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Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Robert John Greenleaf, Misc. Docket AG No. 2, September Term 2013, filed May 16, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/2a13ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission ("the Commission"), Petitioner, charged Robert John Greenleaf ("Greenleaf"), Respondent, with violating Maryland Lawyers' Rule of Professional Conduct ("MLRPC") 8.4.

A hearing judge found the following facts. Detective Sergeant Louis Gary Yamin ("DS Yamin") of the Baltimore Police Department had a Yahoo Messenger account that was connected to a Yahoo profile for a female named "Beth." As "Beth," DS Yamin entered a Yahoo Messenger chat room, in which a person with the username "delmarvan19901" initiated a private chat with "Beth." "Beth" almost immediately sent the message "14/f/balto. md[,]" which is Internet lingo for identifying oneself as a fourteen-year-old female in the Baltimore area. DS Yamin identified "delmarvan19901" as Greenleaf. Greenleaf believed that "Beth" was a fourteen-year-old or a fifteen-year-old. On approximately one-hundred-and-fifty separate dates, Greenleaf and "Beth" chatted and/or e-mailed each other. On nearly half of those dates, Greenleaf used his computer at the Robert C. Murphy Courts of Appeal Building to communicate with "Beth." Greenleaf's and "Beth's" conversations consistently were sexually explicit. For example, Greenleaf asked: "Beth, do you want to have sex with me?"

Based on the above facts, the hearing judge concluded that Greenleaf violated MLRPC 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), or 8.4(a) (Violating the MLRPC).

The Commission did not except to any of the hearing judge's findings of fact or conclusions of law. Greenleaf excepted to the hearing judge's: (1) finding that Greenleaf believed that "Beth" was a fourteen-year-old or a fifteen-year-old; and (2) conclusion that Greenleaf violated CL § 3-324 (Sexual Solicitation of Minor). The Commission recommended disbarment. Greenleaf requested a reprimand.

Held:

The Court of Appeals overruled Greenleaf's exceptions, and upheld all of the hearing judge's conclusions of law. The Court determined that Greenleaf deliberately solicited and preyed on a person whom Greenleaf believed to be under the age of consent; and that Greenleaf is a sexual predator who is a danger to the public. The Court noted eight aggravating factors: selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge misconduct's wrongful nature, vulnerability of victim, indifference to rehabilitation, and illegal conduct. The Court noted only one mitigating factor: absence of a prior disciplinary record. The Court held that, generally, disbarment is the appropriate sanction for a lawyer's misconduct where the lawyer commits a crime that establishes that the lawyer is unfit to continue to practice law.

Attorney Grievance Commission of Maryland v. Ronald Marc Levin, Misc. Docket AG No. 75, September Term 2012, filed May 16, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/75a12ag.pdf

ATTORNEY DISCIPLINE – ATTORNEY MISCONDUCT – SANCTIONS – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland ("AGC"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Ronald Marc Levin. Bar Counsel alleged that Levin, in connection with his employment at the law firm of Joseph, Greenwald & Laake, P.A. from December 2010 through November 2011, engaged in professional misconduct as defined by Md. Rule 16-701(i), violating sections (a), (b), (c) and (d) of Rule 8.4 of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), as adopted by Md. Rule 16-812. Bar Counsel alleged that Levin misrepresented his workload and created fictitious clients and fictitious client papers in order to distort his net originated income and shield his salary from adjustments reflecting his lower than anticipated performance.

Following a hearing before the Circuit Court for Montgomery County, the hearing judge found that Levin violated MLRPC 8.4(a) (conduct constituting a violation of the MLRPC) and MLRPC 8.4(c) (conduct involving dishonesty, fraud, deceit or, misrepresentation), but did not violate MLRPC 8.4(b) (commission of a criminal act reflecting adversely on honesty or trustworthiness) and MLRPC 8.4(d) (conduct prejudicial to the administration of justice). The hearing judge found that Levin engaged in deceit and misrepresentations to maintain his salary at an unwarranted level, but held that Petitioner had not proven by clear and convincing evidence that Respondent committed a criminal act by violating Md. Code (2002, 2012 Repl Vol.), § 7-104(b) of the Criminal Law Article (unauthorized control over property by deception). Consequently, the hearing judge found that Petitioner had not proven a violation of MLRPC 8.4(b).

Additionally, the hearing judge held that Respondent's conduct was essentially private in nature, and therefore, did not seriously impair public confidence in the legal profession, or support finding a violation of MLRPC 8.4(d).

The AGC submitted exceptions to the hearing judge's failure to find that Levin violated Rules 8.4(b) and 8.4(d) of the MLRPC. Respondent did not file exceptions to the hearing court's findings of fact or conclusions of law.

Held:

The Court of Appeals sustained Petitioner's exceptions to the hearing court's failure to find violations of MLRPC 8.4(b) and MLRPC 8.4(d). Concerning 8.4(b), the Court held that

Respondent's conduct satisfied each element of § 7-104(b)(1) of the Criminal Law Article. Because the Court ruled that Respondent violated the criminal law by means of deception, the Court also held that Respondent necessarily violated Rule 8.4(d) by having committed dishonest criminal conduct that reinforced the most damaging cynicisms concerning lawyers' honesty, avarice, and candor. Finally, the Court reiterated that when a member of the bar is shown to be willfully dishonest for personal gain by means of fraud, deceit, cheating or like conduct, absent the most compelling circumstances, disbarment follows. Accordingly, the Court held that disbarment was the appropriate sanction for Respondent's misconduct.

Attorney Grievance Commission of Maryland v. Michael David Fraidin, Misc. Docket AG No. 6, September Term 2013, filed May 16, 2014. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2014/6a13ag.pdf

ATTORNEY DISCIPLINE – RULE 8.4 MISCONDUCT

Facts:

In 2009, Michael Fraidin ("Respondent") and his wife, Mrs. Fraidin, began to struggle financially, leading to legal proceedings surrounding: (1) an outstanding debt related to a credit card held in Mrs. Fraidin's name; (2) an outstanding debt related to a credit card held in Respondent's name; (3) foreclosure related to the marital home; and (4) Mrs. Fraidin's filing for Chapter 13 bankruptcy relief.

Chase Bank USA, N.A. sued Mrs. Fraidin in February 2010 to collect an outstanding debt from use of a credit card in her name alone. Respondent entered his appearance as Mrs. Fraidin's attorney in that case and subsequently paid the negotiated settlement using funds from a "Cash Withdrawal" from his Interest on Lawyer Trust Account ("IOLTA"). In December 2010, Respondent settled with Bank of America on an outstanding credit card debt from an account held for personal use in his name alone. To make his first payment to Bank of America, Respondent made a "Cash Withdrawal" of $7,000.00 from his IOLTA account. Then, in June 2011, Respondent liquidated his personal IRA account and wire-transferred all $15,000.00 from his IRA account into his IOLTA account.

On June 1, 2010, Bank of America initiated a foreclosure action against Respondent and Mrs. Fraidin relating to their home. On September 14, 2011, two days prior to the public auction, Mrs. Fraidin filed a Chapter 13 Voluntary Petition for Bankruptcy. In connection with her bankruptcy proceedings, Mrs. Fraidin, with Respondent's assistance, provided the Bankruptcy Trustee copies of checks, each in the amount of $3,000.00, from Respondent's IOLTA account. These checks purported to represent paychecks arising from Mrs. Fraidin's employment with Respondent's solo law practice. Despite the Fraidins' claims that Mrs. Fraidin was Respondent's employee, Mrs. Fraidin never filed any tax documentation related to her alleged employment and testified that she did not believe her income was contingent upon doing any work. Respondent, who maintained all the books and financial records associated with his office and the Fraidin household, assisted Mrs. Fraidin in the preparation and filing of documentation during the course of her bankruptcy proceedings.

On March 25, 2013, Petitioner filed its Petition for Disciplinary or Remedial Action alleging violations relating to the improper use and maintenance of Respondent's attorney trust account, as well as engaging in and assisting Respondent's wife in committing bankruptcy fraud. Following an evidentiary hearing, the hearing judge found that Respondent violated MLRPC

1.15, 8.1, 8.4(a), (b), (c) and (d), as well as Maryland Rules 16-606.1, 16-608, and 16-609. Respondent filed exceptions to the conclusion that he violated Rule 8.4 with regard to the bankruptcy proceedings, arguing that he was never the attorney of record in Mrs. Fraidin's bankruptcy case, and that the statements at issue in the bankruptcy forms could not be the basis for finding of bankruptcy fraud because the statements were not required to be included on the forms.

Held:

With regard to the mishandling of Respondent's IOLTA account, the Court held that Respondent violated Md. Rule 16-606.1 by failing to maintain adequate client ledgers, Md. Rule 16-607, under the circumstances, by depositing personal funds into his IOLTA account, and Md. Rule 16-609 by making numerous impermissible cash withdrawals from his IOLTA account. Respondent's violations of Md. Rules 16-606.1, 16-607, and 16-609 in this case also constitute a *per se* violation of MLRPC Rule 1.15. In addition, the Court held that Respondent violated MLRPC Rule 1.15 by commingling personal funds with client funds in his trust account to then write checks on his trust account to his wife to create the illusion that she worked for his law office.

The Court also held that Respondent violated MLRPC Rule 8.4(a), (b), (c), and (d) during the course of his involvement with his wife's bankruptcy proceeding. Even though Respondent was not Mrs. Fraidin's attorney of record in the bankruptcy case, Respondent was directly involved with the preparation and filing of Mrs. Fraidin's bankruptcy documentation, which contained intentional misrepresentations of fact intended to mislead and defraud the United States Bankruptcy Court. In particular, with regard to the purported paychecks drawn on Respondent's IOLTA account, the Court agreed with the hearing judge that the checks were issued to Mrs. Fraidin in order to convince the bankruptcy trustee that she had a regular monthly income of $3,000.00, in furtherance of Respondent and Mrs. Fraidin's scheme to commit fraud. Considering the intentional mishandling of Respondent's trust account and the deceitful nature of his conduct in relation to Mrs. Fraidin's bankruptcy matter, the Court held that the appropriate sanction was disbarment.

