” units in an apartment building. Heather Kenney, appellee, lives in one of the garden style units.

Ms. Kenney filed an administrative complaint with the Commission on Common Ownership Communities for Montgomery County, Maryland (“CCOC”), alleging that the Association’s 2019 budget violated the Cherington Condominium Declaration and bylaws. Ms. Kenney alleged that the Association’s board of directors (“Board”) violated the community’s bylaws by requiring all residents, including those like her who live in the garden style units, to contribute financially to the maintenance of outdoor spaces around the townhouse units (the “Lawn and Garden Areas”). Notably, all members of the Board lived in townhouse units.

The CCOC dismissed Ms. Kenney’s complaint, concluding that the increase in assessments against the owners of the garden style units was authorized by the Association’s declaration and bylaws. Ms. Kenney then petitioned for judicial review in the Circuit Court for Montgomery County. Following a hearing, the circuit court issued an order and memorandum opinion and remanded the case to the CCOC for further proceedings. Specifically, the court determined that, because the Board was comprised entirely of townhouse unit owners, the Board’s exercise of discretion was self-interested, and therefore, the CCOC must examine whether the assessment these costs onto the garden style unit owners was fair and reasonable. The Association timely noted an appeal.

Held: Affirmed; remanded for further proceedings.

The Court of Special Appeals reached several holdings. The Court first held that when condominium association boards rely on the benefit of the business judgment rule, then under a commonsense application of the law, they must also contend with its limitations, including the interested director transaction rule. To hold otherwise would be contrary to the basic principles

of corporate and fiduciary law through which both the business judgment rule and the interested director transaction rules were developed.

Because the interested director transaction rule, codified at Maryland Code (1975, 2014 Repl. Vol.), Corporations and Associations Article (“CA”), § 2-419, was written to apply to corporations and its language does not completely pair with the organizational structure of a condominium association, the Court applied the statute in conformity with the applicable principles of the common law. The Court held that under common law principles, the interested director transaction standard applied to the Board’s actions because the assessment by the Association against certain members, allegedly for the benefit of the interested board members, is similar to a transaction between a corporation and its directors.

Finally, the Court held that Ms. Kenney’s initial showing that the Board members may have personally benefited from the assessment to the detriment of the garden style unit owners triggered the interested director transaction rule requiring the Association to prove that the Board’s decision was fair and reasonable. In reaching this holding, the Court clarified that merely showing that the members of a condominium board have an interest in an assessment is not enough to trigger the interested director transaction rule. Rather, a challenger must either show that the board members have a direct financial stake in a direct transaction or contract with board members or with another company or entity; or that an assessment benefits the members of the board to the detriment of unrepresented members. Accordingly, the Court affirmed the decision of the circuit court to remand the case for further consideration by the CCOC.

Graham Schiff v. State of Maryland, No., 725, September Term 2021, filed April 27, 2022. Opinion by Wells, C.J.

<https://mdcourts.gov/data/opinions/cosa/2022/0725s21.pdf>

CRIMINAL LAW – HARRASSMENT – STALKING – SUFFICIENCY OF THE EVIDENCE
– FIRST AMENDMENT PROTECTION

Facts:

After a prosecutor helped secure a conviction against appellant Graham Schiff for stalking a woman, Schiff sent the prosecutor, a colleague in the prosecutor’s office, and two judges, several letters and emails expressing his amorous desire for the prosecutor. The prosecutor obtained a peace order against Schiff and, ultimately, the police filed charges of stalking and harassment against Schiff based on the communications that he sent the prosecutor and the others. Later, a jury convicted Schiff of both charges. Schiff appealed claiming the evidence was insufficient to convict him of either charge.

Held: Affirmed.

Schiff maintained that he could not be convicted of stalking because: 1) he did not engage in threatening conduct; 2) he did not intend any of the communications to cause the prosecutor emotional distress; and 3) his communications did not constitute a “malicious, persistent pattern of conduct showing continuity of purpose.” The Court of Special Appeals explained that under the applicable section of the stalking statute, Criminal Law (“CR”) § 3-802(a)(2), the jury need only have found that Schiff knew or should have known that his malicious conduct would cause the victim to experience serious emotional distress. No reported case has discussed sufficiency under this subsection.

