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http://www.mdcourts.gov/opinions/coa/2015/87a14ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On the Attorney Grievance Commission ("the Commission")'s behalf, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Charles Trent Thomas ("Thomas"), charging him with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5(a) (Unreasonable Fees), 1.16 (Declining or Terminating Representation), 8.1 (Bar Admission and Disciplinary Matters), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), and 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice).

A hearing judge found the following facts. A mother retained Thomas to represent her son in an assault case. Thomas charged a flat fee of $750, which was paid in full. Mother provided Thomas with a list of people who could testify on her son's behalf. Thomas failed to interview or subpoena any of the people. Mother telephoned Thomas on the night before the hearing in her son's case. This was the first time that Son or Mother had communicated with Thomas for more than a month. Thomas told Mother that he could not attend the hearing for personal reasons. Without Thomas, Son and Mother attended the hearing. They never heard from Thomas again, despite Mother's attempts to communicate with Thomas.

A client retained Thomas to represent her for purposes of her separation and to obtain a divorce. Thomas charged the client a flat fee, which the client paid in full. Thomas never filed a complaint for divorce on the client's behalf. The client learned that her then-husband may have molested her daughter, a vulnerable adult with a disability. The client retained Thomas to represent her for purposes of becoming her daughter's guardian. Thomas charged the client a fee of approximately $1,000, which the client paid in full. Thomas failed to timely file a petition for guardianship of the person of a disabled person. The client provided Thomas with the names of several people who would have testified in support of the client's becoming her daughter's guardian. However, Thomas failed to interview any of the people; and, at the guardianship hearing, Thomas failed to call any witnesses. Afterward, on several occasions, the client

unsuccessfully attempted to arrange an appointment or otherwise communicate with Thomas. The client filed a complaint against Thomas with the Commission.

Thomas and Bar Counsel entered into a "Conditional Diversion Agreement" that partially arose out of the client's complaint to the Commission. In the Conditional Diversion Agreement, Thomas agreed to arrange for substance abuse counseling. Thomas enrolled in substance abuse counseling, but was discharged for failure to attend the required number of counseling sessions. Thomas re-enrolled in substance abuse counseling, but was again discharged for failure to attend the required number of counseling sessions. Thomas refrained from informing Bar Counsel of his two discharges, and also refrained from informing Bar Counsel that he was using alcohol and/or opiates.

The hearing judge concluded that Thomas violated MLRPC 1.1, 1.3, 1.4, 1.5(a), 1.16(d), 8.1(b), 8.4(c), and 8.4(d).

The Court of Appeals disbarred Thomas on the date of oral argument.

Held:

The Court of Appeals held that clear and convincing evidence supported the hearing judge's conclusions that Thomas violated MLRPC 1.1, 1.3, 1.4(a)(2), 1.4(a)(3), 1.5(a), 1.16(d), 8.1(b), 8.4(c), and 8.4(d). The Court agreed with the Commission that the appropriate sanction for Shuler's misconduct was disbarment for neglecting clients in two unrelated cases, failing to provide competent and diligent representation, failing to adequately communicate with clients, charging unreasonable fees, failing to properly terminate representation, and failing to provide information to Bar Counsel. Thomas's misconduct was aggravated by a dishonest or selfish motive, multiple violations of the MLRPC, substantial experience in the practice of law, indifference to making restitution, prior attorney discipline, a pattern of misconduct, and likelihood of repetition of misconduct. Disbarment was especially warranted in light of the circumstance that Thomas engaged in intentional dishonest conduct, and there were no mitigating factors, let alone compelling extenuating circumstances.

Attorney Grievance Commission of Maryland v. Charles Stephen Rand, Misc. Docket AG No. 40, September Term 2014, filed December, 21 2015. Opinion by Battaglia, J.

Adkins and McDonald, JJ. dissent

http://www.mdcourts.gov/opinions/coa/2015/40a14ag.pdf

ATTORNEY DISCIPLINE – ATTORNEY MISCONDUCT – INDEFINITE SUSPENSION

Facts:

The hearing judge found that Respondent, Charles Stephen, represented Nancie Klein, beginning in 2011. The essence of Ms. Klein's complaint was that she had retained Rand to assist her in bringing a claim for age and race discrimination against her supervisor at the public school where Ms. Klein taught. Rand, after meeting with Ms. Klein and her husband, entered into a fee arrangement that provided for an hourly rate of $350, later reduced to $250 an hour, and, in an "evergreen" clause, required Ms. Klein to provide a retainer of $1,500 which, upon Rand's furnishing a bill for monies expended, would be replenished by her to maintain a minimum of $1,500, to cover fees, costs and expenses related to the matter.

Ms. Klein paid the initial $1,500 as well as an additional $2,000, in two separate $1,000 payments, when Rand requested replenishment, without his ever having provided a bill which in any way reflected time spent. During the course of the representation, Ms. Klein took early retirement from the school because of stress and the mental and physical symptoms related to the job situation, without having been counseled by Rand about the possibility of a disability retirement.

Although Ms. Klein and Rand had also worked on drafting an addendum to her original complaint with the Equal Employment Opportunity Commission ("EEOC"), detailing specific instances of discrimination in addition to those earlier cited, Rand did not file the addendum, deciding unilaterally to incorporate it into a later response filed with the EEOC. Rand did not advise Ms. Klein of his decision regarding the addendum.

Ms. Klein, believing Rand was not giving sufficient attention to her matter, discharged him and requested both an invoice—having not received a single bill—and a copy of her file. Rand provided an enigmatic invoice, containing some duplicate entries, which demanded $11,230.00. Rand refused to provide Ms. Klein a copy of her file, and asserted an attorney retaining lien.