Mary Caroline Zook v. Susan M. Pesce, No. 75, September Term 2013, filed May 16, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/75a13.pdf

MD. CODE (1974, 2013 REPL. VOL.), § 9-108 OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE – ATTORNEY-CLIENT PRIVILEGE – TESTAMENTARY EXCEPTION

Facts:

Eugene D. Zook ("the Decedent") died on December 24, 2008, after succumbing to prostate cancer at age 81. At the time of his death, the Decedent had three living adult children: Dennis Eugene Zook, Susan M. Pesce ("Respondent"), and Mary Caroline Zook ("Petitioner"). On November 20, 2007, the Decedent, with the help of attorney, Thomas P. Downs ("Downs"), set up the Eugene D. Zook Living Trust ("the 2007 Living Trust"). The Decedent amended the Living Trust on December 2, 2008 ("the 2008 Living Trust"), twenty-two days before his death. The instrument designated Respondent as the trustee of the Living Trust.

Article Seven of the 2008 Living Trust specified that each of the Decedent's three children were to receive a one-third share of all remaining trust property. Although the distribution of the trust assets was equal, each heir's access to his or her share was not. Whereas the 2008 Living Trust directed the trustee to distribute the shares of Dennis Zook and Susan Pesce outright and free of trust, the trustee was directed to maintain in trust Petitioner's share according to specific terms and conditions.

On August 10, 2010, Petitioner, acting *pro se*, filed a "Complaint For Inspection Of Records" ("the Complaint") in the Circuit Court for Prince George's County against Pesce, Downs, Dennis Zook, and Catherine Zook, Dennis's wife. The Complaint offered 18 counts, appearing to question the validity of the 2008 Living Trust.

Pesce admitted the allegations of paragraphs 1, 2, 3, 7, and 13, denied 4–6, 8–12, and 14–18, and requested the Complaint be dismissed for, among other reasons, failure to state a claim. A re-filed version of the motion to dismiss also claimed that the Complaint improperly joined parties who were not part of the administration of the Trust or Estate—namely, Downs, Dennis Zook, and Catherine Zook. This motion was granted for all parties except Pesce.

Trial took place on December 5, 2011. The court interpreted the Complaint as alleging that the 2008 Living Trust must be set aside as invalid because the Decedent was not of sound mind to enter the new agreement. After some discussion moderated by the court, Respondent agreed to provide an audit of the accounting of the trust assets. Notwithstanding this agreement, Petitioner requested access to a copy of the 2007 Living Trust. Downs, responding to Petitioner's subpoena for records, asserted that the 2007 Living Trust was a privileged communication with

his deceased client, and that he would assert that privilege on the Decedent's behalf, as well as on the behalf of the trustee of the Living Trust, Pesce. The court honored that privilege and refused to allow Petitioner access to the 2007 Living Trust or allow any questions about its contents.

The court then moved on to the question of the soundness of the Decedent's mind at the time that the 2007 Living Trust was amended. After hearing from four witnesses called by Petitioner, the court found the revisions to the 2007 Living Trust "fair, proper and reasonable under the circumstances." The court then ruled that "Ms. Zook does not have a claim for relief based on paragraph 5 of her complaint." The court ordered the agreed-to audit of trust assets and dismissed the remainder of the complaint against Pesce.

Petitioner appealed to the Court of Special Appeals, again appearing *pro se*. In an unreported opinion, the intermediate appellate court affirmed the Circuit Court. Petitioner, having acquired counsel, petitioned this Court for *certiorari*, which we granted to consider whether the attorney-client privilege exists in Maryland and, if so, whether it was properly applied in this case.

Held: Affirmed.

The Court of Appeals affirmed the Judgment of the Court of Special Appeals. The Court of Appeals held that the testamentary exception to the attorney-client privilege exists in Maryland. By refusing to recognize that exception, the trial court erred by failing to require that Downs produce the 2007 Living Trust. Yet, Petitioner has the burden to demonstrate that the trial court's error was prejudicial. After due consideration, the Court concluded that admission into evidence of the 2007 Living Trust, or evidence relating to its execution, would not have persuaded the trial court to rule any differently. Accordingly, the Court held that Petitioner is not entitled to a new trial.

Return to ToC

Joy Friolo v. Douglas Frankel, et al., No. 102, September Term 2011, filed May, 19, 2014. Opinion by Wilner, J.

http://www.mdcourts.gov/opinions/coa/2014/102a11.pdf

CIVIL PROCEDURE – ATTORNEY'S FEES

Facts:

This is the third appeal over the award of attorney's fees in a wage payment case. The case began in February, 2000, when Friolo and her husband filed a ten-count complaint against Frankel and his medical practice in the circuit court for Montgomery County. The case proceeded to a trial before a jury. During the trial, many of the plaintiffs' claims were dropped or reduced. The jury entered a verdict for Friolo for $11,778 and declined to award treble damages. Frankel paid the judgment.

Two weeks after the entry of judgment for the unpaid wages, Friolo's attorney filed a motion for attorneys' fees and costs. That motion, as supplemented over the ensuing 14 years, has resulted four proceedings in the circuit court, two in the Court of Special Appeals, and three in the Court of Appeals The demand is now nearly $400,000, with no offer, as to fees, by the defendant.

Held:

The Court of Appeals:

1. Confirmed that the lodestar approach is the one to be used in determining the reasonableness of fees sought in wage payment cases;
2. Held that the mathematical formula crafted by the Court of Special Appeals to measure the reasonableness of fees based on the precise relationship among the plaintiff's claim, the plaintiff's settlement demand, the defendant's settlement offer, and the amount of the judgment for the plaintiff is flawed and not consistent with the lodestar approach;
3. Held that the lodestar amount may be reduced, even significantly, when the attorney effectively prolongs the litigation by refusing reasonable settlement offers or making unreasonable demands;
4. Held that the circuit court erred in not awarding any fees for time expended in pursuing successful appeals; and
5. Remanded the case for further proceedings regarding fees for the appellate effort.

Return to ToC

Francina Spivery-Jones v. In the Matter of the Receivership Estate of Trans Healthcare, Inc., et al., No. 66, September Term 2013, filed May 19, 2014. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2014/66a13.pdf

APPEALS – STATUTORY APPEALABLE INTERLOCUTORY ORDER – COLLATERAL ORDER DOCTRINE – ORDER DENYING MOTION TO VACATE RECEIVERSHIP

Facts:

Trans Healthcare, Inc., a Delaware Corporation with its principal place of business in Sparks, Maryland, and forty-two related entities of which it was the direct or indirect parent of, filed an "Emergency Petition for Appointment of Receiver" pursuant to Section 3-411 of the Corporations and Association Article, which permits the circuit court to appoint a receiver to wind down the affairs of a Maryland corporation that is voluntarily dissolving. The Circuit Court for Baltimore County granted the Petition and appointed Michael Sandnes as receiver over Trans Healthcare and its related entities.

More than two years after the receiver was appointed, an unsecured creditor of Trans Healthcare, Francina Spivery-Jones, Petitioner, filed a motion to vacate the receivership, alleging that the circuit court had no jurisdiction to appoint a receiver over Trans Healthcare, because Trans Healthcare and many of its related entities were out-of-state corporations and limited liability companies. The receiver opposed the motion, contending, *inter alia*, that the circuit court had inherent equitable authority to appoint a receiver over the out-of-state entities; the circuit court judge agreed and denied the motion.

Ms. Spivery-Jones, thereafter, noted an appeal from the order denying her motion to vacate the receivership. The Court of Special Appeals, however, dismissed the appeal, concluding that the order denying the motion to vacate the receivership was not a final judgment, nor was it appealable under Section 12-303(3)(iv) of the Courts and Judicial Proceedings Article, permitting appeals from interlocutory orders "appointing a receiver" or pursuant to the collateral order doctrine.

Held: Affirmed.

The Court of Appeals affirmed the judgment of the Court of Special Appeals dismissing the appeal from the order denying Ms. Spivery-Jones's motion to vacate the receivership. The Court first opined that Section 12-303(3)(iv) of the Courts and Judicial Proceedings Article, permitting appeals from orders "appointing a receiver" did not authorize an appeal, because under a plain

meaning analysis, the statute applies to orders in which the court designates a person or entity to act as a receiver, which the order denying the motion to vacate the receivership had not done.

The Court also rejected Ms. Spivery-Jones's contention that the order was appealable at common law under the collateral order doctrine, which permits appeals from orders that satisfy four criteria: "(1) it must conclusively determine the disputed question; (2) it must resolve an important issue; (3) it must be completely separate from the merits of the action; and (4) it must be effectively unreviewable on appeal from a final judgment." Assuming *arguendo,* that the first three criteria were satisfied, the Court rejected Ms. Spivery-Jones's contention that the order was effectively unreviewable on appeal because assets of the receivership estate would be looted through distributions to other creditors as well as administrative and legal costs. The Court noted that pursuant to the Maryland Rules, a creditor has an opportunity to challenge any partial or complete distribution of assets, rulings about which are reviewable on appeal. The Court concluded, finally, that the mere fact that administrative and legal fees will be expended does not justify application of the collateral order doctrine, because these are costs associated with all legal proceedings.

George Kusi v. State of Maryland, No. 62, September Term 2013, filed May 19, 2014. Opinion by Battaglia, J.

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

http://www.mdcourts.gov/opinions/coa/2014/62a13.pdf

CRIMINAL PROCEDURE – INTERPRETERS - MARYLAND RULE 16-819 – REVIEW OF TRIAL COURT'S DECISION NOT TO APPOINT AN INTERPRETER

Facts:

On the first day of his criminal jury trial, George Kusi, a native of Ghana, informed the trial judge that he wished to have an interpreter during the proceedings pursuant to Section 1-202 of the Criminal Procedure Article, Maryland Code, and Rule 16-819 of the Maryland Rules. Section 1-202 provides, *inter alia*, that a court shall appoint an interpreter when a criminal defendant "cannot readily understand or communicate" in English. The judge engaged in a lengthy colloquy with Kusi, questioning him on his use of the English language, his understanding of the proceedings, and his ability to assist counsel in his own defense. On the record, the judge made factual findings that Kusi understood the proceedings and that he was able to communicate cogently with his counsel; the trial judge subsequently denied Kusi's request for an interpreter. The Court of Special Appeals affirmed the judgment of the Circuit Court.