Here, the evidence was sufficient to objectively show that Schiff’s communications, in fact, caused the prosecutor serious emotional distress and were done with the intent to do so. Further, the emails and letters that Schiff sent to the prosecutor showed a continuing course of conduct, even though this issue had not been preserved.

As for the conviction for harassment, Schiff made similar arguments as to why the conviction could not be sustained under CR § 3-803(a) prohibiting harassment: 1) that he did not intend to harm, alarm or annoy the prosecutor; 2) that he did not ignore the prosecutor’s request to stop communicating with her; and 3) that the communications he sent after the peace order was in place had a legal purpose, and were not sent to harass or annoy the victim.

In this case, the evidence showed that the peace order the prosecutor obtained against Schiff sufficiently warned him that his communications were harassing. Considering only the communications sent after the peace order was established, a reasonable factfinder could conclude that those communications were, in fact, harassing. Those same communications were without legal purpose, even though the communications might have mentioned some legal matter. But this analysis did not extend to the letters Schiff sent to the judges. Those communications could reasonably have been seen to have been sent for primarily a legal purpose, even though they were *ex parte* and inappropriate. Finally, although his argument is unpreserved, a reasonable factfinder could have concluded that the communications sent after the peace order were objectively sent with the intent to harass, alarm, or annoy the prosecutor.

Finally, the Court held that none of Schiff's communications were protected speech under the First Amendment. Schiff did not raise a facial or "as-applied" First Amendment challenge to either of the criminal statutes. Consequently, under a sufficiency of the evidence analysis, the evidence showed that the speech at issue was integral to criminal conduct and did not merit free speech protection.

Bridget Romeka v. RadAmerica II, LLC, et al., No. 1207, September Term 2020, filed April 27, 2022. Opinion by Eyler, Deborah S., J.

<https://mdcourts.gov/data/opinions/cosa/2022/1207s20.pdf>

MARYLAND HEALTH CARE WORKER WHISTLEBLOWER PROTECTION ACT (HCWWPA OR ACT), HEALTH OCCUPATIONS ARTICLE §§ 1-502 THROUGH 1-506 – ACTION FOR VIOLATION OF HCWWPA – PROOF OF CAUSATION – McDONNELL DOUGLAS EVIDENTIARY FRAMEWORK – SUMMARY JUDGMENT.

Facts:

Ms. Romeka worked as a chief radiation therapist for RadAmerica, which supplied radiation treatment health care workers to a hospital’s radiation oncology center. Over a period of 2 ½ weeks, her superiors investigated complaints about her falsification of a medical record, incompetency endangering patient safety, and poor treatment of those she supervised and/or worked with; and the designated Human Resources Department then conducted its own investigation into the same complaints. Ms. Romeka’s immediate supervisors recommended that she be fired, and the Human Resources Department later made the same recommendation. The day after that second recommendation, Ms. Romeka made an oral complaint to her immediate superior about a radiation therapy machine being used with a broken treatment couch. The treatment couch had been broken for only three days. The next day, a Friday, RadAmerica’s President made the final decision to fire Ms. Romeka. There was no evidence that he knew about her complaint when he did so. On Monday, Ms. Romeka was fired by her immediate superior. She asked him if she could resign instead, a request that implicitly was denied.

Ms. Romeka sued, alleging that her oral complaint was a protected disclosure under the HCWWPA and that she was fired in reprisal for making it, in violation of the Act. She also alleged that the failure to allow her to resign instead of being fired, immediately after she was fired, was a further violation of the Act.

The circuit court granted summary judgment in favor of RadAmerica, ruling that on the undisputed material facts, Ms. Romeka could not show causation, i.e., that she was fired because she had made the protected disclosure; and that RadAmerica’s refusal to allow her to resign was not actionable.

Held: Affirmed.

When all material disputed facts and all legal disputes that were not the basis of the summary judgment ruling are assumed in favor of Ms. Romeka, RadAmerica was entitled to judgment as a

matter of law. Contrary to Ms. Romeka's argument, motivating factor causation is not legally sufficient to prove causation in an action under the HCWWPA, nor is a refusal to allow an employee who just has been fired to resign a violation of that Act.