After she discharged Rand, Ms. Klein filed a complaint with the Attorney Grievance Commission on April 15, 2013. Bar Counsel contacted Rand for information regarding his representation of Ms. Klein. Rand asserted that he had "won" Ms. Klein's EEOC case and been awarded attorneys' fees, but failed to provide the requested documentation. Over a protracted

period, Bar Counsel attempted to the obtain data and documents sought from Rand. Those efforts continued until the morning of the first day of the disciplinary hearing, January 21, 2015.

The hearing judge concluded that Rand violated Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.4, 1.5, 1.15(a), 1.16(d), 8.1, and 8.4(a), (c) and (d), and Maryland Rule 16-606.1. Rand filed several exceptions to the hearing judge's findings of fact and conclusions of law.

Held: Indefinite suspension is the appropriate sanction.

The Court of Appeals determined, after considering Rand's exceptions, that his conduct relating to the representation of Ms. Klein violated some of the MLRPC. The unilateral decision by Rand to incorporate the addendum to Ms. Klein's EEOC complaint in a different document without informing her constituted a violation of MLRPC 1.4(a). Rand's failure to provide Ms. Klein with an invoice when he requested replenishment of the "evergreen" account, in derogation of the terms of the fee agreement, was violative of MLRPC 1.4(a) and 1.5(a). During the course of representation, Rand's failure to counsel Ms. Klein as to her options for a medical retirement and the potential effects of retirement on her EEOC claim constituted a violation of MLRPC 1.4(b). The client ledgers sent by Rand to Ms. Klein contained duplicative entries and were inadequately maintained in violation of MLRPC 1.15(a) and Rule 16-606.1.

With respect to Rand's failure to provide Ms. Klein with a copy of her file because of his assertion of an attorney lien, while an attorney does possess the right to assert a retaining lien under Maryland law, a valid retaining lien requires that the attorney have possession of the papers or other documents, has performed services for the client for which the attorney is entitled to recompense and provides the client with information regarding the liquidated amount of unpaid fees and expenses along with a reasonably clear and understandable substantiation of those fees. In the present case, Rand, in attempting to assert a retaining lien, failed to comply with his own fee agreement by not submitting invoices when he requested replenishment and by providing confusing and duplicative ledgers to Ms. Klein in support of the lien. Rand's conduct relating to his assertion of the retaining lien rendered the lien invalid and, therefore, his retention of Ms. Klein's file constituted a violation of MLRPC 1.16(d), as Ms. Klein was entitled to the documents in connection with her ongoing conciliation process with the EEOC. The Court further concluded that Rand knowingly made misrepresentations to Bar Counsel regarding his having "won" Ms. Klein's EEOC case and having been awarded attorneys' fees and failed to timely comply with Bar Counsel's numerous requests for information in violation of MLRPC 8.1. Rand violated MLRPC 8.4 (a), (c) and (d) when he violated others of the Maryland Lawyer's Rules for Professional Conduct. An indefinite suspension from the practice of law was warranted.

Deandre Ricardo Williams v. State of Maryland, No. 9, September Term 2015, filed December 18, 2015. Opinion by Battaglia, J.

Barbera, C.J., Adkins and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/9a15.pdf

CONSTITUTIONAL CRIMINAL PROCEDURE – FIFTH AMENDMENT – RIGHT TO REMAIN SILENT – INVOCATION

CRIMINAL LAW – MARYLAND COMMON LAW – CONFESSION – IMPROPER PROMISES OR INDUCEMENTS

Facts:

Deandre Ricardo Williams, Petitioner, was convicted and sentenced to life in prison for the first degree murder of Justin DeSha-Overcash in College Park in 2011.

During Williams's interview with police, Williams stated several times, "I don't know what's going on." The detectives explained to Williams that in order for them to speak with him they would need to provide him with his *Miranda* rights and that he did not have to talk to them. In total, he used some variation of "I don't know" seven times in response to the detectives' explanation of the *Miranda* process. During the one conversation in issue, Williams stated, "I don't want to say nothing. I don't know" in response to the detectives explaining that they were required to go through the formality of reading him his *Miranda* rights. Following this exchange, one of the detectives read Williams his *Miranda* rights and Williams signed an Advice of Rights form. During further questioning, the detectives described two scenarios of the crime to Williams, one of which included a premeditative murder and the other included a "robbery gone bad" situation, and urged Williams to explain what had happened. Williams subsequently confessed to the robbery and murder.

Williams moved to suppress his confession, arguing that he invoked his right to silence with his statement, "I don't want to say nothing. I don't know." The Circuit Court denied Williams's motion, concluding that his statement was ambiguous and equivocal. Williams appealed his convictions to the Court of Special Appeals, which affirmed in a reported opinion, *Williams v. State*, 219 Md. App. 295, 100 A.3d 1208 (2014). The Court of Special Appeals concluded that the addition of "I don't know" to Williams's statement "I don't want to say nothing" rendered the statement ambiguous. Additionally, the intermediate appellate court concluded that the detectives did not make any improper promises or inducements and that Williams's confession was not involuntary under Maryland's nonconstitutional law.

Held: Affirmed.

The Court of Appeals affirmed. The Court held that Williams's invocation of his right to remain silent by saying "I don't want to say nothing. I don't know" was ambiguous and that his confession was voluntary.

The Court discussed that the essential inquiry to determine whether a suspect has invoked his right to remain silent is whether the invocation is clear or ambiguous. The Court concluded that Williams's statement could have been him weighing his options about wanting to talk or not knowing whether to speak. The Court held that the "I don't know" following "I don't want to say nothing" created ambiguity as to whether Williams wanted to invoke his right to remain silent.

The Court held that Williams's confession was not the result of an improper inducement. The Court concluded that "an appeal to the inner psychological pressure of conscience to tell the truth does not constitute coercion in the legal sense." *Ball v. State*, 347 Md. 156, 179, 699 A.2d 1170, 1181 (1997). The Court concluded, therefore, that the detectives' portrayal of a "robbery gone bad" scenario and a premeditated murder scenario amounted to two different ways of characterizing the situation, rather than an inducement.