Held: Affirmed.

The Court noted that the lengthy colloquy by the trial judge gave that court the opportunity to ascertain Kusi's ability to understand and communicate in English. The Court determined that, in reviewing a trial court's decision to appoint an interpreter, it will employ a two-part process in which it will first examine whether the trial judge's factual findings were clearly erroneous. If the findings were not clearly erroneous, the appellate court will subsequently determine whether the trial judge abused his discretion in making a determination regarding the appointment of an interpreter. Applying this standard to the present case, the Court determined that the trial judge's findings that Kusi understood English were not clearly erroneous and that the judge did not abuse his discretion in declining to appoint an interpreter for Kusi.

Bonita H. Marshall v. Safeway, Inc., No. 56, September Term 2013, filed March 26, 2014. Opinion by Wilner, J.

Adkins, J., concurs and dissents.

McDonald, J., concurs.

http://www.mdcourts.gov/opinions/coa/2014/56a13.pdf

LABOR & EMPLOYMENT – WAGE GARNISHMENT

Facts:

This case began as a dispute over whether twenty-nine dollars and sixty-four cents was wrongfully deducted by respondent Safeway Inc. from the wages of its employee, Bonita Marshall, in response to two writs of garnishment issued by the District Court of Maryland pursuant to Md. Rule 3-646. Marshall filed a class action suit in the Circuit Court for Prince George's County.

Ten days after the class action suit was filed, Safeway changed its payroll garnishment system for Maryland to conform with the standards set forth in the Exemption instruction in the District Court Form – the greater of 75% of disposable wages or 30 times the FLSA minimum hourly wage – retroactive to the garnishments received in April 2009 and July 2010. In conformance with that decision, Safeway tendered to Marshall the amounts that would have been paid to her had those standards been applied at the time.

The Circuit Court for Prince George's County declined to certify the class and entered judgment in favor of Safeway, and the Court of Special Appeals affirmed that judgment. *Marshall v. Safeway*, 210 Md. App. 545, 63 A.3d 672 (2013).

Held: Affirmed.

The Court held:

A. With exceptions not relevant here, the current required exemption is the greater of (1) 75% of the disposable wages due, or (2) 30 times the minimum hourly wage under the federal Fair Labor Standards Act;

B. employees have a direct civil cause of action under Md. Code, § 3-507.2 of the Labor and Employment Article (LE) against employers who deduct from the employee's wage more than is allowed by LE § 3-503;

C. the court may allow and control discovery regarding putative members of the class, prior to class certification, if necessary to a determination of whether the class should be certified; and

D. the circuit court did not abuse its discretion in denying the representative plaintiff's motion to certify the class, based on findings that (1) the discovery regarding putative class members was not necessary in this case; (2) the motion to certify the class was untimely; (3) individual issues predominate over any common issues; and (4) proceedings under Md. Rule 3-646 to challenge amounts withheld pursuant to writs of garnishment were superior to a class action.

Motor Vehicle Administration v. April Marie Deering, No. 52, September Term 2013, filed May 21, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/52a13.pdf

MARYLAND VEHICLE LAW – DRIVERS' LICENSES – ADMINISTRATIVE REMEDIES – IMPLIED CONSENT, ADMINISTRATIVE PER SE LAW

Facts:

The "implied consent, administrative per se law," codified in the Maryland Vehicle Code, see Maryland Code, Transportation Article §16-205.1, incorporates "implied consent" in that it provides that any individual who drives a vehicle in Maryland is deemed to have consented to take a chemical test to measure blood alcohol concentration, if stopped by a police officer with reasonable grounds to believe that the person has been driving under the influence of alcohol. It nonetheless gives a detained driver a choice between taking and refusing the test. The statute also incorporates "administrative per se" in that the statute provides for an automatic suspension of the driver's license for specified periods if the detained driver refuses to take the test or fails the test with a specific blood-alcohol concentration level. The length of suspension varies depending on the alcohol concentration or the refusal of the test, and the number of prior offenses.

After being stopped for traffic violations and failing a number of sobriety tests, Respondent April Marie Deering was arrested for driving under the influence of alcohol. At the police station, the police officer asked her to take a breath test and advised her of the different consequences of refusing or taking the test under the implied consent, administrative per se law. Ms. Deering asked the officer if she could call an attorney prior to electing whether to take the test, but the officer denied her request. Ms. Deering agreed to take the breath test and failed it, and her driver's license was administratively suspended.

Ms. Deering requested an administrative hearing and, at the hearing, argued that she had a right during her detention to consult counsel before she decided whether to take the breath test and that the failure to allow her to call an attorney violated due process. Ms. Deering asked that, in recognition of the alleged due process violation, the administrative law judge take "no action"– that is, not impose a suspension based on the result of the breath test.

The administrative law judge denied Ms. Deering's request to take "no action" and upheld the suspension, explaining that, in the administrative context, there is no right to consult counsel before deciding whether to take the breath test. The circuit court reversed the administrative law judge's decision, holding that, under *Sites v. State*, 300 Md. 702, 481 A.2d 192 (1984), the denial of Ms. Deering's request to contact her attorney violated her right to due process under the Fourteenth Amendment. The circuit court explained that, despite the fact that *Sites* was a criminal case, its holding was applicable to Ms. Deering's administrative proceeding.

Petitioner, the Motor Vehicle Administration, filed a petition for writ of certiorari to the Court of Appeals, which the Court granted to consider whether the administrative law judge properly upheld the suspension of Ms. Deering's license despite the fact that the detaining officer had denied her request to speak to an attorney before she decided whether to take the breath test.

Held:

The Court held that, even if a suspected drunk driver is denied the opportunity to consult counsel before deciding whether to take a breath test under the implied consent, administrative per se law, the driver remains subject to the administrative license suspension that the statute assigns to a test refusal or a particular test result. The Court therefore affirmed the administrative law judge's decision to uphold Ms. Deering's suspension.

In reaching that conclusion, the Court first noted that, if the question of a right to a pre-test consultation with counsel arose in a purely administrative context, it would apply a balancing test and likely conclude that due process does not require such a consultation. The Court, however, noted that a detained driver also faces the prospect of potential criminal penalties, and that the Court in *Sites v. State*, 300 Md. 702, 481 A.2d 192 (1984), a criminal case, had recognized a qualified right of a detained driver to communicate with counsel prior to deciding whether to take the breath test and held that a test result obtained in violation of that right must be suppressed in a criminal proceeding.

The Court concluded, however, that given the clearly expressed legislative intent in the implied consent, administrative per se law to remove impaired drivers from the road, to encourage detained drivers to submit to a test measuring impairment, and to obtain timely and accurate measures of impairment - all of which contribute to public safety and discourage or eliminate a serious hazard on the roadways - the right recognized in *Sites* does not entail suppression of the test result or refusal in proceedings concerning the administrative suspension of the driver's license. The Court thereby confirmed dicta to that effect in *Najafi v. Motor Vehicle Administration*, 418 Md. 164, 12 A.3d 1255 (2011).

COURT OF SPECIAL APPEALS

County Council of Prince George's County, Maryland, Sitting as District Council v. Zimmer Development Company, Nos. 259 and 265, September Term 2013, filed May 28, 2014. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2014/0259s13.pdf

ADMINISTRATIVE LAW – APPELLATE JURISDICTION OF DISTRICT COUNCIL

Facts:

Zimmer Development Company ("Zimmer") is a national real-estate developer with its headquarters located in Wilmington, North Carolina. Zimmer proposes to construct a retail center that will be anchored by a CVS in Prince George's County, Maryland. The property, known as the "Edwards Property," abuts Adelphi Road, Edwards Way, and Riggs Road in Prince George's County along Maryland Route 212.

The Prince George's County Council, sitting as the District Council ("the District Council") is responsible for making discrete land use decisions. Preliminary approval or denial of a proposed zoning plan, however, begins with the Prince George's County Planning Board of the Maryland-National Capital Park and Planning Commission ("the Planning Board").

On March 14, 2011, Zimmer submitted its proposed application for the Edwards Property and the Planning Board subsequently approved Zimmer's application. Thereafter, the District Council exercised its discretion to "call up" the case for review. After review, the District Council remanded Zimmer's application to take further testimony on three specific remand issues ("the three remand issues").

Subsequently, the Planning Board again approved Zimmer's application after it was satisfied with Zimmer's proposed solutions to the three remand issues. The District Council, however, exercised its discretion to "call up" the case for a second time. After a formal hearing, the District Council overturned the decision of the Planning Board and denied Zimmer's application. The District Council set forth several grounds in support of its decision to deny Zimmer's application.

Zimmer petitioned the circuit court for judicial review. In a comprehensive written opinion, the circuit court reversed the District Council and reinstated the Planning Board's approval of Zimmer's application. The circuit court concluded that the District Council was vested with appellate, not original, de novo, jurisdiction. As such, the circuit court found that the District Council was not authorized to substitute its judgment for that of the Planning Board. The circuit

court further observed that the District Council exceeded the scope of its authority when it considered issues other than the three remand issues. Ultimately, the District Council was confined to determining only whether the Planning Board's decision was "arbitrary, capricious, discriminatory, or illegal."

Held: Affirmed.

The Court of Special Appeals held that the District Council is vested with appellate jurisdiction and not original, de novo, jurisdiction over zoning matters. Specifically, the Court of Special Appeals observed that the express language of the Prince George's County Code demonstrates that the Planning Board is vested with the authority to engage in fact-finding. As such, the District Council is limited to determining whether the Planning Board's decision was "arbitrary, capricious, discriminatory, or illegal."