To succeed in an action under the HCWWPA, an employee must prove, among other things, that her employer took an adverse personnel action against her because she made a protected disclosure. In such a retaliation action, when there is no direct evidence, the order and nature of proof is governed by the evidentiary framework established for Title VII cases in *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973). Under that framework: 1) the employee must produce evidence of a prima facie case, *i.e.*, that the employee engaged in a protected activity, that the employer took an adverse personnel action against the employee, and that there was a causal connection between the two; 2) the employer then bears the burden to produce evidence that the adverse action was taken for a legitimate, non-retaliatory reason; and 3) the employee then must show pretext, *i.e.*, that the legitimate reason offered by the employer was not the actual reason for the adverse action, and therefore, by inference, the real reason for the adverse action was illegal retaliation.

In employment retaliation cases under Title VII, an employee must prove that her protected activity was the but-for reason for the employer's adverse action; it is not sufficient for the employee to show that the protected activity was a motivating factor in the adverse action. *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). Traditionally, an employee in a Title VII retaliation claim has been allowed to make out a prima facie case in the first stage of the *McDonnell Douglas* framework with proof of less than but-for causation. In *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243 (4th Cir. 2015), the court held that in retaliation cases to which the *McDonnell Douglas* framework applies, the but-for causation requirement is satisfied because, even though less than but-for causation is required at the first stage, but-for causation is the essence of proof of pretext at the third stage. By proving that her protected activity was the actual reason for the employer's adverse action, the employee is proving but-for causation.

Given the purpose and language of the HCWWPA, the reasoning in *Nassar* and *Foster* are persuasive on the issue of causation in what is a statutorily based employment retaliation action. At the prima facie case stage, proof that RadAmerica's final decision to terminate Ms. Romeka's employment was made one day after she made her protected disclosure may be, and for purposes of this opinion is assumed to be, sufficient to prove causation. The burden shifted to RadAmerica to produce evidence of a legitimate, non-retaliatory reason for firing Ms. Romeka. That burden was satisfied by evidence of the investigations into her misconduct and the recommendations to fire her based on the results of the investigations, all of which took place before she made her protected disclosure. The burden then shifted to Ms. Romeka to show pretext. Her only evidence of pretext was that witnesses for RadAmerica gave differing dates on which the decision to terminate her employment was made. The dates were not inconsistent, however; they all were dates on which recommendations were made to fire her in the course of the step-by-step process used to reach a final decision about termination. This did not show pretext and there was no other pretext evidence offered. Accordingly, on the summary judgment

record, Ms. Romeka did not offer any evidence that would support a reasonable finding that she was fired because she made a protected disclosure under the HCWWPA.

Finally, Ms. Romeka asked to resign after she had been fired. At that time, she no longer was in an employment relationship with RadAmerica, which is necessary for coverage by the HCWWPA. In addition, it would be inconsistent to hold that RadAmerica did not retaliate against Ms. Romeka by firing her but, to avoid liability under the Act, would have had to immediately rescind that justified firing decision and allow her to resign.

A+ Government Solutions, LLC, et al. v. Comptroller of Maryland, No. 466, September Term 2021, filed March 31, 2022. Opinion by Leahy, J.

<https://mdcourts.gov/data/opinions/cosa/2022/0466s21.pdf>

INCOME TAX – DISREGARDED ENTITIES – TAXATION OF NATIVE AMERICAN TRIBES – TRIBAL CORPORATIONS

Facts:

The Chickasaw Nation is a federally recognized Native American tribe. Chickasaw Nation Industries, Inc. (“CNI”), is a federally chartered corporation created and incorporated in 1996 under the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 5201-5210 (“OIWA”), commonly referred to as a “section 17 corporation” after the parallel provision in section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101-5143. The appellants are a collection of six limited liability companies (the “CNI Subsidiaries”), each wholly owned by CNI Government, LLC, which in turn is owned by CNI. The CNI Subsidiaries, as well as CNI Government, are treated as disregarded entities for income tax purposes.