Jacqueline Wagner v. State of Maryland, No. 11, September Term 2015, filed December 17, 2015. Opinion by Watts, J.

Barbera, C.J., Battaglia and Adkins, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/11a15.pdf

SUFFICIENCY OF THE EVIDENCE – MD CODE ANN., CRIM. LAW (2002, 2012 REPL. VOL.) § 7-104(a) – THEFT – MD. CODE ANN., FIN. INST. (1980, 2011 REPL. VOL.) § 1-204(f) – JOINT OR MULTIPLE-PARTY ACCOUNT – RIGHT OF WITHDRAWAL – OWNERSHIP – MD. CODE ANN., CRIM. LAW (2002, 2012 REPL. VOL.) § 7-113(a) – EMBEZZLEMENT (FRAUDULENT MISAPPROPRIATION BY FIDUCIARY)

Facts:

The State, Respondent, charged Jacqueline Wagner ("Wagner"), Petitioner, with theft of property with a value of at least $500 and embezzlement (fraudulent misappropriation by fiduciary). On October 17 and 18, 2013, the Circuit Court for Baltimore County ("the circuit court") conducted a bench trial, at which the following evidence was adduced.

As a witness for the State, Marion Wagner ("Father") testified that Wagner is his daughter and that, until his wife's death in 2005, his wife handled the family finances. After his wife's death, Father handled his own finances for a short period of time before asking Wagner to assist him. At that time, Father had an individual retirement account ("the IRA") containing nearing $200,000, and a checking account and savings account (collectively, "the Account") containing "a few thousand" dollars. On July 29, 2005, Father added Wagner to the Account as a "joint owner," explaining that he wanted someone to be able to access his money if he could not get it himself, so he "asked [Wagner] if [he] could put her name on the account[,] and this is [his] money in there, but not hers, and she agreed to do that."

In 2006, Father mortgaged his house for $87,000, and loaned the proceeds to Wagner to help with Wagner's business; Father expected Wagner to pay the loan back. In 2007, after his house was damaged by a fire, Father moved into Wagner's home, where he stayed until late 2009. Before moving out of Wagner's house, Father received a statement from his bank informing him that the mortgage on his house had not been paid and threatening foreclosure. Father telephoned his bank and discovered the mortgage had not been paid and that he owed his bank $60,000. When he asked the bank about the amount of funds in the Account, Father discovered it was nothing. The money in the IRA and the Account was missing. In 2010, Father went to a Commissioner Station of the District Court of Maryland and filed a complaint against Wagner.

Father had not authorized Wagner to transfer funds from the IRA to the Account, make numerous ATM and cash withdrawals from the Account, or transfer funds from the Account to Wagner's personal checking account or the bank accounts of companies that Wagner owned.

A detective of the Baltimore County Police Department testified that she was assigned to investigate the matter, and that her investigation revealed that, from December 9, 2005, to October 13, 2009, $181,670.09 was transferred from the IRA to the Account, and $251,645.83 was taken from the Account through ATM withdrawals, cash withdrawals, and wire transfers to Wagner's personal checking account and the bank accounts of companies that Wagner owned. The circuit court admitted into evidence a bank signature card, which was dated July 29, 2005, identified the Account, and listed Father as the "Primary Owner." The signature card's middle section contains Father's and Wagner's signatures and Social Security numbers, and labels each of Father and Wagner as a "Joint Owner."

On her own behalf, Wagner testified that she was added to the Account "in case anything happened to" Father. Wagner put money into the Account, but she had "[n]o idea" how much. Wagner sometimes gave Father money out of her personal checking account (which was a joint account with Father) and sometimes transferred money between the Account and her personal checking account. Father received his bank statement every month and balanced his checkbook, so Father knew exactly "what he had" and "what he was using and spending." As to the IRA, originally, Father withdraw funds from the IRA by mailing a form; Father would then receive in the mail a check, which he would deposit. After Father began living with Wagner, Father authorized her to handle telephonic withdrawals from the IRA. Wagner did not take any money out of the IRA without Father's authorization because it was "his money." Wagner did not sign Father's name on the requests for withdrawals from the IRA.

Wagner testified that all of the money taken out of the Account was at Father's request. Wagner never took money from the Account or the IRA for her own benefit or without Father's authorization. Wagner acknowledged that the money deposited into the Account was Father's money. Father gave Wagner the proceeds of the $87,000 mortgage "as a gift[.]" When asked whether she gave Father $200,000 over the course of three years to "lose at the casinos[,]" Wagner testified "[p]ossibly" and explained: "It's [Father's] money. He wanted it, he got it, he did what he wanted with it."

At the conclusion of the bench trial, the circuit court found that Wagner took funds from the Account and used them for her own purposes. The circuit court found Wagner guilty of both theft of property with a value of at least $500 and embezzlement (fraudulent misappropriation by fiduciary). The circuit court sentenced Wagner to eight years' imprisonment, with all but eighteen months suspended, for theft of property with a value of at least $500, followed by five years' supervised probation; the circuit court also ordered Wagner to pay $122,355 in restitution to Father. For sentencing purposes, the conviction for embezzlement (fraudulent misappropriation by fiduciary) merged with the conviction for theft of property with a value of at least $500.

Wagner appealed, and the Court of Special Appeals affirmed. Wagner filed a petition for a writ of *certiorari*, and the Court of Appeals granted the petition.

Held: Affirmed.

The Court of Appeals held that the evidence was sufficient to support the conviction for theft where Wagner willfully or knowingly obtained or exerted unauthorized control over funds—belonging to another, Father—contained in a joint bank account without Father's knowledge or consent and with the intent to deprive Father of those funds; statutorily granted authority permitting a party to a joint or multiple-party account to access and withdraw funds in the account does not confer ownership of the funds in the account to a party such that, as a matter of law, a party cannot be guilty of theft.

