

Amicus Curiarum

VOLUME 28
ISSUE 12

DECEMBER 2011

A Publication of the Office of the State Reporter

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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Alexander N. Agiliga, AG No. 21, September Term 2011, filed October 26, 2011. Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/21a10ag.pdf>

ATTORNEY DISCIPLINE - APPROPRIATE SANCTIONS

Facts: Alexander N. Agiliga, Respondent, was admitted to practice law in Maryland on June 23, 1993. On October 30, 2008, Respondent was decertified from the practice of law for failing to file a report concerning his *pro bono* services. On April 6, 2009, Respondent was suspended from the practice of law for failing to pay an assessment from the Client Security Trust Fund.

The petition filed by the Attorney Grievance Commission concerned several cases handled by Respondent. In two of those cases, Respondent represented clients with regard to their personal injury claims. In both cases, Respondent signed a medical assignment, agreeing to pay the chiropractic facility that treated the clients with the proceeds of any settlement obtained in their cases. Although the cases settled, Respondent failed to pay the money that was owed, despite receiving several letters regarding the respective clients, to which he never responded. In both cases, Respondent had no records regarding the amount of settlement obtained or any other details of the claims. In the final case addressed in the petition, two clients retained Respondent together for their personal injury claim. Although the case settled in November 2008, the clients did not receive their share of the settlement proceeds until March 2009. Furthermore, Respondent did not maintain an escrow account but had a "business" account separate from his personal account. Respondent claimed that these omissions were caused by the dire financial situation he was experiencing and the fact that he had been "locked out" of his office and had no access to his client files or his mail.

The Attorney Grievance Commission, acting pursuant to Maryland Rule 16-751, filed a Petition for Disciplinary or Remedial Action, which alleged that Respondent violated Maryland Rules of Professional Conduct (MRPC) 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15 (Safekeeping Property), 1.16 (Declining or Terminating Representation), 5.5 (Unauthorized Practice of Law), and 8.4 (Misconduct). The Petition also contained allegations that Respondent violated Maryland Rules 16-

603 (Duty to Maintain Trust Account), 16-604 (Trust Account - Required Deposits), and 16-609 (Prohibited Transactions), as well as Maryland Code § 10-306 of the Business Occupations and Professions Article (Misuse of Trust Money).

Pursuant to Maryland Rule 16-752(a), the matter was referred to a judge of the Circuit Court for Prince George's County to conduct a hearing. The hearing was held on February 22, 2011, and in the findings of fact and conclusions of law, the hearing judge found by clear and convincing evidence that Respondent had violated MRPC 1.1, 1.3, 1.15(a), (d), and (e), 1.16(d), 5.5(a) and (b), and 8.4(b), (c), and (d), Maryland Rules 16-603, 16-604, and 16-609, and § 10-306 of the Business Occupations and Professions Article of the Maryland Code.

Held: The hearing judge's findings of fact were not clearly erroneous and her conclusions of law were justified. Sanctions are imposed in attorney discipline matters in accordance with the nature and gravity of the violations and the intent with which they were committed. Respondent's actions were willful and dishonest, and he presented no compelling extenuating circumstances to justify imposition of a sanction other than disbarment. Respondent's conduct in misusing funds, failing to use an escrow account to safeguard client funds, failing to keep records to document the receipt and disbursement of client funds, and engaging in the unauthorized practice of law, warranted the imposition of the sanction of disbarment.

Attorney Grievance Comm'n v. Brady, Miscellaneous Docket AG No. 10, September Term 2010, filed October 25, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/10a10ag.pdf>

ATTORNEY DISCIPLINE - SANCTIONS - DISBARMENT

Facts: Petitioner, the Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against attorney Andre Levell Brady, Respondent. Petitioner alleged violations of the Maryland Lawyers' Rules of Professional Conduct ("MRPC") based on Respondent's conduct in the course of his representation of a client in a civil matter.

The Court of Appeals assigned the matter to the Honorable Larnzell Martin, Jr., of the Circuit Court for Prince George's County, pursuant to Maryland Rule 16-752(a). In making findings of fact, Judge Martin admitted all of Bar Counsel's submitted factual allegations, pursuant to Maryland Rule 2-323(e), because Respondent failed to file an answer to Bar Counsel's Petition, and he neglected to enter an appearance at the matter's hearing on April 27 and May 18, 2011. Subsequently, Judge Martin found by clear and convincing evidence that Respondent violated MRPC 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.5(a) (unreasonable fee), 1.16 (termination of representation), and 8.4(d) (professional misconduct).

Judge Martin found that Respondent had undertaken the representation of a client, Sylvia Robinson-Green, in a civil matter beginning sometime in July 2007. Respondent met with Robinson-Green on more than one occasion to discuss the representation, eventually filing an initial and amended complaint on Robinson-Green's behalf. The defendants in the matter filed Motions to Dismiss the complaint. Respondent filed a notice with the court that the parties, by mutual agreement, had extended the time to respond to the motions. Respondent, however, failed to file a response to either motion. As a result, the complaint was dismissed with prejudice, leaving Robinson-Green unable to pursue her claims.

Judge Martin also found that Respondent failed to notify Robinson-Green that the defendants had moved to dismiss the complaint, and Respondent failed to attend a continued Status Conference on the matter on March 21 and May 2, 2008. Robinson-Green attended the Status Conference, after receiving notice of its scheduling directly from the court, where she first learned of the pending Motions to Dismiss. She attempted to find another attorney

to represent her before the continued hearing on May 2, 2008, but was unable to do so.

Finally, Judge Martin found that the terms of Respondent's representation of Robinson-Green called for an hourly fee of \$220, and an initial deposit of \$1,300. Robinson-Green was also instructed to make monthly payments in the amount of \$1,300. She did as instructed, ultimately paying Respondent approximately \$10,000. However, Robinson-Green never received billing statements indicating the amount of time spent on the case. Respondent has not contacted Robinson-Green since prior to March 21, 2008, and has not responded to her attempts to contact him. He also has not refunded any of the fees he collected.

Judge Martin concluded that Respondent abandoned his client, in violation of MRPC 1.1 and 1.3, by failing to file responses to the defendants' Motions to Dismiss and failing to appear at the Status Conference. Additionally, Judge Martin concluded that Respondent's failure to notify his client about the pending motions and status conference and failure to respond to her reasonable requests for information was a violation of MRPC 1.4. As to MRPC 1.5(a), Judge Martin concluded that, while Respondent's initial fee arrangement was not unreasonable, it became unreasonable after Respondent failed to provide services commensurate to the nearly \$10,000 he collected. Judge Martin also concluded that Respondent's abandonment of his client in the midst of litigation violated MRPC 1.16. Finally, Judge Martin concluded that Respondent engaged in conduct prejudicial to the administration of justice in violation of MRPC 8.4(d) by failing to protect his client's interests and by abandoning her case without notice after accepting approximately \$10,000 in fees, resulting in her inability to pursue her claims.

After Judge Martin issued his findings of fact and conclusions of law, Respondent moved in the Court of Appeals for additional time to respond to Petitioner's Recommendation for Sanction. The Court of Appeals granted Respondent's request for additional time. Nonetheless, Respondent failed to file a response to the Recommendation for Sanction, and did not appear before the Court for oral arguments on September 8, 2011.

Held: Respondent violated Maryland Lawyers' Rules of Professional Conduct 1.1, 1.3, 1.4, 1.5(a), 1.16, and 8.4(d), for which the appropriate sanction is disbarment.

The Court of Appeals conducted an independent review of the record, giving deference to the hearing judge's findings of fact. Neither party filed exceptions to Judge Martin's findings of fact,

so the Court treated those findings as established for the purposes of determining appropriate sanctions. The Court concluded that there was clear and convincing evidence in the record that Respondent violated each of the rules noted above. The Court further concluded that disbarment was the appropriate sanction for Respondent's conduct, noting that Respondent's effective abandonment of his client justified disbarment regardless of his lack of a prior disciplinary history, under *Attorney Grievance Commission v. Tinsky*, 377 Md. 646, 835 A.2d 542 (2003) and *Attorney Grievance Commission v. Wallace*, 368 Md. 277, 793 A.2d 535 (2002).

Attorney Grievance Comm'n v. Paul, Miscellaneous Docket AG No. 51, September Term 2007, filed October 28, 2011. Opinion by Bell, C.J.

<http://mdcourts.gov/opinions/coa/2011/51a07aq.pdf>

ATTORNEY DISCIPLINE - SANCTIONS - PUBLIC REPRIMAND

Facts: Petitioner, the Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against attorney Dana Andrew Paul, Respondent. The petition charged that the respondent violated Rules 3.3, Candor Toward the Tribunal, and 8.4, Misconduct, of the Maryland Rules of Professional Conduct, when he falsified a signature on a document and subsequently submitted that document to court.