On August 18, 2014, the Comptroller of the Treasury issued notices of tax assessment against each of the CNI Subsidiaries for tax year 2012 after determining that they were required to pay pass-through entity income tax (“PTE income tax”). The CNI Subsidiaries challenged this determination, but the Tax Court and the Circuit Court for Anne Arundel County both affirmed the Comptroller’s assessment of PTE income tax against them. The CNI Subsidiaries filed a timely appeal.

Held: Reversed

The Court of Special Appeals analyzed the case in three parts. First, the Court clarified that under Maryland Code (1988, 2016 Repl. Vol.), Tax-General Article (“TG”), § 10-102.1(c)(1), pass-through entity income tax “shall be treated as a tax imposed on the nonresident or nonresident entity members that is paid on behalf of the nonresidents or nonresident entities by the pass-through entity.” The income of a pass-through entity passes through and is attributed to its members for purposes of Maryland income tax law. Consequently, the Court instructed, in determining whether to impose a tax on the owner’s nonresident income pursuant to TG § 10-102.1(c)(1) in this case, the Comptroller must look past all of CNI’s disregarded subsidiaries (including CNI Government) to CNI’s income. Accordingly, the Court held that the CNI Subsidiaries would be responsible for paying any taxes owned on behalf of CNI, not CNI Government.

Second, the Court held that the PTE income tax only applies to nonresident taxable income “[t]o the extent included in federal adjusted gross income.” TG § 10-210(b). Accordingly, if a nonresident entity has zero federal adjusted gross income despite its pass-through entities’ activity in Maryland, then that nonresident entity is not subject to the pass-through entity income tax.

Third, the Court considered whether CNI, as the nonresident parent company of the CNI Subsidiaries, has any federal adjusted gross income. The Court adopted the reasoning of the United States Tax Court in *Uniband, Inc. v. Comm’r of Internal Revenue*, 140 T.C. 230 (T.C. 2013), that Congress’s silence on federal taxation of Native American tribes is “deliberate,” and that Native American tribes are therefore not subject to federal income tax. Because none of CNI’s income is taxable under federal law, CNI has zero nonresident taxable income as the term is defined in TG §§ 10-102.1(a)(6), 10-210(b). Accordingly, the Court held that CNI owes zero pass-through entity income tax on the income it earns via its pass-through entity subsidiaries that do business in Maryland.

ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated February 18, 2022, the following attorney has been indefinitely suspended by consent, effective April 15, 2022:

JOHN ANTHONY MOODY

*

By an Order of the Court of Appeals dated March 9, the following attorney has been indefinitely suspended by consent, effective April 15, 2022:

ANDREW RYAN CORCORAN

*

By an Order of the Court of Appeals dated April 22, 2022, the following attorney has been suspended for seven months, effective *nunc pro tunc* to March 24, 2022:

PAUL SAUL HAAR

*

JUDICIAL APPOINTMENTS

*

On February 17, 2022, the Governor announced the appointment of **HON. ANGELA M. EAVES** to the Court of Appeals. Judge Eaves was sworn in on April 12, 2022 and fills the vacancy created by the retirement of the Hon. Robert N. McDonald.

*

On February 17, 2022, the Governor announced the appointment of **HON. MATTHEW J. FADER** to the Court of Appeals. On April 15, 2022, the Governor announce his designation as Chief Judge of the Court of Appeals. Chief Judge Fader was sworn in on April 15, 2022 and fills the vacancy created by the retirement of the Hon. Joseph M. Getty.

*

On February 17, 2022, the Governor announced the appointment of **HON. ANNE K. ALBRIGHT** to the Court of Special Appeals. Judge Albright was sworn in on April 20, 2022 and fills the vacancy created by the elevation of Hon. Matthew J. Fader to the Court of Appeals.

*

On April 15, 2022, the Governor announced the designation of **HON. E. GREGORY WELLS** as Chief Judge of the Court of Special Appeals.

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RULES ORDERS AND REPORTS

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A Rules Order pertaining to the Third Supplement to the 209th Report of the Standing Committee on Rules of Practice and Procedure was filed on April 13, 2022.

<https://mdcourts.gov/sites/default/files/rules/order/ro209supplement3.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>

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