The Court of Appeals held that Md. Code Ann., Fin. Inst. (1980, 2011 Repl. Vol.) ("FI") 1-204(f) does not mention, let alone implicate, the ownership rights among living parties to a joint or multiple-party account; instead, FI § 1-204(f) provides that a party to a joint or multiple-party account may access and withdraw funds in the account.

The Court of Appeals concluded that, by its plain language, FI § 1-204(f) simply grants a party or a convenience person to a joint or multiple-party account the authority to access the account and withdraw funds, absent language in the account agreement expressly providing otherwise; FI § 1-204(f) does not confer ownership of the funds in the account to the party or the convenience person. The Court of Appeals stated that FI § 1-204(f) does not delineate or detail the relationship among the parties to a multiple-party account; instead, FI § 1-204(f) concerns the relationship between the parties to a multiple-party account and the financial institution where the account is held, as memorialized in an account agreement between the financial institution and the parties to the multiple-party account.

The Court of Appeals determined that FI § 1-204(f) does not create an interest in property or give ownership of property to the party authorized to withdraw. The Court of Appeals concluded that a review of FI § 1-204's legislative history did not change the result or alter the plain meaning of FI § 1-204(f), and instead FI § 1-204's legislative history demonstrated that the General Assembly enacted FI § 1-204 to repeal the rules as to gift and trust that formerly governed the joint or multiple-party accounts of deceased individuals.

The Court of Appeals held that, even if a rebuttable presumption of equal ownership of funds among parties to a multiple-party account exists, the evidence adduced at trial rebutted that presumption in this case. Stated otherwise, the existence of an agreement between Father and Wagner rebutted any presumption that Wagner, as a party to the Account, had an ownership interest in the funds; *i.e.*, the titling of the Account, listing Father and Wagner as "joint owners," did not create an ownership interest in the funds in the Account, as Father and Wagner agreed that the funds belonged to Father. The Court of Appeals concluded that, put simply, the terms of the agreement between Father and Wagner governed their respective ownership rights, or lack thereof, as parties to the funds in the Account.

The Court of Appeals concluded that, viewing the evidence in the light most favorable to the State, the evidence was sufficient to support Wagner's conviction for theft of property with a value of at least $500. Because FI § 1-204(f) does not mention or implicate the ownership rights

among living parties to a joint or multiple-party account, and instead provides that a party to a joint or multiple-party account may access and withdraw funds in the account, the Court of Appeals rejected Wagner's contention that she had an ownership interest in the funds in the Account and that, as a matter of law, she cannot be guilty of theft. The Court of Appeals determined that, under the circumstances of this case, nothing in FI § 1-204(f) prevents a conviction for theft. The evidence demonstrated that Wagner willfully or knowingly obtained or exerted unauthorized control over the funds in the IRA and the Account—which belonged to Father, the owner of the funds—without Father's knowledge or consent, and with the intent to deprive Father of those funds. In other words, the evidence was sufficient to demonstrate that Wagner committed theft.

The Court of Appeals held that the evidence was sufficient to support the conviction for embezzlement (fraudulent misappropriation by fiduciary). The Court of Appeals determined that the evidence was sufficient to demonstrate that Wagner was a fiduciary in connection with the funds in the Account where the evidence adduced at trial established that Father added Wagner to the Account for the sole purpose of "get[ting his] money out if [he] couldn't[,]" *i.e.*, to access his funds at his direction and on his behalf, and not for Wagner's own benefit or on her own accord, and where both Father and Wagner knew that the funds in the Account were Father's. The Court of Appeals concluded that it was evident from Father's testimony that, without the arrangement agreed to by Father and Wagner—that Wagner was to withdraw funds from the Account only at Father's direction and on his behalf—Wagner would not have been added to the Account. It was Father's familial relationship with Wagner, and the trust and confidence such a relationship engenders, that was a key factor leading to Father's arrangement with Wagner with respect to the Account.

Corey Jones v. State of Maryland, No. 16, September Term 2015, filed December 7, 2015. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2015/16a15.pdf

PETITION FOR WRIT OF ERROR CORAM NOBIS – DOCTRINE OF LACHES – DELAY – PREJUDICE

Facts:

On May 28, 1999, in the Circuit Court for Baltimore City ("the circuit court"), in Case Number 299148035, the State, Respondent, charged Corey Jones ("Jones"), Petitioner, with distribution of heroin (Count I), use of a minor for the purpose of distributing heroin (Count II), possession of heroin with the intent to distribute (Count III), and possession of heroin (Count IV).

On September 14, 1999, the circuit court conducted a guilty plea proceeding. The prosecutor stated: "[W]e would be proceeding under Count II of the case ending in 035 . . . . [s]ix years, suspending all but the first eighteen months, three years[']] probation." During the guilty plea colloquy, Jones's counsel informed Jones and another defendant that they were "each pleading guilty to a count of possession with intent to distribute." Jones responded: "Yes, ma'am." The prosecutor read a statement of facts. The circuit court found that the facts sufficed to support Jones's guilty plea, found that Jones's guilty plea was "knowing and voluntary[,]" entered a verdict of guilty, and sentenced Jones to six years of incarceration, with all but eighteen months suspended and with credit for time served, followed by three years of supervised probation. Jones failed to move to withdraw his guilty plea, move for a new trial, apply for leave to appeal, move to set aside an unjust or improper verdict, or petition for post-conviction relief.

On August 24, 2005, Jones pled guilty to violating the order of probation. The circuit court sentenced Jones to three years of incarceration.