The Court of Appeals referred the case, pursuant to Rule 16-752 (a), to the Honorable Philip T. Caroom, of the Circuit Court for Anne Arundel County, for hearing. Judge Caroom found, by clear and convincing evidence, the Respondent violated Rule 8.4 (d) only.

During the course of litigation between divorced parties resolving a dispute over the sale of their home, the respondent found himself working against opposing counsel and former colleague with whom he had a contentious relationship in the past. Because the sale of the home had been completed before suit was filed against his client, Respondent filed a motion to dismiss both the suit and the Notice of *Lis Pendens*, and, after speaking with the respondent and reviewing the sale contract, opposing Counsel agreed to dismiss the respondent's clients from the law suit. Opposing Counsel then faxed the respondent, accepting his offer to draft the stipulation of dismissal of the complaint as to the respondent's clients, and further asked that he include all of the clients who were privy to the lawsuit, including her own. Instead, the respondent drafted a dismissal that did not comply to opposing Counsel's request, and opposing Counsel, after seeing the respondent's non-conforming draft, sent him her own draft containing the corrections along with her own signature, to be filed.

Judge Caroom found that the respondent filed his version of the Stipulation of Dismissal and Notice of Termination of *Lis Pendens*, cutting the opposing counsel's signatures from the documents she signed and, using a photocopy machine, pasting them on a redline version of the ones he had prepared. Judge Caroom found that Respondent intentionally cut and pasted the opposing counsel's signature without her authorization, in violation of Rule 8.4 (d), conduct 'prejudicial to the administration of justice' because: a) Respondent acted with a deliberate disregard of Rule 1-

311 (b) when he purported to offer to the court a document which had been signed and approved by another attorney; in fact, that document was not approved by that attorney - even though she might have lacked a substantive basis to object to it; and b) respondent took this action without prior appropriate communication to opposing counsel under circumstances which Respondent had reason to believe would cause an unnecessary conflict with opposing counsel.

Finding that since the document altered was not a public record, as required by the criminal code on which the 8.4 (b) violation was based, and finding that because of his honest belief that he was justified in making the alteration, and thus, did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, Judge Caroom exonerated Respondent of a violation of Rule 8.4 (b). Further, interpreting the "false statement of material fact or law" that Rule 3.3 prohibits a lawyer from making to a tribunal as involving substantive representations, as opposed to procedural matters involving documents' status as originals, copies or composites, the court exonerated the respondent of a violation of that Rule.

Bar Counsel took no exceptions to either the findings of fact made, or the conclusions of law drawn, by the hearing court. The respondent took exception to the hearing judge's factual findings subsequent to the disputed stipulation of dismissal transaction. Particularly, he argued that the findings were immaterial to the charges filed against him because they took place after his alteration of the document, the basis of his misconduct charges.

Held: Respondent violated Maryland Lawyers' Rules of Professional Conduct 8.4 (d), for which the appropriate sanction is a public reprimand.

The Court of Appeals overruled the respondent's exception, concluding that what the respondent did when confronted with the alteration and how he defended the disciplinary action brought as a result were relevant to a determination of his intent in, and justification for, making the alteration.

The Court then determined what was the appropriate sanction for Respondent's misconduct. The Court first noted that the Respondent and opposing Counsel agreed to the terms of the Dismissal as to the respondent's clients, and his misconduct did not have any adverse impact on the rights of any other parties to the litigation; thus, the clients were not prejudiced or harmed in any way from the respondent's misconduct. Secondly, the respondent's behavior was not self-serving or profitable, and he did not make the misrepresentation to the court in order to gain

something that otherwise would have been unobtainable. The respondent behaved, although intentionally and deliberately, with an honest belief that he was legally authorized to do so; thus, his misconduct was not willful and his motivation not fraudulent. Lastly, the respondent's show of remorse, as well as his lack of a prior disciplinary history, deemed it unlikely that he would repeat the misconduct again.

Attorney Grievance Commission of Maryland v. Joel David Joseph, No. AG 11, September Term, 2011, filed October 27, 2011, Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/11a10ag.pdf>

ATTORNEY DISCIPLINE – CANDOR TOWARD THE TRIBUNAL – MRPC 3.3(a)(1), 8.4(c), 8.4(d) (Misconduct)

Facts: Joel David Joseph ("Respondent") was charged with professional misconduct arising out of representations made to the California Bar and third persons, regarding his residency in connection with applications for appearance *pro hac vice*.

On January 31, 2007, Respondent left Maryland to live in California. In March 2007, Respondent contacted the Law Offices of Robert M. Moss, located in California. Respondent told the office administrator that he was a Maryland attorney looking for local counsel to sponsor his admission *pro hac vice* and act as co-counsel in cases to be filed in California courts. Respondent said he lived in Maryland, had an office in Maryland and had been practicing for years. Respondent and Moss entered into an Agreement to work together on two cases. The applications for *pro hac vice* in these cases included the following averment signed under penalty of perjury by Respondent: "I am not a resident of . . . the State of California." Each indicated that his out of state address was: Law Offices of Joel D. Joseph, 7272 Wisconsin Avenue, Suite 300, Bethesda, Maryland 20814.

The law firm received a phone call from the State Bar of California, indicating that Respondent's applications had to provide a residential address rather than an office address in accordance with California Rule 9.40, which prohibits California "residents" from gaining *pro hac vice* admission. Joseph responded by averring that 4938 Hampden Lane, Apt. 118, Bethesda, Maryland was an apartment where he lived with his girlfriend. In fact, this address was a rented UPS mailbox. There was other evidence demonstrating that Respondent was living in California at the time and intentionally chose to misrepresent his residency.

Held: Disbarment was the appropriate sanction.

Respondent's exceptions to the hearing judge's findings of fact and conclusions of law were overruled. There was clear and convincing evidence that Respondent violated MRPC 3.3(a)(1), as he was not candid in his applications for admission *pro hac vice* filed in California courts. Respondent engaged in dishonesty, deceit and misrepresentation in violation of MRPC 8.4(c), and that his

dishonest and deceptive conduct was prejudicial to the administration of justice because it was "likely to bring the legal profession into disrepute," in violation of MRPC 8.4(d). Disbarment is typically the appropriate sanction for intentionally dishonest conduct.

Erik Stoddard v. State of Maryland, No. 105, September Term, 2010. Opinion filed on November 3, 2011 by Raker, J.

<http://mdcourts.gov/opinions/coa/2011/105a10.pdf>

CRIMINAL PROCEDURE - DEFENDANT'S ELECTION TO TESTIFY OR REMAIN SILENT

Facts: The central issue in this case was whether the circuit court erred by requiring a criminal defendant to testify before the completion of the defense case or forgo testifying at all.

In 2008, a jury found petitioner guilty of child abuse resulting in death and manslaughter, in connection with the 2002 death of three-year-old Calen DiRubbo. Petitioner had been tried twice before, but this Court reversed the conviction resulting from petitioner's first trial, *Stoddard v. State*, 389 Md. 681, 887 A.2d 564 (2005), and the circuit court vacated the jury's verdict and ordered a new trial after petitioner's second conviction. Petitioner testified in the latter of these trials. The issue in this appeal arose during petitioner's third trial.

At trial, petitioner sought to call an expert medical witness, who had testified at his second trial about the timing and nature of the injuries that caused Calen's death. Although the parties anticipated completing the trial before the judge left town for a three-day judicial conference, defense counsel informed the court that the expert witness would not be available to testify before the proceedings broke. During discussions on scheduling the remainder of the trial, defense counsel told the court that all defense witnesses could testify before the expert witness, identifying in particular a "long" witness whose testimony could last a few hours. The court agreed to let the expert witness testify after the break in proceedings.

After the brief testimony of two defense witnesses, the court asked if any defense witnesses, other than the expert, remained. Defense counsel indicated that petitioner was the "long" witness mentioned earlier and that he intended to testify, upon which the court ordered petitioner to take the stand at once. When defense counsel stated that petitioner would prefer to wait until the expert witness had testified before deciding to whether take the stand, the court told petitioner that if he wished to testify, he would do so at that time or forgo the right to testify at all. Over the objections of defense counsel and petitioner, petitioner testified.

Thereafter, petitioner was convicted. He timely appealed to the Court of Special Appeals, which affirmed in an unreported opinion. This Court granted his petition for writ of certiorari, *Stoddard v. State*, 417 Md. 125, 9 A.3d 1 (2010), to consider whether the trial court's requiring him to testify, if he wished to testify at all, prior to the last defense witness violated due process and the prohibition of compelled self-incrimination as set forth in *Brooks v. Tennessee*, 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972).

Held: The Court of Appeals affirmed. In *Brooks*, the United States Supreme Court held that a state statute that required a defendant wishing to testify in his own behalf to be the first witness called by the defense violated the right to due process and right against self-incrimination guaranteed by the United States Constitution.