The Court of Special Appeals further extended the holding of *Cnty. Council of Prince George's Cnty. v. Curtis Regency*, 121 Md. App. 123 (1998), to cases involving zoning decisions. Although the District Council argued that *Curtis Regency* was limited to cases involving subdivision matters, the Court expressly held that *Curtis Regency* applied to zoning decisions of the District Council.

As a result of pending arguments in *Curtis Regency*, the District Council amended its county code to empower the District Council to exercise "original jurisdiction" over zoning matters. Nevertheless, the Prince George's County Code limits the District Council's review to the record established before the Planning Board. The pertinent provision of the Prince George's County Code, however, conflicts with the Maryland Regional District Act ("RDA"). Specifically, the RDA entrusts preliminary zoning decisions with the Planning Board, not the District Council. The Planning Board, therefore, exercises original jurisdiction, while the District Council exercises appellate jurisdiction.

Moreover, the Court of Special Appeals concluded that the code provision is internally inconsistent in that it purports to grant the District Council "original jurisdiction," despite limiting the District Council to reviewing only the record established before the Planning Board. The Court explained that it is inherently inconsistent for a body to possess "original jurisdiction," while requiring that the District Council make its determination "based on the record."

Additionally, the Court of Special Appeals held the District Council exceeded the scope of its review when it considered issues other than the three remand issues during the second "call-up." The Court observed that the District Council's review was limited "to the facts and information contained within the record made at the hearing before the Planning Board." The Court held that the District Council erred as a matter of law when it failed to limit its review to the three remand issues. Because the District Council failed to confine itself to its statutorily defined powers, the Court did not address the grounds set forth by the District Council in denying Zimmer's application.

Sail Zambezi, Ltd. v. Maryland State Highway Administration, No. 1888, September Term 2012, filed April 30, 2014. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2014/1888s12.pdf

JURY INSTRUCTIONS – APPELLATE REVIEW

ADMIRALTY – SIGNALING REQUIREMENTS

EVIDENCE – HEARSAY–BUSINESS RECORD EXCEPTION

EVIDENCE – HEARSAY–BUSINESS RECORD EXCEPTION

EVIDENCE – DOUBLE HEARSAY

Facts:

Sail Zambezi, Ltd.'s ("Sail Zambezi") sole asset is a 60' Oyster sailboat named the Zambezi. On October 16, 2010, the owner and a few people, including the captain of the Zambezi went out for a day of sailing. Going out, the Zambezi traveled downstream through the Spa Creek bridge, a drawbridge that connects Annapolis and Eastport and is controlled by a drawtender. The Zambezi returned to the bridge around 1:45pm and waited by the Annapolis City Marina for the bridge to open. Around 2pm, the bridgetender received a call to open the bridge. Boats traveling downstream went through first, and the Zambezi, without signaling to the drawtender, began moving upstream toward the bridge. The drawbridge began to close as the Zambezi proceeded through the opening. When the captain of the Zambezi observed the bridge closing, he reversed the direction of the boat, but the bridge and boat collided.

On May 19, 2011, Sail Zambezi filed a complaint in the circuit court alleging that the Maryland State Highway Administration was negligent in that it breached its duty of care to Sail Zambezi because the drawtender failed to observe the Zambezi approaching the bridge.

Prior to trial, the trial court addressed jury instructions regarding the Code of Federal Regulations requirement that each vessel must signal a drawtender before proceeding through a bridge span. The trial court found that such a requirement was not at variance with the C.F.R.'s specific regulation for the Spa Creek bridge describing when a bridge shall open.

During trial, Sail Zambezi sought to introduce a spreadsheet documenting the expenses paid for repairs from the collision, but the trial court denied its admission because the Zambezi's Captain testified that he made the spreadsheet "for the purposes of this case." The trial court found that because the Captain prepared the spreadsheet from other source documents, Sail Zambezi should have been using the source documents.

The jury found both Sail Zambezi and MSHA negligent with Sail Zambezi being 85 percent at fault and MSHA 15 percent at fault, but awarded no dollar damages.

Held:

The trial court did not err by including the C.F.R.'s general signaling requirements in the jury instructions because those requirements are not at variance with the specific Spa Creek bridge regulations. The Spa Creek bridge regulation simply indicates the times when the bridge will open. Nothing in the language of the Spa Creek bridge regulation suggests an intent to omit the general signaling requirement imposed on each vessel to signal independently for the opening of a draw. Moreover, eliminating the need to signal prior to passage through a bridge would not, in our view, be reasonable, logical, or consistent with common sense. The Spa Creek bridge is in a heavily trafficked area for motor vehicle and pedestrians. The waterway that it spans is busy with boat traffic that does not necessarily intend to pass through the bridge. It would be unreasonable to interpret the regulation to mean that the bridge is required to open every half hour even when no boat has signaled its intent to pass through.

The trial court did not abuse its discretion by denying the admission of the spreadsheet into evidence because it was prepared for this case, and even if it qualified as a business record, the trial court could have found the facts surrounding its creation to be untrustworthy. No evidence was presented that Sail Zambezi had provided the Maryland State Highway Administration with the source documents during discovery or the monthly spreadsheets from which the exhibit was created. Therefore, the Maryland State Highway Administration had no opportunity to compare the spreadsheet with the source documents.

Additionally, the information in the spreadsheet contains hearsay that did not satisfy an exception to the hearsay rule because it was prepared from invoices of other service providers. The Maryland State Highway Administration did not stipulate to the admissibility of the invoices during discovery, nor did Sail Zambezi have the provider of the invoices testify to admit the invoices as business records or have expert testimony explaining the reasonableness of the expenses.

Leslie Valentine-Bowers v. The Retina Group of Washington. P.C., et al., No. 2117, September Term 2012, filed May 29, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/2117s12.pdf

FAILURE OF DISCOVERY – CIVIL – SANCTIONS

Facts:

Leslie Valentine-Bowers alleged that over a two-year period, The Retina Group of Washington ("TRG") and Dr. Nicole Moffett, among others, negligently failed to monitor a condition in her eye that caused her to lose vision. After she filed the Complaint and served the defendants, TRG and Dr. Moffett both answered, noting her deposition and serving written discovery requests. Her counsel did not respond to discovery from either defendant after numerous requests, and each filed a motion to compel.

The circuit court granted both defendants' motions to compel and ordered Ms. Valentine-Bowers to "provide" answers to interrogatories and "produce" the requested documents by a specific date—with the express warning that if she failed to do so she "may be subject to sanctions and/or penalties ordered by this Court." Although counsel for Ms. Valentine-Bowers claimed not to have received one order, at least two other orders issued from the court with these same directives—*i.e.*, that Ms. Valentine-Bowers was to "provide full and complete Answers to Interrogatories and to produce all requested documents," "by or before" a date certain, or she would be subject to sanctions.

Around the same time that the court issued these orders, Ms. Valentine-Bowers's noted deposition date of July 6 arrived. Although counsel for all defendants appeared at TRG's counsel's offices for the deposition, Ms. Valentine-Bowers and her counsel did not. So TRG filed a Supplemental Memorandum in support of the Motion for Sanctions, and cited this additional discovery failure as a reason to dismiss the case.

Both of the trial court's compliance deadlines came and went, and the appellees heard nothing from Ms. Valentine-Bowers. It seems that on the date she was supposed to comply with the court's order, Ms. Valentine-Bowers's counsel *mailed unexecuted* Answers to Interrogatories, which counsel for the appellees received four days later. Counsel for Ms. Valentine-Bowers mailed the signature page, dated *one* day after the court's deadline, *five* days after the deadline. After receiving the unexecuted, undated responses, the appellees consolidated all grounds for dismissal in *one* motion, the "Defendants' Joint Motion for Sanctions" (the "Joint Motion"). They cited Ms. Valentine-Bowers's multiple failures to respond to outstanding discovery, her failure to appear for her deposition, and her failure to comply with the court's orders.

The trial court reviewed the chronology of the discovery motions, noting Ms. Valentine-Bowers's obligation to communicate with, and remain accessible to, her counsel as a plaintiff in

litigation. It cited to *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 725-26 (2002), reviewed the five factors therein, and concluded that dismissal was justified: *first*, the discovery violation was substantial in that Ms. Valentine-Bowers completely ignored numerous discovery requests; *second*, the discovery was not ultimately provided in a timely manner; *third*, Ms. Valentine-Bowers provided no adequate reason for the violation; *fourth*, the degree of prejudice to the defendants because of the lengthy delay was substantial; and *fifth*, the court had no reason to think that a postponement would cure the problem. Ms. Valentine-Bowers appealed.

Held: Affirmed.

The Court of Special Appeals agreed with the circuit court's conclusion that Ms. Valentine-Bowers's *total* failure to comply with discovery requests justified the "ultimate sanction" of dismissal. It noted the appellate court's narrow review of a trial court decision regarding discovery, given that the trial court has broad discretion to impose sanctions for discovery violations ranging from striking out pleadings to dismissal. The Court stressed that the appellate court should not look to *each* discovery request to determine whether a party complied, but to the overall course of discovery. In this case, given counsel's "chronic inaction," the Court held that the trial court did not abuse its discretion when it dismissed the case.

Ms. Valentine-Bowers had an affirmative duty, which she had failed to fulfill, to move her own case forward. Her counsel never objected to a deposition notice, instead allowing all other parties to appear when he knew he was not going to produce his client. The Court pointed out that her failure to get *meaningful* discovery to the defendants by the court-ordered deadline also constituted a substantial violation—and even if counsel's delays were not "willful" because they were not deliberate, neglect or failure to act can constitute an equally substantial disregard for the discovery process.

Even if counsel for Ms. Valentine-Bowers had problems locating her to discuss her deposition date or review and sign discovery materials, he never let opposing counsel know of these problems—nor did he do anything to substantiate the problems with any evidence before either the trial judge or the appellate court. (The Court also remarked that the brief filed by Ms. Valentine-Bowers did not accurately convey the chronology that led to dismissal in the first place.) The Court agreed with the trial court that the degree of prejudice to the defendants was great (pointing out that the defendants had every right to put off further discovery until they had gotten the key piece of the plaintiff's deposition testimony in place), and a postponement would do nothing to help.