On July 23, 2012, in the United States District Court for the District of Maryland, Jones pled guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). Due, in part, to his 1999 conviction in the circuit court, Jones was subject to a mandatory minimum of fifteen years of incarceration under 18 U.S.C. § 924(e)(1), the statute known as the Armed Career Criminal Act. But for this conviction, Jones would have been subject to a maximum of ten years of incarceration under 18 U.S.C. § 924(a)(2).

On October 9, 2012, Jones filed in the circuit court a petition for a writ of error coram nobis, in which Jones contended that his 1999 guilty plea was involuntary because he had not been informed of the elements of the offense or nature of the charge to which he pled guilty. On November 27, 2012, the State filed a response in which the State contended that the doctrine of laches barred Jones from seeking coram nobis relief.

On December 7, 2012, the circuit court conducted a hearing on the coram nobis petition. The State called as a witness a police officer who had seen Jones on the day of his arrest. The officer testified that, after reviewing the statement of charges and an offense report that he had prepared in connection with the case, he had no independent recollection of Jones or his arrest. The officer testified that he had looked for, but could not find, the Baltimore Police Department's folder for Jones's case.

In an order dated January 18, 2013, the circuit court granted the coram nobis petition. The State appealed, and the Court of Special Appeals reversed, holding that the doctrine of laches barred the coram nobis petition. Jones filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that the doctrine of laches may bar the right to seek coram nobis relief. The Court also held that, for purposes of the doctrine of laches, delay begins when a petitioner knew or should have known of the facts underlying the alleged error. The Court's conclusion furthered laches's purpose of protecting against stale claims. Additionally, the Court's conclusion furthered the public's interests in accurately and promptly resolving allegations of error and maintaining the finality of convictions. Finally, the Court's conclusion was equitable; laches is an equitable defense, and it is only fair to require a petitioner to bring an alleged error to the trial court's attention without unreasonably delaying after the time at which the petitioner knew or should have known of the facts underlying the alleged error.

Applying its holding to the case's facts, the Court concluded that the delay began in 1999, when Jones pled guilty and knew or should have known of the facts underlying the alleged error—namely, an allegedly involuntary guilty plea. The Court also concluded that the State demonstrated by a preponderance of the evidence that Jones's thirteen-year delay was unreasonable based on the following three circumstances: (1) in 1999, the circuit court sentenced Jones to six years of incarceration, with all but eighteen months suspended, followed by three years of supervised probation; (2) in 2005, the circuit court circuit court sentenced Jones to three years of incarceration for violating the order of probation, thus incentivizing Jones to challenge his 1999 conviction; and (3) the reason for the coram nobis petition was that Jones committed another crime (namely, being a felon in possession of a firearm) in 2012.

The Court further held that, for purposes of determining whether laches bars an individual's ability to seek coram nobis relief, prejudice involves not only the State's ability to defend against the coram nobis petition, but also the State's ability to reprosecute. For one thing, prejudice is generally held to be anything that places the opposing party in a less favorable position. Additionally, laches is an equitable defense. It would have been inequitable—and, indeed, nonsensical—for the Court to blind itself to the State's ability to reprosecute. Whether in a coram nobis matter or in a new trial, the State's interest is precisely the same: to successfully prosecute an alleged violation of the law. The Court also held that, to establish prejudice, the

State need not prove that the delay makes it impossible to reprosecute a petitioner; instead, the State must prove simply that the delay places the State in a less favorable position for purposes of reprosecuting the petitioner.

Applying its holdings to the case's facts, the Court concluded that the State met its burden of proving by a preponderance of the evidence that Jones's thirteen-year delay placed the State in a less favorable position for purposes of reprosecuting Jones. The officer testified that, even after reviewing the statement of charges and an offense report he had prepared in connection with the case, he had no independent recollection of Jones. The officer also testified that he had looked for, but could not find, the Baltimore Police Department's folder for Jones's case. It was difficult to imagine anything more prejudicial than the circumstance that the State's only eyewitness can no longer testify about what the eyewitness saw.

Matthew David Meyer v. State of Maryland, No. 21, and *State of Maryland v. Helen C. Rivera*, No. 22, September Term 2015, filed December 22, 2015. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2015/21a15.pdf

CRIMINAL LAW – PROBATION

Facts:

Matthew David Meyer ("Meyer") pled *nolo contendere* to two counts of manslaughter by motor vehicle. As a result, he was sentenced to fourteen years of incarceration, seven of which were suspended, and three years of unsupervised probation with the special condition that he not operate a motor vehicle in the State of Maryland. During the probationary term, Meyer obtained a driver's license from the Motor Vehicle Administration. Shortly thereafter, while still on probation, Meyer received citations for driving at an unreasonable speed and for failure to use headlights while operating a motor vehicle. As a result of these traffic violations, Meyer was charged with and found in violation of the special condition of probation. Meyer filed a Motion to Correct an Illegal Sentence under Maryland Rule 4-345(a) arguing that the condition of probation prohibiting him from driving in the State of Maryland was illegal under Rule 4-345(a). After a hearing, the Circuit Court for Washington County denied the Motion to Correct an Illegal Sentence. Meyer timely appealed this denial to the intermediate appellate court. Pending the appeal and prior to any proceedings in the intermediate appellate court, we granted *certiorari*.

In a separate case, consolidated with *Meyer* for the purposes of the Court's opinion, Helen C. Rivera ("Rivera") was driving an SUV when she encountered a group of bicyclists riding on the street. Rivera began to drive aggressively and twice swerved her SUV towards the group. In one instance, the SUV hit a bicyclist, which caused the bicyclist to fall and sustain injuries. A Montgomery County Circuit Court jury found Rivera guilty of two counts of second-degree assault and one count of failing to remain at the scene of an accident involving bodily injury. The sentencing judge placed Rivera on probation before judgment for the two counts of assault, and imposed, among other things, a special condition of probation: Rivera was prohibited from driving a motor vehicle for one year "or until [the] Motor Vehicle Administration permits you[, Rivera,] to drive, whichever is later in time." Rivera appealed the no-driving condition to the Court of Special Appeals. In an unreported opinion, the intermediate appellate court held that *Sheppard v. State*, 344 Md. 143, 685 A.2d 1176 (1996) was controlling, and that the trial court abused its discretion by imposing the no-driving condition.