A majority of the Court of Appeals, after reviewing the broad language used by the Supreme Court, held that *Brooks* was not limited to situations where a statute prescribed the order of a criminal defendant's testimony. Rather, a defendant's rights are violated when a trial court pressures a defendant to take the stand at a particular time by foreclosing later testimony if he refuses. Whether a defendant had decided to testify, the majority further stated, addressed not whether there was a *Brooks* violation but whether such a violation was harmless.

A plurality of the Court held that a *Brooks* violation is subject to harmless error analysis, and that, under the circumstances of this case, the error was harmless. Stressing that such an inquiry is fact-intensive and case-specific, the Court considered the following factors in concluding beyond a reasonable doubt that petitioner had already or would have elected to testify regardless of the trial court's error: (1) that petitioner, through counsel, had indicated previously an intention to testify; (2) that petitioner had elected to testify in his second trial; (3) that the expert witness's testimony did not depart from his previous testimony on the stand, and that petitioner did not allege that he would have forgone testifying after hearing the expert's testimony; and (4) that testimony by petitioner was necessary to support his particular, chosen defense.

Briscoe v. State, No. 4, September Term 2010, filed October 24, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/4a10.pdf>

CRIMINAL LAW - FOURTH AMENDMENT - INVENTORY SEARCH - EVIDENCE OF ESTABLISHED POLICY

FOURTH AMENDMENT - GOOD-FAITH EXCEPTION - REASONABLE RELIANCE ON BINDING PRECEDENT

Facts: Petitioner, William E. Briscoe, was convicted by a jury in the Circuit Court for Baltimore City of possessing a regulated firearm after having been convicted of a disqualifying crime; wearing, carrying, or transporting a handgun in a vehicle; possessing cocaine; and driving on a suspended license. The charges arose from evidence the police recovered from a search conducted at the time of Petitioner's arrest of the vehicle he had been driving.

At trial Petitioner sought to suppress the handgun, which had been recovered from a locked glove compartment. The suppression court denied the motion on the grounds that the evidence had been obtained lawfully, either as an inventory search or as a search incident to arrest pursuant to *New York v. Belton*, 453 U.S. 454 (1981).

Petitioner appealed to the Court of Special Appeals. While the case was pending in that court, the United States Supreme Court decided *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009), which overruled *Belton*. In the Court of Special Appeals, the State conceded that the search of the locked glove compartment was not lawful pursuant to *Gant*, but argued that the good-faith exception applied to the officer's conduct. The State argued that Petitioner, therefore, was not entitled to have the handgun suppressed. The Court of Special Appeals held that the search was a valid inventory search and did not address whether the good-faith exception applied.

Petitioner then sought review in the Court of Appeals. After oral argument and while the case was still pending, the Supreme Court decided *Davis v. United States*, 564 U.S. ___, ___, 131 S. Ct. 2419, 2423-24 (2011), which held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."

Held: Reverse. The Court of Appeals held that, because the

record developed at the suppression hearing lacked any evidence of a Baltimore City Police Department policy, the search was not a valid inventory search. Further, the record lacked evidence demonstrating that the vehicle's locked glove compartment would have been inventoried according to departmental policy once it was towed to the impound lot. Therefore, the Court could not conclude that the handgun from the locked glove compartment would have been discovered inevitably.

The Court held that the police searched the vehicle Petitioner was driving pursuant to the then-prevailing bright-line rule of *Belton*. *Belton* permitted a search in the "relatively narrow compass of the passenger compartment[,]" including any containing found therein. 453 U.S. at 460. Although the police officer subjectively believed he was performing an inventory search, the good-faith exception requires "objectively reasonable reliance" on appellate precedent. Because the search was permissible under the bright-line *Belton* rule, the good-faith exception applies. The suppression court correctly denied the motion to suppress the handgun found within the locked glove compartment.

Kenneth Gerald Stabb v. State of Maryland, No. 2, September Term 2011, filed 22 October 2011, Opinion by Harrell, J.

<http://mdcourts.gov/opinions/coa/2011/2a11.pdf>

CRIMINAL LAW - JURY INSTRUCTIONS - STATE'S LACK OF SCIENTIFIC EVIDENCE

Facts: Stabb was charged with third-degree sexual assault and second-degree assault for touching a seven year old girl in the area of her external genitalia. No physical exam to search for fingerprints or DNA was performed on the victim because she did not disclose penetration. At trial, the State's case-in-chief relied heavily on the statements of the victim. Stabb's defense, while commenting on the lack of corroborating physical evidence, focused on the State's single child witness, conflicting testimony of other witnesses, motive of the victim's mother and grandmother to implicate Stabb, the possibility of an alternative assailant, and an alibi. At trial, prior to closing arguments and over defense counsel's objection, the court delivered a State requested jury instruction that said, in relevant part:

there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case.

The jury found Stabb guilty of both counts and he was sentenced to eight years, with all but four years suspended. Stabb appealed and the Court of Special Appeals, in an unreported opinion, affirmed the convictions and the jury instruction given by the trial court. The Court of Appeals granted Stabb's petition for writ of certiorari to consider the following question:

Did the trial court err in instructing the jury that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case?

Held: Reversed. The Court of Appeals concluded that although "anti-CSI effect" jury instructions, such as the one given in this case, are not per se impermissible; however, under these facts, the preemptive instruction violated Stabb's right to a fair trial by relieving the State of its burden to prove guilt beyond a reasonable doubt. In *Atkins v. State*, 421 Md. 434, 26 A.3d 979 (2011), the Court of Appeals reversed a conviction based on the giving of the same instruction as was given in Stabb's case, finding that the instruction invaded the province of the jury by

commenting on a question of fact. In *Atkins* and this case, the Court found that the state of the scholarly legal and scientific research was inconclusive as to whether a "CSI effect" exists and if it unduly influences jurors. The Court cautioned that future use of "anti-CSI effect" jury instructions should be limited to circumstances where curative instructions are necessary, i.e., to correct an overly robust and vehement closing argument that harps on the lack in the State's case of physical evidence or an incorrect statement of law.

Shawn Johnson v. State, No. 137, September Term 2010, filed October 27, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/137a10.pdf>

CRIMINAL LAW AND PROCEDURE - JURY TRIALS - RIGHT TO AN IMPARTIAL JURY

Facts: Petitioner Shawn Johnson was convicted by a jury of robbery, conspiracy to commit armed robbery and related offenses in the Circuit Court for Baltimore City. At trial, the State admitted, among other evidence, two inoperable cell phones allegedly used by Petitioner's cousin, an admitted accomplice to the robbery and a State's witness. The cell phones were sent to the jury for deliberations. Thereafter, the jury sent a note to the court disclosing that one of the jurors inserted his/her own battery into at least one of the cell phones, turned it on, and discovered information corroborative of Petitioner's cousin's testimony.

Petitioner moved for a mistrial based on the jury's improper investigation. The court instructed the jury to disregard the evidence and asked the jury whether any of the jurors would be unable to comply with the court's instruction. There was no response to the question. The court denied the motion for mistrial, reasoning that the instruction had cured any potential prejudice. The Court of Special Appeals affirmed the conviction.

Held: Reversed. The Court of Appeals held that the trial court abused its discretion in denying the defendant's motion for mistrial without conducting a proper *voir dire* of the jury to determine whether the jury would be able to render a verdict based solely on the evidence adduced at trial. Given the nature of the misconduct and the degree to which the extrinsic information obtained as a result could impair Petitioner's right to a fair trial by an impartial jury, the court could not reasonably rely on a general admonishment to the jurors to ignore the improperly obtained information. And, the question to the jury whether any individual juror was unable to comply with the instruction was inadequate under the circumstances of this case. The trial court's discretion can be exercised properly only on the basis of sufficient facts, and, without having performed a proper *voir dire*, the trial court lacked that factual basis.

Ellis Douglas and Lamont Curtis v. State, Nos. 146 & 147, Sept. Term 2010, filed October 27, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/146a10.pdf>

CRIMINAL PROCEDURE - PETITION FOR WRIT OF ACTUAL INNOCENCE - IMMEDIATE APPEAL OF DENIAL

CRIMINAL PROCEDURE - PETITION FOR WRIT OF ACTUAL INNOCENCE - DENIAL WITHOUT HEARING

Facts: Appellants were each convicted in unrelated cases in the Circuit Court for Baltimore City. They each filed petitions for a writ of actual innocence based on newly discovered evidence pursuant to then-newly enacted Maryland Code (2001, 2008 Repl. Vol, 2010 Supp.), § 8-301 of the Criminal Procedure Article (C.P.).

Appellant Douglas asserted in his petition, in part, that there was newly discovered evidence that one of the State's witnesses, a forensic analyst, had later been determined to have falsified his credentials. He attached a newspaper article, dated several years after his conviction, that reported the discovery.

Appellant Curtis asserted in his petition that the newly discovered evidence was an affidavit from his grandmother indicating that she had never mentioned a particular name to a police officer. The State had used that name at trial to establish a relationship between Curtis and a defense witness, who had testified earlier that he was not acquainted with Curtis. Curtis alleged that he could not obtain the evidence within time to move for a new trial because his grandmother was ill and because he was incarcerated.