James R. Thomas, Jr. v. Peter A. Bozick, Jr., et al., No. 269, September Term 2013, filed May 28, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/0269s13.pdf

MARYLAND LIMITED LIABILITY COMPANY ACT – RIGHTS OF MEMBER OF LLC UPON WITHDRAWAL AND SUBSEQUENT FAILURE OF LLC TO EXERCISE OPTION TO PURCHASE MEMBER'S INTEREST – SUFFICIENCY OF EVIDENCE TO DEFEAT MOTION FOR SUMMARY JUDGMENT

Facts:

Appellant was a member of the architectural firm George, Miles & Buhr, LLC ("GMB") from 1969 until December 31, 2010, when he retired. GMB rented office space in property owned by GMB Plaza, LLC ("GMB Plaza"), a limited liability company that was governed by an Operating Agreement. Prior to appellant's retirement, appellant and appellees comprised all of the members of GMB Plaza.

Pursuant to the Operating Agreement, appellant's retirement from GMB triggered his involuntary withdrawal from GMB Plaza, and an automatic offer to sell his interest in GMB Plaza to GMB Plaza. GMB Plaza had the option to purchase appellant's interest within sixty days of January 1, 2011. The purchase price of the option was to be determined based on the value of the property owned by GMB Plaza ("Property"), which value was calculated using a formula set forth in the Operating Agreement. The value of the Property on January 1, 2011, as determined by such formula, was $1,221,671.

On February 16, 2011, appellees decided that $1,221,671 did not represent the fair market value of the Property, because two appraisals commissioned in September 2010 showed that the Property had a fair market value of $875,000 using the sales approach and $760,000 using the income approach. Accordingly, GMB Plaza declined to exercise its right to purchase appellant's interest in GMB Plaza.

On October 20, 2011 appellees voted to dissolve GMB Plaza and to sell the Property to a newly formed entity, GMB Properties, for $765,000, which was the average of two new appraisals conducted in June of 2011. GMB Properties was composed of appellees plus an additional member of GMB who did not have an interest in GMB Plaza. After settlement on the sale, a check for $270,394.60 was distributed to appellant, representing his interest in GMB Plaza.

Appellant filed suit against appellees alleging, among other things, a breach of the Operating Agreement. The circuit court granted appellees' motion for summary judgment. On appeal, appellant's primary contention was that, because GMB Plaza did not exercise the option to purchase his interest in GMB Plaza, he retained, under the Operating Agreement and the Maryland Limited Liability Company Act (Act"), all of his membership rights in GMB Plaza,

and thus had a right to notice of all GMB Plaza meetings, as well as the right to vote and participate in all decisions of GMB Plaza. Appellant also argued that the circuit court erred in granting summary judgment in favor of appellees, because there was a genuine dispute of material fact regarding the fair rental value of the Property and the fair market value of the Property when sold to GMB Properties.

Held: Affirmed.

The Court first observed that the Operating Agreement provided GMB Plaza with the option to purchase appellant's interest upon his involuntary withdrawal, but was silent on what happened in the instant case, namely GMB Plaza's election not to exercise the option to purchase. The Court then looked to the Act to fill the gap. Under Section 4A-606.1(b) of the Act, if a person ceases to be a member of a limited liability company and the company fails to liquidate the person's interest, that person is "deemed to be an assignee of the unredeemed economic interest." Further, under Section 4A-603(b)(2), an assignee is not a member of a limited liability company and may not exercise any of the rights of a member.

The Court rejected appellant's contentions (1) that the Operating Agreement provided for the retention of his membership rights upon withdrawal where GMB Plaza declined to purchase his interest, and (2) that the Operating Agreement superseded Section 4A-606.1(b). The Court concluded that appellant's membership in GMB Plaza ended upon his retirement, and only his economic interest in GMB Plaza, of which he was an assignee, remained. As an assignee, appellant could not partake in the management of GMB Plaza or vote on company matters. Appellant was not entitled to notice of meetings of GMB Plaza, nor could he participate in the decision to sell the Property or decide on the Property's fair market value.

The Court concluded that appellant's second argument regarding the fair rental value and fair market value of the Property lacked merit. The Court noted that with their motion for summary judgment, appellees submitted as evidence the two June 2011 appraisals and a sworn affidavit regarding the September 2010 appraisals. Appellant, however, presented no admissible evidence to show that the rental rate for the Property was not reflective of prevailing market rates or that the Property was sold for less than fair market value. Appellant essentially relied on allegations contained in the complaint, which the Court stated were insufficient to create a genuine dispute of material fact.

David S. Bontempo v. Clark J. Lare, et al., No. 678, September Term 2012, filed April 30, 2014. Opinion by Nazarian, J.

http://mdcourts.gov/opinions/cosa/2014/0678s12.pdf

CORPORATIONS – OPPRESSED SHAREHOLDER REMEDIES
CORPORATIONS – DISSOLUTION FOR ILLEGALITY, OPPRESSION, OR FRAUD
CORPORATIONS – OPPRESSION
CORPORATIONS – OPPRESSED SHAREHOLDER REMEDIES
CORPORATIONS – OPPRESSED SHAREHOLDER REMEDIES - DISSOLUTION
CLOSELY HELD CORPORATIONS – FIDUCIARY DUTIES
ATTORNEYS' FEES – THE AMERICAN RULE
ATTORNEYS' FEES – THE COMMON FUND DOCTRINE

Facts:

In 1999, Clark Lare and his wife, Jodi, formed an information technology company called Quotient, Inc. Soon after, the Lares hired David Bontempo, made him a shareholder, and executed an amended shareholders' agreement, giving Mr. Bontempo forty-five percent of Quotient, Mr. Lare four percent, and Ms. Lare fifty-one percent. As the company's revenues grew, so did the benefits to the shareholders. Quotient covered various expenses for the shareholders, and the Lares also began paying household employees from Quotient's payroll account, using Quotient funds for personal legal fees, and advancing interest-free loans to themselves and to relatives.

Discord arose between Mr. Bontempo and Mr. Lare, and in January 2010, Mr. Bontempo proposed splitting the company. Mr. Lare rejected this proposal and demanded that Mr. Bontempo sell back his stock. In March 2010, after Mr. Bontempo refused to sign a separation agreement, Mr. Lare terminated Mr. Bontempo's employment. Mr. Bontempo resigned in August 2010 as an officer and director, but continued as a shareholder, receiving distributions of $252,665 in 2010 and $465,000 in 2011.

He filed suit against Quotient and the Lares in the Circuit Court for Howard County seeking equitable relief, personally, for shareholder oppression pursuant to Md. Code (1975, 2007 Repl. Vol.), § 3-413(b)(2) of the Corporations and Association Article ("CA"), and various remedies for Quotient through multiple derivative claims.

Through CA § 3-413, Mr. Bontempo sought an array of equitable relief, including, among other things, dissolution of Quotient, an accounting from the Lares for improper uses of Quotient's assets, and attorney's fees ("Count I"). Although the circuit court found that the Lares had oppressed Mr. Bontempo's reasonable expectations as a shareholder, it declined to dissolve Quotient. Instead, it recognized the array of equitable remedies available under *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233 (2005), and ordered a full accounting by the Lares for their wrongful misappropriations from Quotient.

Mr. Bontempo also alleged, through a derivative claim brought on Quotient's behalf, that Mr. Lare breached his fiduciary duty to Quotient by using the company's assets for his personal benefit ("Count III"). The court agreed and entered a judgment in favor of Quotient. But the court did not order that the Lares reimburse Quotient for the misappropriated amounts. Instead, the court treated the Lares' misappropriations as a distribution to the Lares (in an amount established by the accounting ordered under Count I). The court also awarded attorney's fees to Mr. Bontempo under Count III, the derivative claim, pursuant to the "common fund doctrine."

In sum, the circuit court ordered Quotient to pay Mr. Bontempo, *first*, forty-five percent of the amount the Lares wrongfully misappropriated from Quotient (through a distribution in an amount determined by the accounting ordered under Count I), and *second*, attorney's fees under Count III. Quotient was not awarded, and the Lares were not ordered to pay, any damages.

Held: Affirmed in part, vacated in part, and remanded.

The crux of Mr. Bontempo's argument on appeal was that the package of remedies the circuit court awarded did not reflect the full scope of the victory he won or the harms he and Quotient suffered. Quotient did not challenge the remedies imposed, but contested the court's decision to award attorney's fees to Mr. Bontempo. The Court of Special Appeals affirmed the bulk of the circuit court's decisions. It found that ample evidence existed on the record to support the court's findings that the Lares wrongfully blurred, and even ignored, the boundaries that Maryland corporate law draws between Quotient and the Lares' personal affairs, and that they did so to the detriment of Quotient and Mr. Bontempo. But the Court also found that the record supported the circuit court's conclusion that Mr. Bontempo overstated his direct injuries, and also supported its refusal to dissolve Quotient. Instead, the Court found error in the circuit court's assignment of responsibility for *damages* among the parties.

The Court recognized that the Lares, as Quotient's majority shareholders, owed a fiduciary duty to both Quotient and Mr. Bontempo (the minority shareholder) neither to exercise their control to Mr. Bontempo's disadvantage nor to use their voting power for their own benefit or for a purpose adverse to the interests of the corporation. In Maryland, when such a violation occurs, a minority shareholder has three options: *first*, a direct action against the majority shareholders or the corporation; *second*, a derivative action on behalf of the corporation against the majority shareholders; and *third*, an action pursuant to CA § 3-413 requesting the dissolution of the corporation or alternative equitable relief available under *Edenbaum*, 165 Md. App. 233.