Held: In *Meyer*, judgment of the Circuit Court for Washington County is affirmed. In *Rivera*, judgment of the Court of Special Appeals is reversed.

The *Sheppard* Court erred in holding that the enactment of the Transportation Article preempted the Judiciary from imposing the no-driving condition. Although the Transportation Article confers power on the MVA to regulate the issuance of driver's licenses as well as suspensions, revocations and reinstatements, the language of the statutory scheme does not suggest or expressly restrict the broad discretion of a sentencing judge to place restrictions on one's driving privileges as a condition of probation. As such, the *Sheppard* Court erred by implying legislative intent to curtail the power of the Judiciary in this area. The Executive branch and the Judiciary have shared authority to regulate driving privileges, but only the Executive branch has the authority to issue, suspend, revoke and reinstate a driver's license. The Judiciary, however, has the discretion, where appropriate, to restrict a defendant's standard of conduct, which includes prohibiting one's ability to operate a motor vehicle as a condition of probation. Both the Executive branch and the Judiciary may make decisions that adversely affect one's driving privileges, however, the manner in which each branch may do so, as explained above, differs. As such, *Sheppard* is overruled.

The no-driving conditions of probation imposed on Meyer and Rivera were reasonably related to their convictions. Thus, the trial court's imposition of the no-driving condition of probation was neither an abuse of discretion nor a violation of the separation of powers doctrine

A sentencing judge's imposition of no-driving as a condition of probation is not an illegal sentence within the meaning of Rule 4-345(a). Rule 4-345(a) is an exception to the general rule of finality and is "limited to those situations in which the illegality inheres in the sentence itself" which occur where "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed." *Chaney v. State*, 397 Md. 466, 918 A.2d 510 (2007). Meyer's *nolo contendere* pleas resulted in valid convictions, and his incarceration and probationary terms were permitted by law.

Lauren McClanahan v. Washington County Department of Social Services, No. 79, September Term 2014, Opinion by Adkins, J.

Battaglia and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/79a14.pdf

MARYLAND CODE (1984, 2012 REPL. VOL.), § 5-701 OF THE FAMILY LAW ARTICLE ("FL") — CHILD ABUSE MENTAL INJURY — STATUTORY CONSTRUCTION:

Facts:

In 2010 the Washington County Department of Social Services ("the Department") conducted investigations of Lauren McClanahan's ("Mother") alleged abuse and neglect of her daughter ("R"). The investigations were triggered by multiple allegations by R that her biological father (Mother's ex-husband) had sexually abused her when she visited him. Mother reported these allegations at various medical facilities, where R was subjected to nine vaginal exams over the course of several years. These exams showed evidence of vaginal redness or discharge, not sexual abuse. Those who examined R, however, could not fully discount her allegation that her father had "hurt her bottom."

After conducting its investigations, the Department notified Mother that it found her responsible for indicated child abuse mental injury and indicated child neglect. Mother requested contested case hearings through the Office of Administrative Hearings to challenge both findings. The Administrative Law Judge ("ALJ") who was assigned to Mother's appeal held a hearing for both cases in 2011.

In its decision, the ALJ affirmed the Department's finding of indicated child abuse mental injury. The ALJ concluded that Mother's actions "were either an intentional attempt to manipulate and influence the outcome of an ongoing custody dispute with R[]'s father, or were a result of her subconscious efforts to have R[] remain close to her." The ALJ authorized the Department to identify Mother in a central registry as being responsible for child abuse mental injury. The ALJ, however, modified the Department's finding of indicated child neglect to "ruled out child neglect."

Mother appealed the ALJ's decision to the Circuit Court for Washington County. Affirming the ALJ's decision, the Circuit Court rejected Mother's argument that a finding of indicated child abuse mental injury requires proof of intent. In a reported opinion, the Court of Special Appeals affirmed the judgment of the Circuit Court. *McClanahan v. Washington Cnty. Dep't of Soc. Servs.*, 218 Md. App. 258, 96 A.3d 917 (2014). The Court of Special Appeals concluded that the ALJ did not err by failing to include scienter as an element of indicated child abuse mental injury. Mother filed a Petition for Writ of Certiorari, which we granted.

Held: Reversed.

Mother and the Department disputed the meaning of Md. Code (1984, 2012 Repl. Vol.), § 5-701 of the Family Law Article ("FL"), which defines child abuse, as well as the scope of Code of Maryland Regulations ("COMAR") 07.02.07.12, which directs the dispositions of investigations of suspected child abuse. The Department pointed out that the regulations pertaining to child abuse mental injury contain no express scienter requirement. Scienter only appears in one criterion, namely, to rule out child abuse physical injury. We rejected the Department's argument because the statute itself, FL § 5-701, fails to draw any distinction between physical and mental injury to a child. Without statutory directive, there is no reason why scienter should be required in one instance (physical), and not the other (mental).

We explained that our decision in *Taylor v. Harford County Department of Social Services*, 384 Md. 213, 862 A.2d 1026 (2004) was instructive on how to interpret FL § 5-701. The Department dismissed *Taylor* as a case limited to child abuse causing physical injury. Notably, though, we were skeptical in *Taylor* that "*either* § 5-701 of the Family Law Article or COMAR 07.02.07.12 intend[ed] for such a draconian strict liability standard always to attach to the intentional acts of parents or caretakers who unintentionally injure their children." 384 Md. at 231–32, 862 A.2d at 1036–37 (emphasis added). In other words, we did not limit our concern about a strict liability standard to acts causing physical injury. We found no reason here to limit this concern to cases of physical injury.