The circuit court denied both petitions without a hearing. Both Appellants sought review in the Court of Special Appeals. The Court of Appeals issued a writ of certiorari in each case before argument in the intermediate court and then consolidated the two cases.

Held: Douglas's case is Reversed; Curtis's case is Affirmed. The Court of Appeals held that a denial of a petition for writ of actual innocence filed pursuant to C.P. § 8-301 is an immediately appealable order, regardless of whether the trial court affords a petitioner an opportunity for a hearing before denying the petition, because the denial is a final judgment under Maryland Code (1974, 2006 Repl. Vol.), § 12-301 of the Courts and Judicial

Proceedings Article ("C.J."). A denial of a petition for writ of actual innocence is a final judgment because, once the petition is denied, no matters remain pending in the circuit court and the statute does not permit subsequent petitions based on the same allegations of newly discovered evidence. The right to appeal final judgments provided by C.J. § 12-301 is not abrogated by the Uniform Postconviction Procedure Act ("UPPA"), C.P. § 7-107(b), which precludes appeals of claims that could have been brought under the UPPA because it is well settled that claims of actual innocence are not cognizable under that statute.

The Court of Appeals further held that C.P. § 8-301 prohibits a court from denying a petition for writ of actual innocence without a hearing if the petition: (1) is in writing; (2) states in detail the grounds on which it is based; (3) describes the newly discovered evidence; (4) requests a hearing; (5) distinguishes the newly discovered evidence claimed in the petition from any claims made in prior petitions; and (6) satisfies the burden of pleading and asserts grounds upon which relief may be granted, i.e. that there is newly discovered evidence that creates a significant or substantial possibility that the trial results may have been different and that the evidence could not have been discovered in time to move for a new trial under Rule 4-331.

Applying these holdings, the Court of Appeals broadly construed both Appellants' petitions for a writ of actual innocence because they had been filed *pro se*. The Court concluded that Appellant Douglas's recitation of the language of the statute, including that a request for a hearing must be made if desired, as well as his mislabeled request for a writ for his appearance at a hearing, amounted to a sufficient request for a hearing. The circuit court erroneously denied Appellant Douglas's petition for writ of actual innocence without holding a hearing when one had been requested because the evidence of the officer's falsified credentials was newly discovered, and Douglas alleged sufficiently that the evidence created a substantial or significant possibility that the result of the trial may have been different.

The Court of Appeals held that the circuit court properly denied Appellant Curtis's petition without a hearing, although he had explicitly requested one, because the evidence Curtis alleged as newly discovered was known, though unavailable, within the time period during which Curtis could have filed a Rule 4-331 motion. Therefore, the petition failed to satisfy the burden of pleading because it did not assert grounds upon which relief could be granted.

State v. Allen, No. 76, September Term, 2010, filed October 28, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/76a10.pdf>

CRIMINAL LAW - SIXTH AMENDMENT - RIGHT TO A JURY TRIAL - USE OF COLLATERAL ESTOPPEL AGAINST A CRIMINAL DEFENDANT

Facts: Jeffrey Edward Allen, the Respondent, was convicted of first degree felony murder, second degree murder, robbery, and lesser related charges after a trial in October 2001. On appeal, the felony murder conviction was reversed and remanded for a new trial, while all the other convictions were affirmed. *State v. Allen*, 387 Md. 389 (2005). The felony murder conviction was reversed because the jury was instructed incorrectly on the intent element for that crime.

At the remanded trial, during the jury selection process, the trial court informed the jury pool that Respondent had been previously convicted of second degree murder and robbery. The trial court explained that jurors for the case would not consider evidence connected to those crimes, and would only consider evidence that related directly to the felony murder. Later, during the jury instruction phase, the trial court elaborated on its earlier warning by explaining that the felony (the robbery) and murder underlying the felony murder charge was not before the jury. Instead, the jury had to limit its deliberations to the intent element of felony murder. After hearing this instruction and retiring to deliberate, the jury found Respondent guilty of felony murder.

On appeal to the Court of Special Appeals, Respondent argued that the trial court's instruction and statement during the jury selection process acted as collateral estoppel against him. The trial court's actions stopped litigation on certain elements of the crime, establishing those elements as concluded as a matter of law. Respondent contended that use of collateral estoppel against him deprived him of his Sixth Amendment right to a jury trial. The Court of Special Appeals agreed, reversing Respondent's conviction. The State filed, and we granted, a writ of certiorari to decide whether the Sixth Amendment prevents the State from using a prior conviction to foreclose litigation and deliberation on elements of a charged crime.

Held: Affirmed. The State may not use prior convictions against a criminal defendant to establish elements of felony murder as a matter of law. The Sixth Amendment guarantees a jury trial "in all criminal prosecutions." To fulfill that guarantee,

a jury may only find guilt when it has the chance to deliberate on every element of the charged crime. Collateral estoppel impermissibly removes elements from the jury's consideration, rendering the jury unable to perform fully its deliberative function. Therefore, the Sixth Amendment prohibits the State from the offensive use of collateral estoppel against a criminal defendant.

Denisyuk v. State, No. 45, September Term 2010, filed October 25, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/45a10.pdf>

CRIMINAL LAW - SIXTH AMENDMENT - RIGHT TO EFFECTIVE COUNSEL -
GUILTY PLEA - NOTIFICATION OF IMMIGRATION CONSEQUENCES

Facts: On November 2, 2006, Petitioner Mark Denisyuk pled guilty to second degree assault in the Circuit Court for Harford County. Petitioner, an immigrant from Latvia, received no notice from defense counsel, the State, or the court, that his plea carried immigration consequences. Deportation proceedings were initiated against the Petitioner as a result of his conviction. Subsequently, Petitioner filed a Petition for Post-Conviction Relief, arguing that his counsel's failure to notify him of the immigration consequences of his conviction constituted ineffective assistance of counsel under the Sixth Amendment of the U.S. Constitution.

The Circuit Court for Harford County granted Petitioner the relief of a new trial. The State filed an application for leave to appeal. The Court of Special Appeals granted the application and set the case on its regular appeal docket. The Court of Special Appeals in a reported opinion, *State v. Denisyuk*, 191 Md. App. 408, 461, 991 A.2d 1275, 1306 (2010), reversed the grant of post-conviction relief, holding that the "Sixth Amendment does not impose on a lawyer a duty to inform a client contemplating a guilty plea about collateral consequences generally or the risk of deportation specifically." *Id.* at 460-61, 991 A.2d at 1305. The Court of Appeals issued a writ of certiorari to decide the effect upon Petitioner's case of the Supreme Court decision in *Padilla v. Kentucky*, 559 U.S. ____, 130 S. Ct. 1473 (filed March 31, 2010). In *Padilla*, the Supreme Court held that effective assistance of counsel under the Sixth Amendment requires defense counsel to notify clients of the potential immigration consequences of a guilty plea.

Held: Reversed. The holding of *Padilla* applies retroactively to Petitioner's case, and Denisyuk is entitled to the post-conviction relief of a new trial.

The Court applied the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1985), to the Petitioner's case in light of the *Padilla* decision. This test for proving ineffective assistance of counsel requires a defendant to show that (1) counsel's performance was deficient, and (2) that the result of the proceeding had a reasonable probability of being different but for

counsel's errors.

After examining the facts and procedural history of the *Padilla* decision, the Court of Appeals turned to the State's argument that *Padilla* should not be applied retroactively to Petitioner's case. The Court of Appeals disagreed, concluding that the holding of *Padilla* applies retroactively to those cases involving convictions from guilty pleas occurring after the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The Court reasoned that the *Padilla* decision applied the *Strickland* standard regarding the effectiveness of counsel's performance to a new set of facts and was not intended to establish a rule of only prospective application. The Court categorized the *Padilla* decision as one correcting an error that prevented the *Strickland* test from applying to the precise factual situations of *Padilla* and Petitioner. Therefore, the Court of Appeals found the first prong of the *Strickland* test retroactively applied to Petitioner's case.

The Court of Appeals next turned to the second prong of the *Strickland* test (whether Petitioner established prejudice as the result of counsel's ineffectiveness), which the *Padilla* decision did not reach. Under this prong, the Court noted that it was bound to accept the post-conviction court's first-level findings. That included Petitioner's sworn affidavit that he would not have entered a guilty plea had defense counsel provided adequate representation. Because the post-conviction court gave full credit to this affidavit, which the State made no effort to rebut, the Court of Appeals accepted the credited affidavit as sufficient to establish that the Petitioner was prejudiced by his counsel's ineffectiveness.

Concluding that both prongs of *Strickland* were satisfied, the Court of Appeals held that the post-conviction court correctly granted Petitioner the relief of a new trial, and remanded the matter to the Court of Special Appeals with instructions to affirm that judgment.