With respect to Count I, the Court held that the circuit court appropriately found that the Lares engaged in oppressive conduct, as the term is used in CA § 3-413(b)(2). Still, Mr. Bontempo challenged the relief awarded to him, arguing that despite finding oppressive conduct, the circuit court failed to grant relief for his lost employment. The Court agreed that dissolution was inappropriate and looked instead to what Quotient and its shareholders actually agreed to, and specifically whether this agreement included any rights to employment that Mr. Bontempo could vindicate under the dissolution statute.

The Court recognized that the shareholders' agreement made no mention of employment rights that would permit Mr. Bontempo to obtain relief pursuant to CA § 3-413 for his wrongful termination. Instead, it agreed with the circuit court's finding that Mr. Bontempo was an at-will employee with no expectation of employment, so he could not recover employment-related damages under CA § 3-413. And although Mr. Bontempo's reasonable expectations as a shareholder were oppressed, he remained a shareholder and continued to receive shareholder distributions. In that context, and because less drastic remedies than dissolution were available to address the Lares' oppressive conduct and the resulting harm, the Court found no abuse of discretion in the circuit court's decision not to dissolve Quotient. With respect to the relief granted under Count I, the Court held that the circuit court's decision to award damages determined by an accounting of the funds diverted by the Lares, of which Mr. Bontempo would receive a *pro rata* distribution, fell within its discretion because he was made whole personally by a distribution that paid him his proportionate share of the funds misappropriated by the Lares.

The Court also agreed with the circuit court's finding, under Count III, that the Lares breached fiduciary duties owed to Quotient by diverting company assets to their personal use. The Court did, however, find error in the circuit court's conflation of the damage awards for this count and Count I. Whereas the *pro rata* distribution awarded to Mr. Bontempo under Count I redressed the Lares' oppressive conduct directly against him, Count III was a derivative claim seeking redress for *Quotient*. However, the Court held that by treating the Lares' misappropriations of Quotient's funds as a distribution to them, and by not requiring the Lares to repay the funds they diverted from Quotient, the circuit court effectively absolved the Lares of their obligation to reimburse Quotient and spared the Quotient board the obligation to justify any distribution on their merits. The Court then reasoned that, in essence, the order required Quotient to forgive the Lares *in toto*, and it only got to "keep" 55% of the money the Lares diverted—it had to pay the remaining 45% out of pocket to Mr. Bontempo. As a result, the Court vacated the damages awarded under Count III and ordered that the circuit court, on remand, determine the value of the Lares' diversion and order the Lares to repay that sum to Quotient.

The Court also ordered the circuit court, on remand, to reconsider its award of attorney's fees to Mr. Bontempo, as its application of the "common fund doctrine" was in error. The circuit court's fee award, made pursuant to the "common fund doctrine," derived exclusively from Count III, the derivative claim brought by Mr. Bontempo. Under that doctrine, a litigant who recovers a common fund for the benefit of persons other than himself is entitled to a reasonable attorney's fee from the fund as a whole. But the Court held that to award attorney's fees pursuant to this doctrine, there must be a recovered "fund" from which the fee award can be derived, and because the court did not award any damages to Quotient under Count III, no such fund existed. The Court vacated the award, ordered that the circuit court first revisit the damage award for the derivative claim, then revisit the fee award against the backdrop of that common fund.

Lance William Hayes v. State of Maryland, No. 2684, September Term 2012, filed May 1, 2014. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2014/2684s12.pdf

CRIMINAL PROCEDURE – VOIR DIRE – RACIAL, ETHNIC, OR OTHER BIAS QUESTION REQUIRED BY *HERNANDEZ V. STATE*, 357 MD. 204 (1999) – ERROR BY TRIAL COURT IN FAILING TO POSE MANDATORY *VOIR DIRE* QUESTION SOUGHT BY A PARTY – CIRCUMSTANCES UNDER WHICH CURE IS NOT POSSIBLE.

Facts:

During *voir dire* in a criminal case defense counsel requested the following question: "Mr. Hayes [the defendant] is an African American. Would that fact in any way impact your ability to be fair and impartial?" ("Question 8"). The prosecutor objected to Question 8 on the ground that it was not implicated because the witnesses and the defendant all were African American. The trial judge declined to pose Question 8 to the venire.

Halfway through the second day of what turned out to be a three-day trial, the prosecutor informed defense counsel and the trial judge that she believed she had been mistaken in objecting to Question 8 during *voir dire*, and in fact the question was required to be asked (if requested) under the holding in *Hernandez v. State*, 357 Md. 204 (1999). Thus, the trial court's decision not to pose Question 8 to the venire during *voir dire* had been in error. The prosecutor suggested that the court cure the error by posing Question 8 to the seated jurors. Defense counsel agreed that the failure to ask Question 8 during *voir dire* had been error, but objected to the suggested cure. The court did not pose Question 8 to the seated jurors. The defendant was convicted of numerous crimes and was sentenced to a total of 53 years' active incarceration.

Held: Reversed and remanded.

Judgments reversed and case remanded for new trial. The trial court erred by not propounding Question 8 to the venire panel during *voir dire*. The question was requested and under *Hernandez* was mandatory as it went to the issue of juror impartiality. The fact that the witnesses to be called were African American, as was the defendant, did not make the question immaterial. The trial court properly refused to attempt to "cure" its error by posing Question 8 to the seated jurors. Under the circumstances the proposed cure would not have been effective.

Stephanie Ann Abe v. State of Maryland, No. 99, September Term 2013, filed May 1, 2014. Opinion by Kenney, J.,

http://www.mdcourts.gov/opinions/cosa/2014/0099s13.pdf

CRIMINAL LAW – THEFT OF PROPERTY LESS THAN $100

Facts:

Appellant was charged with theft of property valued at less than $100 under Md. Code, Crim. Law §7-104. The statutory punishment, in addition to restitution, is imprisonment not exceeding 90 days, a fine not exceeding $500, or both. Appellant prayed for a jury trial, and her case was forwarded to the circuit court. The State moved to remand the case to the District Court on the grounds that appellant was not entitled to a jury trial at the initial trial level because the penalty for theft less than $100 did not exceed 90 days. The circuit court granted the States' request, and appellant filed an interlocutory appeal.

Held:

The trial court did not err in remanding the case back to the District Court. Three factors have been distilled from the case law to help determine whether the State constitutional right to a jury trial attaches to an offense at the initial trial level. The first factor is whether the offense had historically been considered a petty offense subject to the jurisdiction of justices of the peace or had been historically been tried before juries. The second is whether the accused is subject to a significant statutory penalty or incarceration in the penitentiary. The third is whether the offense is an infamous crime or is considered serious. Applying the first factor, petit theft was historically tried before justices of the peace, which weighs in favor of not attaching a jury trial at the initial trial level. As to the second factor, the maximum prison penalty for theft less than $100 is 90 days, and, by statute, one cannot be sentenced to the penitentiary for that amount of time. The fact that such punishment would not be considered infamous also weighs in favor of not attaching a jury trial right at the initial trial level. As to the third factor, the General Assembly amended the theft statute in 2004 with the clear intent to bifurcate the crime into a more and less serious offense carrying more and less serious punishments. The maximum sentence of 90 days reflects the less serious nature of theft of property valued at less than $100. By bifurcating petty theft into a more and less serious offense category, the General Assembly created a constitutionally valid mechanism designed to keep the less serious thefts in the district court at the initial trial level.

Sara Sue Drexler, et vir. v. Jennifer Lynn Bornman, et al., No. 1394, September Term 2013, filed May 28, 2014. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2014/1394s13.pdf

FAMILY LAW – JURISDICTION – UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

Facts:

Cameron Wright was born in Indiana and lived there with his parents until he was approximately eighteen months old. Thereafter, Cameron and his parents moved to Maryland, where they lived with the Drexlers—Cameron's maternal grandmother and maternal step-grandfather—and lived there, in Maryland, for approximately three years and five months.

After that period living in Maryland, Cameron and his mother moved back to Indiana. But, less than a month later, Cameron's mother arranged for him to return and stay with the Drexlers while she continued to live in Indiana. That arrangement ended when, fourteen and a half months later, Cameron was returned to Indiana to live with his mother.

After having spent about a year in Indiana, Cameron and his mother moved back to Maryland. At that time, Cameron's mother intended to "stay" in Maryland. But, within a week of arriving in Maryland, Cameron's mother changed her mind (upon reconciling with her former girlfriend and domestic partner), and she and Cameron returned to Indiana to live.

The Drexlers filed a complaint, in the Baltimore County circuit court, seeking custody of Cameron. Cameron's mother responded with a motion to dismiss on the grounds that Maryland did not have jurisdiction in the matter because Indiana was Cameron's "home state." Following a hearing, the circuit court granted the motion to dismiss, declaring that Indiana was Cameron's "home state" and that, therefore, Maryland lacked jurisdiction over the custody dispute.

Held: Affirmed.

The Uniform Child Custody Jurisdiction and Enforcement Act (the "Act") provides that a child's "home state" has exclusive jurisdiction to "make an initial child custody determination," FL § 9.5-201, except when the "home state" has declined to exercise its jurisdiction, FL § 9.5-201(a), or when a "child is present in this State" and has been abandoned or is need of protection "because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse," FL § 9.5-204(a).

For a child older than six months, such as Cameron was at the time the Drexlers initiated their lawsuit, the child's "home state" is the state where the child lived for six consecutive months before the commencement of the proceeding. Any "temporary absence" of the child from the state in which he had been living does not affect the determination of his "home state."

We agree with those state appellate courts that have concluded that the proper way to determine if a child's absence from a state was a "temporary" one, under the Act, is to examine the totality of the circumstances of that absence. Applying a totality-of-the-circumstances test would encompass both the duration of the absence and whether the parties intended the absence to be permanent or temporary as well as "additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise." *Chick v. Chick*, 596 S.E.2d 303, 308 (N.C. Ct. App. 2004). This test, we believe, provides courts with the necessary flexibility in making this determination. Other tests or approaches, such as looking only at the length of the absence, would, as the Illinois intermediate appellate court pointed out, discourage parents from entering into "agreements providing for extended out-of-state visitations." *In re Marriage of Richardson*, 625 N.E.2d 1122, 1125 (Ill. App. Ct. 1993).