We acknowledged that there may be examples of mental injury arising from parental conduct that are so reprehensible that an ALJ might infer intent to harm or reckless disregard just from the act. But in this case, the parental conduct was ostensibly for a child's protection. If we read the statutory and regulatory scheme as the Department does, the parent would face potential inclusion on the central registry merely by reporting. The Department's view, then, would undermine the paramount statutory purpose of child protection. *See* FL § 5-702.

Because FL § 5-701(b) does not differentiate between mental injury and physical injury, we refused to interpret the statutory scheme to sanction a regulation in which a parent can be deemed a child abuser for unintentionally causing mental injury but not liable for unintentionally causing physical injury. Ultimately, we declined to enforce the portion of COMAR 07.02.07.12C that limits its exculpatory scope (for accidental injury) to alleged abusers causing physical injury. Thus, to be included as a "child abuser" in a central registry, a person must either intend to injure the child or at least act in reckless disregard of the child's welfare.

The ALJ's conclusion, however, veered much too close to strict liability for parental decisions. In a case where the alleged abuser's conduct falls within the realm of conduct that could benefit the child, as medical treatment does, there must be some evidence that supports a conclusion that the parent was at least reckless vis-à-vis the child's health. In other words, a parent's conduct must constitute a gross departure from the type of conduct a reasonable person would engage in under the circumstances. *Cf. Jones v. State*, 357 Md. 408, 430, 745 A.2d 396, 408 (2000). Thus, we remanded for further proceedings.

In re: Adoption/Guardianship of Dustin R., No. 24, September Term 2015, filed December 21, 2015. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2015/24a15.pdf

APPEALABILITY – INTERLOCUTORY ORDER – JURISDICTION – STATUTORY AUTHORITY – MD. CODE ANN., FAM. LAW (1984, 2012 REPL. VOL.) § 5-328(a) – MD. CODE ANN., FAM. LAW (1984, 2012 REPL. VOL.) § 5-324(b)(1)(ii)(7)(B) – MD. CODE ANN., FAM. LAW (1984, 2012 REPL. VOL.) § 5-324(b)(1)(ii)(8) – SEPARATION OF POWERS – ARTICLE 8 OF MARYLAND DECLARATION OF RIGHTS

Facts:

On December 16, 1992, Dustin R. ("Dustin"), Petitioner, was born. In February 1995, Dustin entered foster care and the juvenile court terminated Dustin's biological parents' parental rights and granted guardianship to the Anne Arundel County Department of Social Services ("DSS") with the right to consent to adoption or long-term care short of adoption. On March 28, 1995, DSS placed Dustin in a treatment foster care home with Jacqueline and Darrell P. ("Mrs. P." and "Mr. P.," respectively), where he has lived since that date.

Dustin is medically fragile and has special needs. Dustin has, among other conditions, an intellectual disability, severe seizure disorder, cortical visual impairment, gastro-esophageal reflux, scoliosis, osteoporosis, ischemic encephalopathy, global orthopedic impairments, cerebral palsy, and an Unidentified Long Chain Fatty Acid Syndrome with a Mitochondrial Disease (a metabolic disorder). Dustin has a tracheostomy, full glottal closure, a colostomy, and a gastrostomy tube for feeding. The Department of Health and Mental Hygiene ("DHMH"), Respondent, administers the Maryland Medical Assistance Program ("Medicaid"), which has paid Dustin's medical expenses in foster care.

As Dustin grew older, his condition worsened, and in 2005, after an emergency hearing, the Circuit Court for Anne Arundel County, sitting as a juvenile court ("the juvenile court"), ordered DSS to secure round-the-clock (twenty-four hours per day, seven days per week) nursing services for Dustin. In 2006, DSS contracted with MedSource Community Services, Inc. to provide those nursing services. Since that time, Dustin has had a rotating team of eight registered nurses providing round-the-clock services.

As early as 2010, Dustin began to seek the provision of services for himself after age twenty-one. In June 2011, Dustin filed an amended petition for co-commitment to DHMH and DSS, requesting that the juvenile court require DHMH and DSS to "present a written plan to provide for the care of Dustin [] in the [] home [of Mr. and Mrs. P.], including 24 hour skilled nursing care, upon turning" twenty-one years old. Eventually, in April 2013, DHMH consented to co-commitment, and the juvenile court ordered DHMH to "continue the planning process for the transition of [Dustin] from foster care under the guardianship of [DSS] to the guardianship of his

current foster parents or other appropriate persons[.]" On multiple occasions, Dustin requested that the juvenile court order DHMH to fund and provide to him after his twenty-first birthday the same services that he was then receiving. DHMH consistently opposed those requests on the grounds that such requests exceeded the juvenile court's authority.

Mr. and Mrs. P. decided to seek guardianship of Dustin so that he could remain in their home; on July 26, 2013, Mr. and Mrs. P. submitted through Dustin's resource coordinator a proposed service funding plan, in which they proposed to continue Dustin's budget as is. DHMH responded to the proposed service funding plan, stating that certain services provided to Dustin were "covered waiver services[,]" including Dustin's nursing, medical equipment and supplies, medications, and other medical care, but that other services requested in the proposed service funding plan were not covered, and thus were denied.