John L. Boland, et. al., v. Sean F.X. Boland, et al., No. 123, September Term, 2010. and *John L. Boland, et. al., v. Boland Trane Associates, Inc., et. al.*, No. 129, September Term, 2010. Opinion filed on October 31, 2011 by Adkins, J.

<http://mdcourts.gov/opinions/coa/2011/123a10.pdf>

CORPORATIONS – DERIVATIVE LAWSUITS – SPECIAL LITIGATION COMMITTEES – STANDARD OF REVIEW OF A MOTION TO DISMISS OR FOR SUMMARY JUDGMENT BASED ON THE REPORT OF A SPECIAL LITIGATION COMMITTEE –Maryland

rejects the so-called *Zapata* standard under which Delaware courts review the Special Litigation Committee's recommendation on the merits, applying their "independent business judgment." Instead, after a motion to dismiss or for summary judgment against the derivative plaintiffs, Maryland courts must review the SLC's independence, and whether it made a reasonable investigation and principled, factually-based conclusions. In this inquiry, the Special Litigation Committee is not entitled to a presumption that it was sufficiently independent from the directors.

CORPORATIONS – SHAREHOLDER DIRECT SUITS AGAINST CORPORATE DIRECTORS – RES JUDICATA – EFFECT OF EARLIER GRANT OF SUMMARY JUDGMENT IN A RELATED DERIVATIVE LAWSUIT –

When a court grants summary judgment in a derivative suit based on a Special Litigation Committee's determination that continuing the lawsuit is not in the corporation's best interest, that court decision is not a final adjudication on the merits so as to preclude a direct suit under the doctrine of *res judicata*. The court makes no determination of the merits of the derivative allegations when reviewing a Special Litigation Committee's decision. Moreover, a direct action, which forwards individual rights, is an entirely different cause of action than a derivative action, which is brought on behalf of the corporation.

CONTRACTS – STOCK PURCHASE AGREEMENTS – CONSIDERATION – In a closely held corporation, an agreement that the corporation will repurchase stock from a deceased shareholder's estate at a set value may be valuable consideration received by the shareholder. Without such a repurchase agreement, the estate may be unable to sell the shares of the closely held corporation. Thus, the repurchase provision is enforceable.

Facts: Two corporations, owned primarily by eight siblings and directed by three of them, attempted to repurchase the stock of one of the sisters, now deceased, pursuant to the terms of a Stock Purchase Agreement. The sister's estate refused on the grounds that the Agreement undervalued the estate's shares. The corporations filed a declaratory judgment action, seeking

enforcement of the Agreement, and named the other siblings as defendants and interested parties. Meanwhile, the non-director siblings had learned of an earlier stock transaction in which the three directors had acquired additional corporate stock for themselves. Aggrieved by this transaction, two of the non-director siblings sent a demand for litigation to the corporation, and shortly thereafter filed a derivative action in the Circuit Court for Montgomery County, alleging self-dealing and breach of fiduciary duty. They also filed "direct" claims, as cross-claims in the declaratory judgment action, on grounds related to the derivative action. In response, the corporations appointed a special litigation committee ("SLC"), consisting of two "independent directors" to examine the claims. After an extended study, the SLC issued a report concluding that the stock transactions were legitimate and that the Stock Purchase Agreement was enforceable. The Circuit Court, deferring to the judgment of the SLC, granted summary judgment in favor of the corporations on the derivative action. In the declaratory judgment action, the Circuit Court relied on *res judicata* to dismiss the cross-claims and grant summary judgment to the corporation. On appeal, the Court of Special Appeals upheld the Circuit Court in the derivative action and had not published its opinion in the direct action when the Court of Appeals granted *certiorari*.

Held: The Court of Appeals rejected the Petitioners' suggestion that Maryland courts should apply their "independent business judgment" and review the SLC's substantive conclusions, holding instead that Maryland courts adhere to the business judgment rule as applied in *Auerbach* and limit the judicial investigation of an SLC report to the issues of whether the SLC was independent, acted in good faith based on facts, and followed reasonable procedures. Nevertheless, the Court reversed in the derivative action, holding that the Circuit Court had made an inadequate inquiry into the SLC's independence and the reasonableness of its procedures. In the declaratory judgment action, the Court affirmed the Circuit Court's grant of summary judgment on the contract issue, agreeing that the Stock Purchase Agreement was supported by adequate consideration and was enforceable. The Court reversed with regard to Petitioners' cross-claims, however. The Circuit Court had based its grant of summary judgment solely on the doctrine of *res judicata* in light of the derivative action, and the Court held that the resolution of a derivative claim is not necessarily a factual resolution of the merits of the claim and that the Petitioners had stated a separate, individual cause of action regarding allegedly oppressive actions by the majority shareholders.

In re Adoption/Guardianship of Chaden M., No. 56, September Term 2010, filed October 25, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/56a10.pdf>

FAMILY LAW - TERMINATION OF PARENTAL RIGHTS - RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL - DISABILITY ALLEGATION

Facts: The Baltimore City Department of Social Services ("DSS") filed a petition for guardianship of minor child, Chaden M. DSS alleged in the petition that Chaden M.'s mother, April C., may have had a disability that made her "incapable of consenting to [DSS's] Petition for Guardianship or of participating in the proceeding for Guardianship." The nature of the alleged disability was mental health. DSS requested that an attorney be appointed for April C. Attorney Smith entered her appearance two days after DSS filed the petition. Neither April C. nor Attorney Smith on April C.'s behalf filed a notice of objection to the petition within the 30-day period after April C. was served, as provided by Maryland law. After expiration of the time period within which April C. could have objected, DSS withdrew its allegation that April C. was disabled. Attorney Smith then filed an untimely notice of objection, which DSS moved to strike. The juvenile court held a disability determination hearing and found that April C. was not disabled. The juvenile court then granted DSS's motion to strike April C.'s untimely objection. The failure to file a timely objection resulted in April C. being deemed to have consented to the petition for guardianship. The matter then proceeded on an uncontested basis and the juvenile court granted DSS's petition, which had the effect of terminating April C.'s parental rights.

April C. appealed to the Court of Special Appeals and asserted that she had been denied effective assistance of counsel. That court held that April C. had a right to effective assistance of counsel and, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), April C. was denied that right and entitled to a file a belated notice of objection on remand. DSS then petitioned the Court of Appeals for a writ of certiorari.

Held: Affirmed. The Court of Appeals held that April C. had a right to counsel rooted in Maryland Code (1999, 2006 Repl. Vol.), § 5-307(a) of the Family Law Article as well as Maryland Rule 9-105(b) because DSS had alleged that she was disabled. The right continued at least until the juvenile court made a disability determination. The right to counsel includes the right to effective assistance of counsel. Attorney Smith, who

entered her appearance on behalf of April C., rendered ineffective assistance. She assumed that DSS agreed April C. was disabled and the court would ultimately find that April C. was disabled. Based on those unfounded assumptions, Attorney Smith failed to file a timely notice of objection to preserve April C.'s right to contest the petition for guardianship in the event that DSS withdrew its allegation of disability or the juvenile court found that April C. was not disabled. The conclusion that Attorney Smith rendered ineffective assistance of counsel was based on her clear and admitted failure to file the notice of objection after she entered her appearance. The Court of Appeals, therefore, did not need to address the applicability of a *Strickland* analysis, as the intermediate court had done. April C. is entitled to file a belated notice of objection on remand.

Lewis v. Waletzky, No. 3, September Term, 2010, filed October 27, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/3a10m.pdf>

HEALTH - MARYLAND HEALTH CARE CLAIMS ACT - ADMINISTRATIVE FILING REQUIREMENTS - CHOICE OF LAW - LEX LOCI DELICTI

Facts: Katherine M. Lewis filed a malpractice suit against Jeremy P. Waletzky in the United States District Court for the District of Maryland. Waletzky moved to dismiss the suit on grounds that Lewis did not file the claim in compliance with Maryland's Health Care Malpractice Claims statute ("the Maryland Act"), Md. Code, Courts & Judicial Proceedings Article("CJ"), §§ 3-2A-01 through 3-2A-10. Lewis responded that D.C. law, which had no filing requirements, governed her claim, because her injury occurred in Washington D.C.

The District Court ruled that the Maryland Act governed the filing requirements of the claim. Sitting in diversity jurisdiction, the court applied the *lex loci delicti* rule from Maryland's choice-of-law jurisprudence. The rule directed the court to apply the substantive law of the place where the injury occurred, and the procedural law of the forum state. The District Court ruled that the Act was substantive, so D.C. law would normally apply. However, the court further ruled that Maryland's Act implicated strong public policy; therefore, under the public-policy exception to *lex loci delicti*, Maryland's substantive law applied. The District Court subsequently dismissed Lewis' claim.

Lewis appealed the ruling to the United States Court of Appeals for the Fourth Circuit. Before deciding the matter, the Fourth Circuit certified a question to the Maryland Court of Appeals, asking whether Maryland recognized a public policy exception to *lex loci delicti*, which could be invoked by the public policy underlying the Maryland Act.