A review of the totality of the circumstances surrounding Cameron's week-long stay in Maryland, leads us to conclude that that stay was merely a "temporary absence" from Indiana and, therefore, Indiana was his "home state" under the Act.

Jeannine Morse v. Erie Insurance Exchange, No. 511, September Term 2013, filed April 29, 2014. Opinion by Moylan, J.

Woodward, J., dissents.

http://www.mdcourts.gov/opinions/cosa/2014/0511s13.pdf

UNINSURED MOTORIST INSURANCE – DENIAL OF INSURANCE COVERAGE – FAILURE TO OBTAIN INSURER'S CONSENT TO SETTLE WITH TORTFEASOR FOR POLICY LIMITS – PREJUDICE – INS. § 19-110 – INS. § 19-511

Facts:

Morse was injured in an automobile accident with an underinsured motorist who was at fault. She settled her claim with the tortfeasor's liability insurer for full policy limits, without the consent of her uninsured motorist insurer, Erie Insurance Exchange. Erie denied Morse's claim for uninsured motorist benefits based on her failure to obtain its consent to settle, citing both its policy and Md. Code, § 19-511 of the Insurance Article. Morse brought suit against Erie for breach of contract, arguing that Erie could not deny coverage unless it could show actual prejudice from her failure to obtain its consent to settle, citing Md. Code, § 19-110 of the Insurance Article. A jury found in favor of Erie and Morse appealed to the Court of Special Appeals.

Held: Affirmed.

An uninsured motorist insurer may disclaim insurance coverage based on its insured's failure to obtain its consent to settle with a tortfeasor, with or without prejudice. The § 19-110 prejudice rule is limited to disclaimers of liability insurance coverage based on an insured's failure to cooperate or to provide required notice. Section 19-110 does not extend to an insured's failure to obtain the insurer's consent to settle with a third party. Furthermore, § 19-110 cannot excuse an insured's failure to comply with § 19-511, which sets forth a mandatory procedure for an insured to settle her claim against a tortfeasor for liability policy limits without prejudice to her claim for uninsured motorist benefits.

Linda Connors, Individually, etc.. v. Government Employees Insurance Company, No. 773, September Term 2011, filed March 25, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/0773s11.pdf

INSURANCE – UNDERINSURED MOTORIST COVERAGE ("UIM") – PROPER METHOD OF APPLYING CREDITS FOR PAYMENTS BY TORTFEASOR'S INSURANCE CARRIER TO UIM LIMITS OF INSURED'S POLICY.

Facts:

Appellants, husband and wife, were involved as pedestrians in a motor vehicle accident. The wife sustained minor physical injuries, but significant emotional trauma, while the husband was injured severely and ultimately died as a result of his injuries. Appellants were insured under a GEICO motor vehicle policy with uninsured/underinsured coverage ("UIM") of $300,000 per person/$300,000 per occurrence. The tortfeasor maintained automobile liability insurance through Allstate with liability limits of $100,000 per person/$300,000 per occurrence. With GEICO's consent, appellants accepted the "per person" policy limits from Allstate of $100,000 each. After crediting the $200,000 paid by Allstate, GEICO determined that only $100,000 of UIM benefits remained. Appellants disagreed, contending that the "per person" limit of GEICO's policy should apply, leaving $300,000 in UIM benefits remaining ($200,000 left on each "per person" claim with a cap of $300,000 per occurrence). GEICO subsequently paid the $100,000 it claimed was due to appellants.

Appellants filed suit against GEICO seeking declaratory relief. After considering cross-motions for summary judgment, the Circuit Court for Montgomery County granted summary judgment in favor of GEICO. Appellant appealed.

Held: Affirmed.

In a case of first impression, the Court determined that GEICO's interpretation of the manner in which the UIM benefits were calculated was the correct interpretation, relying on the language of GEICO's policy, the application of Section 19-509 of the Insurance Article, and Maryland's overall "gap theory" of UIM recovery. The Court stated that under the unambiguous language of GEICO's policy, where bodily injury is sustained by two or more persons as a result of one accident, the limit of liability to the insurer is the coverage limits relating to "each accident." Thus, in the instant case, the $300,000 per accident limit controls GEICO's liability, which leaves $100,000 of benefits remaining after crediting the tortfeasor's total payment of $200,000. The Court rejected appellants' assertion that the language of the policy made the $300,000 limit governing "each accident" subservient to the $300,000 limit for "each person."

Even if the language of GEICO's policy was ambiguous, the Court concluded that under Section 19-509 of the Insurance Article and the "gap theory" of UIM recovery recognized in Maryland, the result would be the same. Section 19-509 and the "gap theory" of UIM recovery provide, in essence, that an injured insured is entitled to recover an amount that would have been available had the tortfeasor carried liability coverage equal to the amount of uninsured motorist coverage that the injured insured purchased from his or her own insurance company. Here, if the tortfeasor had maintained the same coverage as appellants' UIM provision ($300,000 per person/$300,000 per accident), appellants' recovery would have been limited to a total of $300,000. According to GEICO's calculation, appellants should receive a total of $300,000 ($200,000 from the tortfeasor and $100,000 from GEICO), while appellants' position would result in a recovery of $500,000 ($200,000 from the tortfeasor and $300,000 from GEICO). The Court concluded that GEICO's position was consistent with the "gap theory" adopted in Maryland.

Jessica N. Woznicki v. GEICO General Insurance Co., No. 532, September Term 2013, filed April 29, 2014. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2014/0532s13.pdf

INSURANCE LAW – CONSENT TO SETTLE

Facts:

Ms. Woznicki was injured in an automobile accident. The other driver was at fault and was insured by a liability policy issued by Nationwide Insurance Company with policy limits of $20,000. Ms. Woznicki was covered by an insurance policy issued by GEICO which provided her with uninsured/underinsured motorist benefits in the amount of $300,000, subject to certain exclusions. In relevant part, the policy contained a Consent to Settle clause which tracks Md. Code Ann. § 19-511 of the Insurance Article. Ms. Woznicki, represented by a Delaware attorney, agreed to settle with Nationwide, on behalf of the tortfeasor, for policy limits, conditional upon Ms. Woznicki signing a release. The attorney contacted GEICO by telephone and received what Ms. Woznicki asserts was GEICO's consent to settle her claim with the tortfeasor without prejudice to her right to pursue a claim for underinsured motorist benefits ("UIM") from GEICO. Ms. Woznicki sent the signed release back to Nationwide. GEICO subsequently denied Ms. Woznicki's claim for UIM coverage because Ms. Woznicki failed to comply with the Consent to Settle and § 19-511.

Ms. Woznicki, represented by new counsel, filed a breach of contract claim against GEICO seeking reimbursement of her damages in excess of the $20,000 that she received from Nationwide. GEICO answered and later filed a motion for summary judgment, asserting that there were no disputes of material fact and that Ms. Woznicki had settled with Nationwide without giving GEICO the opportunity to either consent to or refuse acceptance of the settlement. Ms. Woznicki opposed the motion for summary judgment. The circuit court granted summary judgment in favor of GEICO.

On appeal, Ms. Woznicki asserted that the circuit court erred by granting summary judgment because she had established a genuine dispute of material fact as to whether GEICO waived compliance with the Consent to Settle clause and § 19-511. Ms. Woznicki also argued that § 19-110 of the Insurance Article required GEICO to demonstrate actual prejudice before it could defend its denial of coverage based on her failure to comply with the Consent to Settle clause and § 19-511 and that GEICO failed to do so. GEICO contended that § 19-511 was non-waivable and that § 19-110 did not require it to show actual prejudice.

Held: Affirmed

The Court of Special Appeals explained that § 19-511 is waivable after concluding that: (i) when the General Assembly wants to make it clear that a statutory provision is non-waivable, it generally says so explicitly; (ii) such language is absent from § 19-511; and (iii) § 19-511's remedial purposes would not be served by holding that an insurer cannot, as a matter of law, waive strict compliance in an appropriate situation.

The Court next concluded that the attorney's deposition testimony that he "understood" that an unidentified employee of GEICO waived compliance with Md. Code Ann. (2011) § 19-511 of the Insurance Article and consented to the settlement and release of the tortfeasor without prejudice to the insured's right to file a claim for underinsured motorist coverage was insufficient to defeat GEICO's motion for summary judgment because (1) the attorney conceded that he was unaware of either § 19-511 or the policy's substantially similar counterpart; (2) the attorney pointed to no specific language by the GEICO employee upon which a fact finder could conclude that the attorney's "understanding" was a reasonable one; (3) the attorney's deposition testimony gave no indication whatsoever as to the apparent or actual authority of the GEICO employee to waive; and (4) the GEICO employee's request that the attorney forward a copy of the proposed release and declaration page of the policy was not a sufficient basis upon which to conclude that the employee had the authority to consent to the settlement; nor was it reasonable for the attorney to conclude that the employee had such authority based on that statement.

Finally, the Court concluded, noting that § 19-110 of the Insurance Article requires an insurer to demonstrate actual prejudice when it denies coverage based on the insured's failure to cooperate or failure to provide required notice. A denial of coverage based on an insured's failure to comply with § 19-511 and its contractual equivalent is more akin to a breach of a "no action" clause, *see Phillips Way, Inc. v. Am. Equity Ins. Co.*, 143 Md. App. 515 (2002), and is a condition precedent to coverage. As such, the Court concluded that GEICO was not required to demonstrate actual prejudice in this case. The Court noted that a companion case, *Morse v. Erie Insurance Exchange*, ___ Md. App. ___, No. 0511, September Term 2013, also addresses the prejudice issue and provides a more comprehensive analysis of the relationship between §§ 19-110 and 19-511.