Held: The Court did not reach the question of whether the public policy exception applied to the Maryland Act, holding that Maryland's Act applied as the procedural law of the forum state. To determine if a law qualified as "procedural" for purposes of *lex loci delicti*, the Court adopted the analysis from *Jacobs v. Adams*, 66 Md. App. 779, 505 A.2d 930 (1986). A procedural law is one that affects the way in which the state's courts administers justice. Therefore, a law could be labeled procedural if it restricts, limits, defines, qualifies, or modifies an existing cause of action.

The Maryland Act, through its filing requirements, affects the way the State administers justice by controlling access to Maryland courts. It is a procedural law, and the law of the forum state. Without reaching the public policy exception question, the Court held that the filing requirements of the Maryland Act apply to Lewis' claim.

Megan Cathey v. Board of Review, Department of Health and Mental Hygiene, No. 12, September Term, 2011, filed October 25, 2011.
Opinion by Adkins, J.

<http://mdcourts.gov/opinions/coa/2011/12a11.pdf>

HEALTH LAW - DEVELOPMENTAL DISABILITIES LAW - RESIDENCE
REQUIREMENTS FOR DEVELOPMENTAL DISABILITY ADMINISTRATION
SERVICES

Facts: Petitioner is a developmentally disabled adult who requires regular care and supervision to perform many day-to-day tasks. In 1990, her parents divorced. Under the initial divorce decree, Petitioner's mother had primary residential custody of Petitioner. The divorce decree was modified in 2006, giving Petitioner's parents joint legal and physical custody, and requiring Petitioner to spend alternating two-week blocks of time with her mother in New Jersey and her father in Maryland. When in New Jersey, Petitioner receives funding and services from that state's Division of Developmental Disabilities.

In light of this modified divorce decree, Petitioner's father applied for services in Maryland. This application was denied by the Maryland Developmental Disabilities Administration in November 2006. The DDA reasoned that Petitioner was not a "resident" of Maryland, as the code requires. Petitioner appealed to an administrative law judge, who held a hearing and upheld the DDA's ruling. Petitioner subsequent's appeals to the Secretary of the Department of Health and Mental Hygiene, the Department's Board of Review, and the Circuit Court for Baltimore City were all unsuccessful. Each level of review affirmed the DDA's decision.

Held: Reversed and Remanded. Throughout the proceedings, the agency and administrative law judge held that the "resident" requirement meant that an applicant had to be "domiciled" in Maryland. Under domicile analysis, the Petitioner needed the voluntary intent to make Maryland a permanent home. The Court held, however, that the relevant provisions of the Developmental Disabilities Act were to be construed liberally to advance the appropriate remedies, and that domicile analysis was not appropriate.

Furthermore, the statute has broad policy goals to provide services and help for developmentally disabled individuals in the state of Maryland, and increasingly complex interstate custody arrangements are becoming more commonplace. With this in mind, the Court interpreted Petitioner's residence as the place where

she "actually lives." Here, that residence is in Maryland for the times she lives with her father, and Petitioner is eligible for DDA services during those times. The Court's ruling is retroactive to the initial application by Petitioner's father.

Montgomery County v. Deibler, No. 120, September Term, 2010, filed October 27, 2011. Opinion by Barbera, J.

<http://mdcourts.gov/opinions/coa/2011/120a10.pdf>

LABOR & EMPLOYMENT - WORKERS' COMPENSATION - WAGE EARNING CAPACITY - OVERTIME PAY

Facts: Captain Kenneth Deibler ("Petitioner"), a firefighter employed by Montgomery County, filed two claims for worker's compensation after suffering two separate work-related knee injuries. Each injury prohibited Petitioner from performing his normal firefighting duties, forcing him into a "light duty" role while the knee rehabilitated. While on light duty, Petitioner earned the same amount of base pay he had been earning before each injury. However, Petitioner's light duty status restricted him from working the same amount of overtime hours he had been able to work as a full-duty firefighter. Therefore, Petitioner's overall income decreased.

The Workers' Compensation Commission awarded Petitioner temporary partial disability compensation to make up for the loss in income. It found that Petitioner's drop in overtime compensation fulfilled the requirement of the Workers' Compensation Act, Md. Code, Labor & Employment Article ("LE") § 9-615(a), that his post-disability "wage earning capacity" be less than his pre-disability "wage earning capacity." Montgomery County sought review of the Commission's order. The Circuit Court for Montgomery County affirmed the Commission's order. Montgomery County then noted an appeal to the Court of Special Appeals arguing that "wage earning capacity" in LE § 9-615(a) could not include the capacity to earn overtime compensation. Before oral argument in that court, the Court of Appeals issued a writ of certiorari to answer the question.

Held: The phrase "wage earning capacity" includes the capacity to earn overtime compensation. In interpreting the language of § 9-615(a), the Court looked to the common meaning of the word "wage," definitions of "wage" found elsewhere in the Labor and Employment Article, and the general purpose of the Worker's Compensation Act. The Court found that "wage" is a broad term, consistently defined in common parlance and the Maryland Code as including all forms of compensation an employee receives for work. Additionally, reading "wage" broadly to include overtime compensation comports with the Act's purpose to protect workers and their families from the hardships imposed by disabilities. The Court, therefore, affirmed Petitioner's award of temporary partial disability compensation.

Mary Thomas v. Panco Management of Maryland, LLC, et al., No. 133, September Term 2010, filed October 31, 2011, Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/133a10.pdf>

TORTS - MOTION FOR JUDGMENT - ASSUMPTION OF THE RISK

ASSUMPTION OF THE RISK - VOLUNTARINESS

Facts: Petitioner filed a negligence action against the owner of her apartment complex and the apartment management company (collectively, Respondents) stemming from a slip and fall incident on "black ice" that occurred on the premises of the apartment complex. The evidence produced at trial showed that the primary means of egress from the apartment complex was a central, covered flight of stairs. There was also a separate, back exit that led to an "unpaved, dirt area."

At the conclusion of Petitioner's presentation of her case, Respondents moved for judgment, asserting the defenses of contributory negligence and assumption of the risk. While the trial judge denied the motion as to contributory negligence, he granted it on the grounds that Petitioner had assumed the risk of her injury as a matter of law. Noting that the Court of Special Appeals had decided *Allen v. Marriott Worldwide Corp.*, 183 Md. App. 460, 961 A.2d 1141 (2008) the previous day, the trial court concluded that Petitioner had knowledge of the risk of slipping on black ice. In addition, as to the voluntariness requirement of the assumption of the risk defense, the court rejected Petitioner's argument that *Rountree v. Lerner Dev. Co.*, 52 Md. App. 281, 447 A.2d 902 (1982) controlled, and ruled that Petitioner had encountered the danger voluntarily. The Court of Special Appeals affirmed.

Held: Reversed and Remanded

It was error for the trial court to rule, as a matter of law, that Petitioner had knowledge of the risk for the same reasons we explained in *Poole v. Coakley & Williams Constr., Inc.*, ___ Md. ___ (2011) (No. 130, September Term 2010) (filed Oct. 27, 2011), namely that the *Allen* case expanded the knowledge prong of the assumption of the risk test to permit the trial judge to impute knowledge under circumstances where the risk of danger may not have been fully known and understood by the plaintiff. In the instant case, there were factual issues creating a jury question as to Petitioner's knowledge of the risk of slipping on black ice.

As to the voluntariness element, we recognized *Rountree* as an example of a landlord-tenant situation, where the plaintiff may have acted under the compulsion of circumstances created by the tortious conduct of the defendant. Insofar as it applies to a tenant's right to a reasonably safe means of ingress and egress from his or her property, *Rountree* is consistent with our case law. Therefore, when a tenant sustains injuries as the result of a dangerous condition affecting the only reasonably safe means of ingress and egress from his or her apartment, it cannot be said that the tenant voluntarily encountered the risk of his or her injuries. If, however, there was more than one reasonably safe means of ingress and egress, the Petitioner may have voluntarily encountered the risk if she deliberately chose the more dangerous route. In this case, given the testimony that there may have been more than one reasonable means of exit, voluntariness was a jury question.

George Poole v. Coakley & Williams Construction, Inc., et al., No. 130 September Term 2010, filed October 27, 2011 Opinion by Greene, J.

<http://mdcourts.gov/opinions/coa/2011/130a10.pdf>

TORTS - SUMMARY JUDGMENT - ASSUMPTION OF THE RISK

THIRD PARTY COMPLAINT - SUMMARY JUDGMENT

STATUTE OF LIMITATIONS - PERSONAL INJURY CLAIM

Facts: Appellant sued Coakley & Williams Construction, Inc. and Forsgate Ventures II, LLC, Appellees. Appellant alleged that on December 21, 2005, he was walking through the parking lot toward his place of employment, when he slipped, fell, and injured himself on what he surmised to be "black ice" while wading through a stream of water that created a path through the otherwise icy lot.

Coakley filed a third party complaint against Judd Fire Protection, LLC ("Judd") alleging that Judd was responsible for the alleged water flow onto the property.

Nearly one year after filing the original complaint, Appellant filed an amended complaint naming Transwestern/Carey Winston, LLC ("Transwestern"), and The Brickman Group Ltd. LLC ("Brickman"), as additional defendants. Brickman moved to dismiss and Transwestern moved for summary judgment for violation of the statute of limitations. Both motions were granted.

Prior to trial, Appellees moved for summary judgment. From the evidence presented, several allegations were consistent: Appellant believed that he took a safe path to the building by choosing to walk through a running stream of water; he did not believe ice could form beneath running water; he had walked through the same stream at least 5-7 times previously without incident; that the conditions in the parking lot were more wet and less icy on the morning of his accident than the night before; and he did not see ice in the path he chose to take. The trial judge, relying heavily on *Allen v. Marriott Worldwide Corp.*, 183 Md. App. 460, 469, 961 A.2d 1141, 1146 (2008), cert. denied, *Allen v. Marriott*, 408 Md. 149; 968 A.2d 1065 (2009), granted summary judgment in favor of the defendants on the ground that Appellant had assumed the risk of his injury.

Held: Reversed in part and Remanded.

Questions 1 and 2:

On the basis of the record before the trial court, Appellant had not assumed the risk of his injury as a matter of law. Additionally, we overruled *Allen* to the extent it suggested that the compilation of facts and inferences, amounting to less than actual knowledge, may be sufficient to impute knowledge to a plaintiff as a matter of law.

In order for a plaintiff to have assumed the risk of his or her injuries as a matter of law, we require that a plaintiff "must" have known that the risk was actually present, not that he or she "would," "should," or "could" have known that the risk "might well be present." For a plaintiff to have knowledge of the risk, as a matter of law, there must be undisputed evidence that he or she had actual knowledge of the risk prior to its encounter. Actual knowledge can be proven, for example, by evidence of the particular plaintiff's subjective knowledge of the risk, e.g. previous experience with or sensory perception of the danger, or evidence that the risk was so obvious that it could not have been encountered unwittingly.

Question 3:

We affirmed the grant of summary judgment in favor of Transwestern, and the dismissal in favor of Brickman, because the claims against both were barred by Appellant's failure to comply with the three year statute of limitations for bringing civil claims. Appellant was fully aware of the nature and cause of his injury, namely falling on black ice, as of the date of injury. Therefore, the "discovery rule" did not apply to toll the limitations period to allow Appellant to add new defendants.

Question 4- Cross Appeal:

On Coakley's cross-appeal, we reversed the trial judge's grant of summary judgment in favor of Judd because the contract executed between the parties provided sufficient evidence regarding its contingent liability to Coakley in the instance that Coakely is found liable to Appellant.

COURT OF SPECIAL APPEALS

Grymes v. State, No. 1838, September Term 2010, filed October 28, 2011 Opinion by Eyler, Deborah S., J.

<http://mdcourts.gov/opinions/cosa/2011/1838s10.pdf>

CONSTITUTIONAL LAW - FOURTH AMENDMENT SEARCH AND SEIZURE - LEGITIMATE EXPECTATION OF PRIVACY - COMMON AREA OF MULTI-UNIT APARTMENT BUILDING - FIFTH AMENDMENT MIRANDA APPLICATION - CUSTODIAL INTERROGATION.

Facts: In the Circuit Court for Montgomery County, the appellant, Antwan Grymes, was charged with robbery with a dangerous weapon, assault in the first degree and use of a handgun in the commission of a crime of violence. He filed pretrial motions to suppress a cell phone found in the pocket of his jacket when he was arrested and a gun found in the common laundry room of the multi-unit apartment building where he was staying with a friend at the time of the crime. Both motions were denied. Prior to trial, the police returned the cell phone to the robbery victim.

At trial, the appellant unsuccessfully moved *in limine* to exclude evidence of the gun on the basis that it lacked a sufficient connection to him or the crime. He also moved to exclude evidence of the cell phone, or, alternatively, requested a missing evidence jury instruction. The motion was denied and the court declined to give a missing evidence instruction. The appellant was permitted to argue to the jurors that they could draw an adverse inference from the fact that the cell phone was not maintained in police custody.

The jury acquitted the appellant of the three charged crimes, but convicted him of the lesser included offenses of robbery and assault in the second degree. He was sentenced to a term of 15 years' incarceration for robbery and a concurrent term of 10 years for assault.

Held: Judgment affirmed. The warrantless search of the common laundry room of a multi-unit apartment building was not a violation of the appellant's Fourth Amendment rights because he did not have an objectively reasonable expectation of privacy in the place searched. The front door of the apartment building was kept unlocked, as was the door to the laundry room, facts that distinguish this case from *Garrison v. State*, 28 Md. App. 257

(1975). Moreover, the Court of Appeals decision in *Fitzgerald v. State*, 384 Md. 484 (2004), and almost all of the federal courts of appeal that have considered the issue have held that tenants of multi-unit apartment buildings do not have a reasonable expectation of privacy in common areas of the building that are freely accessible by the public.

The cell phone recovered from the appellant's jacket pocket after he was arrested was not the product of a custodial interrogation prior to the appellant receiving his *Miranda* warning. When the appellant was arrested, he was clothed only in shorts and perhaps a T-shirt. It was December and he requested that the police retrieve for him from the apartment two black jackets he had been using as a pillow and a gray pair of pants. An officer, who knew that these clothes matched the description of those worn by the robber, retrieved them and showed them to the appellant, who confirmed that they were his. The officer searched the clothing, discovering in the pocket of one of the jackets a cell phone stolen from the victim. While the appellant was in custody at the time of the search, the exchange between the officer and the appellant did not constitute an interrogation or its functional equivalent. Accordingly, there was no *Miranda* violation.

The court did not err in denying the motion to exclude evidence of the gun. A police officer testified that a witness told him that the appellant had a gun on the night of the crime and that he may have hidden it in the common laundry room of the apartment building, where it was later discovered. This evidence established that there was a reasonable probability that the gun was connected with the appellant and it was for the jury to weigh the evidence.

A missing evidence instruction was not warranted when the cell phone was photographed and returned to its rightful owner, the crime victim, prior to trial. The cell phone was not the type of evidence typically subjected to forensic testing and it was not central to the appellant's defense. Thus, there was no abuse of discretion in the denial of the instruction.

Richard Ramlall v. MobilePro, Inc., et al., No. 1309, September Term, 2010, filed October 30, 2011. Opinion by Matricciani, J.

<http://mdcourts.gov/opinions/cosa/2011/1309s10.pdf>

CORPORATE LAW – PIERCING THE CORPORATE VEIL – LIABILITY OF SUCCESSOR CORPORATION – CONTRACT LAW – CONSTRUCTION OF ORAL AGREEMENT

Facts: A telecommunications company hired appellant as a consultant in a billing dispute with a vendor. When appellant began to bill more hours than the telecommunications company could afford to pay, he orally agreed to accept a contingent-based bonus fee in lieu of hourly compensation. Under the oral contract, appellant was to be paid a portion of the benefit he obtained for the telecommunications company in negotiating the billing dispute. Appellant lead a negotiating strategy whereby the telecommunications company withheld money from the vendor. The telecommunications company and the vendor eventually settled the billing dispute, and the telecommunications company saved approximately \$1.5 million dollars.

Later, a parent corporation orchestrated a merger between its wholly-owned subsidiary corporation and the telecommunications company. The wholly-owned subsidiary corporation survived and the telecommunications company dissolved. Appellant sought to collect his bonus fee from the surviving corporation and the parent corporation, but both refused to pay based on an interpretation of appellant's bonus fee that was contained in an attachment to the merger agreement. Appellant sued the successor corporation and parent corporation to enforce the oral agreement he had made previously with the target corporation. The Circuit Court for Montgomery County granted the parent corporation's motion for summary judgment and denied the successor corporation's and appellant's motions for summary judgment. After a bench trial, the circuit court granted the successor corporation's motion for judgment.

Held: The Court of Special Appeals affirmed in part and vacated in part. In granting summary judgment for the parent corporation, the circuit court held correctly that there was no basis to hold the parent corporation liable for the debts of the subsidiary corporation. Maryland courts will pierce the corporate veil only where necessary to prevent fraud or enforce a paramount equity. Maryland is more restrictive than other jurisdictions in applying the doctrine, and the plaintiff failed to allege by clear, specific acts, facts that in law constituted fraud by the parent corporation.