Laurie Burr v. Maryland State Retirement and Pension System of Maryland, No. 761, September Term 2013, filed May 1, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/0761s13.pdf

ACCIDENTAL DISABILITY RETIREMENT BENEFITS – "ACCIDENT"

Facts:

Laurie Burr, a former employee of Maryland's Administrative Office of the Courts, worked from home over the course of her battle with cancer. After her health had improved but before doctors had cleared her to return to work, her supervisor called a meeting that she understood was for the purpose of discussing her leave and transition back to full-time work. Instead, she alleged that he informed her in that meeting of unilateral changes he would be making to her schedule, and he demanded that she return to work in the office before her doctors had cleared her to do so. She contended that these unexpected decisions precipitated a sudden decline in her mental health and caused her to become suicidal. She never returned to work, and she sought accidental disability retirement benefits under Md. Code (1993, 2009 Repl. Vol.), § 29-109(b) of the State Personnel and Pensions Article ("SP"). The Medical Board to the State Retirement Agency ultimate disagreed with her characterization, and it approved only an "ordinary" disability retirement—a decision that an ALJ and the Circuit Court for Anne Arundel County later upheld. Ms. Burr appealed the decision, arguing that the unexpected decisions in the meeting and her reaction to them constituted an "accident" under § 29-109.

Held: Affirmed.

The Court of Special Appeals held that where decisions conveyed in the course of a workplace meeting between a supervisor and an employee came as a "total surprise" to the employee, and she became suicidal as a result of the shock, the employee was not entitled to accidental disability retirement benefits under § 29-109, which permitted an award "to a member if [she] is totally and permanently incapacitated for duty as the natural and proximate result of an accident that occurred in the actual performance of duty at a definite time and place." The Court held that even if she did not expect the meeting or the decisions conveyed to her during it, a *meeting* cannot fall within the definition of "accident" under its everyday meaning.

Looking first to the plain meaning of the word "accident" in keeping with rules of statutory interpretation, the Court noted that dictionary definitions tie the term to the fact that an event is unforeseeable, defining it, for example, as "an unforeseen and unplanned event or circumstance," and an "unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured but for which legal relief may be sought." The definitions support the notion that *first*, an event's status as an accident depends not on the victim's

subjective expectation that it will (or won't) take place, but its *objective* foreseeability. *Second*, an accident happens unintentionally—maybe, as the dictionaries recognize, as a result of carelessness or negligence, but not as the result of an intentional act. *Finally*, the definitions include some physical event that takes place that precipitates harm. (The Court clarified that although the event need not necessarily involve violence, no cases suggest that an accident can be caused by mere conversation, as opposed to some tangible physical occurrence.)

Because Ms. Burr's "surprise" came not from the mere fact of the meeting with her supervisor, but from the personnel *decisions* that he conveyed to her during that meeting, these decisions were not accidents. They were intentional (and fairly mundane) personnel actions, which included the *kinds* of decisions that a State employee could objectively expect, and did not involve any sort of physical and tangible force. Accordingly, they could not constitute an "accident" that entitled Ms. Burr to an accidental disability retirement allowance.

Darlene White v. Register of Wills of Anne Arundel County, Maryland, No. 677, September Term, 2013, filed May 1, 2014. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2014/0677s13.pdf

STATUTORY INTERPRETATION – ADMINISTRATIVE DEFERENCE – SEPARATION OF POWERS

Facts:

Ms. White was terminated from her position as Chief Deputy Register of Wills for Anne Arundel County on January 31, 2012. Ms. White contends that she was terminated in retaliation for a complaint that she filed against her former boss, the Register of Wills for Anne Arundel County, with the Department of Budget and Management ("DBM") on December 19, 2011. She seeks protection under the Maryland Whistleblower Law, Md. Code (1993, 2009 Repl. Vol.) § 5-305 of the State Personnel and Pensions Article.

Before her termination, Ms. White called the DBM to inquire whether the Maryland Whistleblower Law would protect her from reprisals if she filed a complaint, and she was informed that it would apply to her because she was an executive branch employee. Relying on that advice, she filed a whistleblower complaint and was subsequently terminated.

Later, DBM dismissed her complaint for lack of jurisdiction, reasoning that Ms. White was a judicial branch employee, but that the whistleblower statute applied only to executive branch employees. Ms. White appealed to the Office of Administrative Hearings ("OAH"), which affirmed DBM's ruling. She then filed a petition for judicial review in the Circuit Court for Anne Arundel County. The circuit court affirmed OAH's dismissal, and Ms. White noted a timely appeal.

Held: Affirmed.

Ms. White, in her role as Chief Deputy of the Register of Wills, was a judicial branch employee, not an executive branch employee. Thus, she is not entitled to file a whistleblower action under Md. Code (1993, 2009 Repl. Vol.) § 5-305 of the State Personnel and Pensions Article.

Although Md. Code (1997, Repl. Vol. 2009), § 4-108(a) and (c) of the State Government Article and Md. Code (1974, 2011 Repl. Vol.) § 2-208(b) of the Estates and Trusts Article give the Comptroller certain powers over the office of the registers of wills, including the ability to set the number and compensation of assistant clerks and deputies, to increase the salary of the staff, and to approve the appointments and compensation of deputies and clerks, these statutes do not convert an otherwise judicial position into an executive one. Instead, the Comptroller simply serves as a fiscal watchdog over the office of the registers of will.

Moreover, as Chief Deputy of the Register of Wills, Ms. White could act in place of the Register of Wills. Given that the Register of Wills is clearly within the judicial branch, the Chief Deputy must be classified that way as well.

Further, Ms. White's classification as a judicial employee would not raise a separation of powers concern with the executive branch because the Comptroller does not perform any core or essential judicial functions.

Dallas E. Gravette v. Visual Aids Electronics, et al., No. 291, September Term 2013, filed April 29, 2014. Opinion by Salmon, J.

http://www.mdcourts.gov/opinions/cosa/2014/0291s13.pdf

WORKERS' COMPENSATION – UNDER MARYLAND WORKERS' COMPENSATION LAW A TRAVELING EMPLOYEE WHO IS ENGAGED IN REASONABLE AND FORESEEABLE RECREATIONAL ACTIVITIES WHEN INJURED, IS ENTITLED TO RECOVER WORKERS' COMPENSATION BENEFITS FOR HIS INJURIES BECAUSE SUCH RECREATIONAL ACTIVITIES ARE "REASONABLY INCIDENT TO TRAVEL."

Facts:

Dallas E. Gravette ("Gravette") was injured on July 10, 2011 in Prince George's County. At the time of his injury he was an employee of *Visual Aids Electronics* ("the employer"). Gravette's injury occurred when he slipped on some liquid while dancing. All relevant facts concerning that injury were undisputed – and are summarized below.

The employer was in the business of providing "audio visual equipment, including computer equipment, and technical staff to set up and service equipment . . . at hotels and convention centers." Prior to the accident, the employer contracted to provide its services to a customer at the Gaylord National Resort and Convention Center ("the Gaylord Center") located in Prince George's County.

Gravette, at all relevant times, was a resident of Idaho. To fulfill its contract to provide equipment and services at the Gaylord Center, the employer made arrangements for Gravette to stay at the Gaylord Hotel, which is part of the Gaylord Center. Gravette's employer paid for his travel expenses from Idaho to Maryland and for the price of his hotel room.

Gravette was assigned to work at the hotel on behalf of his employer, and to stay there between July 7 and July 16, 2011. On July 10, 2011, the date of his injury, Gravette worked at the hotel between 7:00 a.m. and 3:00 p.m. as an audio visual technician for his employer. The accident occurred at the Pose Ultra Lounge & Nightclub (hereafter "the Nightclub"), which is a facility located in the Gaylord Hotel. Gravette was injured at about midnight on July 10, 2011.

Entry into the Nightclub is restricted to persons registered at the Gaylord Hotel and their guests. Gravette, while off-duty, was dancing when he fell and injured his pelvis. There was no indication that Gravette was intoxicated at the time he was injured.

Gravette was not in the Nightclub at the request or direction of his employer nor was he engaged in any "specific activity that was for the benefit" of his employer.

The Workers' Compensation Commission ("the Commission") concluded that Gravette was not entitled to workers' compensation benefits because, in its view, his injury did not arise out of and

in the course of his employment. Gravette filed a petition for judicial review, but the circuit court affirmed the Commission's decision.

Held: Reversed.

The Court of Special Appeals, at the outset, characterized Gravette as a "traveling employee," which it defined as "an employee who is required to travel away from his employer's premises in order to perform his job." Relying on *Mulready v. University Research*, 360 Md. 1 (2000) and several out-of-state cases, the court held that a traveling employee, who is injured while engaged in recreational activities, can recover workers' compensation benefits for such injuries so long as, from the employer's perspective, the activities are both foreseeable and reasonable.

Based on the undisputed fact in the case at hand, Gravette's July 10, 2011 injuries met that test.

Return to ToC

ATTORNEY DISCIPLINE

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This is to certify that the name of

LOUIS PETER TANKO, JR.

has been replaced upon the register of attorneys in this state as of May 1, 2014.

*

By an Order of the Court of Appeals dated May 13, 2014, the following attorney has been indefinitely suspended by consent:

MICHAEL A. GIACOMAZZA

*

By an Opinion and Order of the Court of Appeals dated May 16, 2014, the following attorney has been disbarred:

ROBERT JOHN GREENLEAF

*

By an Opinion and Order of the Court of Appeals dated May 16, 2014, the following attorney has been disbarred:

MICHAEL DAVID FRAIDIN

*

By an Opinion and Order of the Court of Appeals dated May 19, 2014, the following attorney has been disbarred:

TAIWO A. AGBAJE

*

*

This is to certify that the name of

HERBERT THOMAS NELSON

has been replaced upon the register of attorneys in this state as of May 28, 2014.

*

By an Order of the Court of Appeals dated May 28, 2014, the following attorney has been disbarred by consent:

KEVIN ANTHONY RING

*

Return to ToC

RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Eighty-Third Report of the Standing Committee on Rules of Practice and Procedure was filed on May 27, 2014:

http://www.mdcourts.gov/rules/rodocs/183ro.pdf