The circuit court erred, however, in granting the subsidiary corporation's motion for judgment. Under Maryland Code (1976, 2007 Repl. Vol.), Corporations and Associations Article § 3-114(f)(1), when there is a consolidation or merger, "the successor is liable for all the debts and obligations of each nonsurviving corporation." The telecommunications company's liability to appellant was set forth in an oral agreement. An attachment to the merger agreement between the target corporation and the subsidiary corporation was not a memorialization of the oral agreement between appellant and the target corporation. The circuit court erred in holding that the appellant's bonus payment was conditioned on a "refund" when the oral agreement contained no such condition.

Howard County Citizens for Open Government, et al. v. Howard County Board of Elections. Case No. 503, September Term, 2010, filed October 27, 2011. Opinion by Kehoe, J.

<http://mdcourts.gov/opinions/cosa/2011/503s10.pdf>

ELECTION LAW ARTICLE §6-203 - CONSTITUTIONALITY - MARYLAND CONSTITUTION AND HOWARD COUNTY CHARTER

Election Law Article § 6-203 sets out the required information that must accompany a petition signer's signature on a petition for referendum. In *Doe v. Montgomery County*, 406 Md. 697 (2008), the Court of Appeals held that § 6-203's requirements are mandatory. HCCOG challenged § 6-203 as infringing on the right to referendum reserved to Howard County citizens by Article XVI of the Maryland Constitution and the Howard County Charter.

This Court holds that Election Law § 6-203 conflicts with neither Article XVI of the Maryland Constitution nor with the Howard County Charter.

ELECTION LAW ARTICLE §6-203 - CONSTITUTIONALITY- UNITED STATES CONSTITUTION- FIRST AMENDMENT

Election Law Article § 6-203 sets out the information that must accompany a petition signer's signature on a petition for referendum. In *Doe v. Reed*, ___ U.S. ___, 130 S. Ct. 2811, 2819 (2010), the United States Supreme Court held that states have an "undoubtedly important interest in protecting the integrity and reliability of the initiative process" and that a state's interest in identifying fraud in the referendum process is "particularly strong."

This Court holds that because the information required in § 6-203 is necessary for a county election board to perform a meaningful validation and verification process, the statute's requirements are a reasonable, nondiscriminatory restriction on the right to sign a referendum petition and are reasonably related to the State's undoubtedly important interest in protecting the integrity and reliability of the initiative process. Accordingly, § 6-203 does not conflict with the First Amendment of the United States Constitution.

BOARD OF ELECTIONS- ACTIONS- RETROACTIVITY

The Howard County Board initially informed HCCOG that it had provided a sufficient number of valid signatures, under §211 of the Howard County Charter, to warrant a thirty-day extension to

submit the remaining necessary signatures. Before HCCOG submitted the remaining required signatures, the Board became aware of the holding in *Doe v. Montgomery County*, 406 Md. 697 (2008), that § 6-203's requirements were mandatory. The Board then reviewed the previously submitted signatures under the requirements of § 6-203. The Board did not act impermissibly in applying *Doe* to the previously submitted signatures.

BOARD OF ELECTIONS - ACTIONS - PROCEDURAL DUE PROCESS

The Board was not required to provide the referendum sponsor with notice and a hearing before determining that the sponsor's petition effort was deficient. The petition sponsor is limited to the expansive post-decision rights to judicial redress provided by Election Law § 6-209.

Facts: Howard County Citizens for Open Government ("HCCOG") sought to take a newly-enacted ordinance of the Howard County Council to referendum. For a referendum question to secure a place on the ballot, petitions containing the signatures of at least 5,000 of the County's registered voters must be filed within sixty days of the passage of the ordinance in question. The filing deadline may be extended for an additional thirty days if the sponsor of the referendum effort submits petitions containing at least 50% of the required signatures within the initial deadline.

HCCOG submitted petitions, containing 3,301 signatures, to the Howard County Board of Elections (the "Board") before the initial deadline. The Board's staff reviewed the signatures, without considering the provisions of Election Law Article § 6-203(a) ("EL"), and decided that HCCOG had submitted a sufficient number of valid signatures to qualify for a thirty-day extension to obtain the remaining required signatures. The Board's staff subsequently became aware of *Doe v. Montgomery County*, 406 Md. 697 (2008), which held that the requirements of EL § 6-203 were mandatory and must be applied to petitions for referendum. The Board's staff reviewed the previously-submitted signatures under EL § 6-203(a) and determined that, under that statute, the number of valid signatures was insufficient to extend the filing deadline. HCCOG sought judicial review of the Board's decision. The Circuit Court for Howard County affirmed the Board.

Held: Affirmed. Under *Doe v. Montgomery County*, 406 Md. 697 (2008), the Board was required to apply EL § 6-203(a)'s mandatory signature standards and, therefore, disregard any petitioner signatures that did not match the petitioner's name as it appears on the statewide voter registration list or that did not list

"the surname of registration and at least one full given name and the initials of any other names" EL § 6-203(a).

The mandates of EL § 6-203(a) do not conflict with the Maryland Constitution or the Howard County Charter. Under the Maryland Constitution, the State may regulate the referendum process in a reasonable, content neutral, nondiscriminatory manner. EL § 6-203(a) is such a regulation. Furthermore, the Howard County Charter does not restrict the State's authority to set standards for referendum petitions.

EL § 6-203(a) also does not conflict with the First Amendment of the United Constitution. States have an "undoubtedly important interest in protecting the integrity and reliability of the initiative process" and a state's interest in identifying fraud in the referendum process is "particularly strong." *Doe v. Reed*, __ U.S. __, 130 S. Ct. 2811, 2819 (2010). The signature information required under EL § 6-203(a) is necessary to the Board's performance of a meaningful validation and verification process and is reasonably related to the State's "particularly strong" interest in protecting the integrity and reliability of the initiative process. In addition, EL § 6-203(a) is a reasonable, non discriminatory restriction on the right to sign a referendum petition. Accordingly EL § 6-203(a) does not conflict with the United States constitution.

The Board's staff provided sufficient due process in applying EL § 6-203(a) to HCCOG's petition signatures. The Board's staff was not required to provide HCCOG with notice before determining that its petition effort was deficient. HCCOG is limited to the expansive post-decision rights to judicial redress provided by EL § 6-203(a). The Board's staff did not act retroactively in applying *Doe* to HCCOG's petition signatures, because *Doe* represented no change in the law; EL § 6-203(a) has been the law, in its current form, since 2005.

ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals dated October 26, 2011, the following attorney has been disbarred from the further practice of law in this State:

ALEXANDER NNANNA AGILIGA

*

By an Opinion and Order of the Court of Appeals dated October 26, 2011, the following attorney has been indefinitely suspended from the further practice of law in this State:

BRENDA CAROL BRISBON

*

By an Opinion and Order of the Court of Appeals dated October 27, 2011, the following attorney has been disbarred from the further practice of law in this State:

JOEL DAVID JOSEPH

*

By an Order of the Court of Appeals dated November 9, 2011, the following attorney has been disbarred by consent from the further practice of law in this State:

BRIAN WILLIAM YOUNG

*

The following attorney has been replaced upon the register of attorneys effective November 17, 2011 in the Court of Appeals:

VALERIA N. TOMLIN

*

JUDICIAL APPOINTMENTS

On September 28, 2011, the Governor announced the appointment of the **HON. HASSAN ALI EL-AMIN** to the Circuit Court for Prince George's County. Judge El-Amin was sworn in on October 24, 2011 and fills the vacancy created by the elevation of the Hon. Michele D. Hotten.

*

On September 28, 2011 the Governor announced the appointment of the **HON KRYSTAL QUINN ALVES** to the Circuit Court for Prince George's County. Judge Alves was sworn in on October 24, 2011 and fills the vacancy created by the retirement of the Hon. William D. Missouri.

*

On September 28, 2011 the Governor announced the appointment of the **HON. DaNEEKA VARNER COTTON** to the Circuit Court for Prince George's County. Judge Cotton was sworn in on October 24, 2011 and fills the vacancy created by the retirement of the Hon. Thomas E. Smith.

*

On September 28, 2011, the Governor announced the appointment of **JOHN PAUL DAVEY** to the Circuit Court for Prince George's County. Judge Davey was sworn in on October 24, 2011 and fills the vacancy created by the retirement of the Hon. A. Michael Chapdelaine.

*

On September 28, 2011, the Governor announced the appointment of the **HON. JEANNIE JINKYUNG HONG** to the Circuit Court for Baltimore City. Judge Hong was sworn in on October 19, 2011 and fills the vacancy created by the death of the Hon. John N. Prevas.

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On September 28, 2011, the Governor announced the appointment of **MICHAEL WILSON REED** to the Circuit Court for Baltimore City. Judge Reed was sworn in on October 20, 2011 and fills the vacancy created by the elevation of the Hon. Shirley M. Watts.

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On September 28, 2011, the Governor announced the appointment of **MASTER JANE CAIRNS MURRAY** to the Circuit Court for Cecil County. Judge Cairns was sworn in on October 17, 2011 and fills the vacancy created by the retirement of the Hon. O. Robert Lidums.

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