On August 26 and 27, 2013, and September 27, 2013, the juvenile court conducted an annual guardianship review hearing. At the conclusion of the hearing, the juvenile court orally ruled that DHMH's plan was clinically inadequate. The juvenile court made factual findings and then addressed a two-page document that Dustin submitted entitled "Proposed Findings and Order." The juvenile court signed the Proposed Findings and Order, which stated, in pertinent part: "ORDER that DHMH develop and approve a written plan that ensures that Dustin will continue to receive all of the services and supports [that] he is currently receiving[,] including[,] but not limited to[,] all services that will ensure that Dustin will receive 24/7, one-on-one skilled nursing care provided by registered nurses [who] have been fully oriented to his care needs and have demonstrated competence in all of the tasks on the Skills Checklist developed by the supervising nurse." At the bottom of the Proposed Findings and Order, the juvenile court judge signed on the signature line that had been provided and announced: "The order is signed." After the guardianship review hearing, the clerk of the juvenile court made a docket entry stating the "Proposed Finding and order" was filed on September 30, 2013.

On October 24, 2013, DHMH noted an appeal to the Court of Special Appeals. On December 2, 2013, the juvenile court conducted another guardianship review hearing, and signed an order dated December 2, 2013, crossing out the word "Proposed," so the title read "~~PROPOSED~~ ORDER"; the order, as amended and signed by the juvenile court judge ordered relief nearly identical to that ordered in the September 27, 2013 order.

On appeal, although neither DHMH nor Dustin raised any issue as to the appealability of the juvenile court's September 27, 2013 order, in an unreported opinion dated December 22, 2014, a three-judge panel of the Court of Special Appeals dismissed DHMH's appeal on its own initiative, a majority holding that the September 27, 2013 order was not a final, appealable order; accordingly, the Court of Special Appeals did not reach the merits. Notably, the Honorable Andrea M. Leahy dissented, stating that the juvenile court signed the proposed order, consistent with its oral rulings on the record, and that the juvenile court and the parties intended the signed proposed order to be a final, appealable order.

Dustin filed a petition for a writ of *certiorari* and DHMH filed an answer and cross-petition for a writ of *certiorari*. The Court of Appeals granted the petition and denied the cross-petition.

Held: Reversed.

The Court of Appeals held that the Court of Special Appeals erred in dismissing DHMH's appeal because the juvenile court's September 27, 2013 order was immediately appealable at a minimum as an interlocutory order granting injunctive relief. The record demonstrated that the juvenile court ordered DHMH to develop, approve, and implement a plan to provide ongoing services to Dustin. As such, the order granted injunctive relief because it was a writ framed according to the circumstances of the case commanding action which the juvenile court regarded as essential to justice.

The Court of Appeals determined that the order was, indeed, an order because by signing the "proposed" order, the juvenile court made the "proposed" order into an actual order, and clearly intended the order as a binding command to the parties. The Court of Appeals stated that the juvenile court did not strike out the word "Proposed" in the title, or otherwise alter the prefatory language (*i.e.*, "Dustin [] requests" and "Dustin requests"), was not dispositive of whether the order is, in fact, an order. The Court of Appeals concluded that, here, the juvenile court signed an order setting forth the relief requested by Dustin, and both parties understood the order to be the juvenile court's command or decree.

The Court of Appeals held that the juvenile court had jurisdiction and the statutory authority to order DHMH to develop and approve a written plan of clinically appropriate services in the least restrictive setting that ensured that Dustin would continue to receive services, where Dustin was not yet twenty-one years old when the juvenile court issued its order and where such services were required to protect Dustin's health and welfare, and where the juvenile court's order served to bridge the gap in services as Dustin transitioned from his juvenile guardianship case to adult guardianship care and the final outcome (meaning judicial review, including the appellate process) of any Medicaid fair hearing proceedings.

The Court of Appeals determined that, by its plain language Md. Code Ann., Fam. Law (1984, 2012 Repl. Vol.) ("FL") § 5-328(a) provides that, in cases where the local department is a child's guardian, the juvenile court "retains jurisdiction[] until the child attains 18 years of age[,]" but that it "may continue jurisdiction until the child attains 21 years of age." (Paragraph break omitted). In other words, although the juvenile court's jurisdiction ordinarily ends once a child turns eighteen years old, the juvenile court's jurisdiction "may" extend until the child turns twenty-one years old. Under FL § 5-328(a)(2), if the juvenile court exercises its discretion to extend its jurisdiction in a guardianship proceeding past a child's eighteenth birthday, the juvenile court is not thereafter divested of jurisdiction in that guardianship proceeding until the child turns twenty-one years old. Thus, the juvenile court has the authority to act, even if a child is twenty years and three hundred and sixty-four days old.

The Court of Appeals determined that the juvenile court in the instant case had jurisdiction to issue both the September 27, 2013 order and the December 2, 2013 order because Dustin was twenty years old at the time those orders were issued; indeed, Dustin did not turn twenty-one

years old until December 16, 2013. FL § 5-328(a)(2)'s plain language leads to the conclusion that the juvenile court's jurisdiction continues until a child turns twenty-one, not that the juvenile court's order is no longer effective when a child reaches age twenty-one.

The Court of Appeals determined that, by its plain language, FL § 5-324(b)(1)(ii)(7)(B) provides that, prior to termination of the guardianship case (*i.e.*, before the juvenile court is divested of jurisdiction), the juvenile court must order a party to provide any service or take any other action to obtain any ongoing care needed to protect the health of a child with disabilities after he or she turns twenty-one years old. In other words, FL § 5-324(b)(1)(ii)(7)(B)'s purpose is to ensure that services are provided for, if needed, *i.e.*, that care is in place before a child turns twenty-one years old, so that there is no gap in care between the end of the juvenile guardianship case and transition into the adult guardianship system. In short, FL § 5-324(b)(1)(ii)(7)(B) unambiguously provides that, while a juvenile court has jurisdiction in a guardianship case (i.e., before a child turns twenty-one years old, assuming the juvenile court has exercised its discretion to extend its jurisdiction pursuant to FL § 3-528(a)(2)), the juvenile court is required, consistent with the best interests of a child with a disability, to direct the provision of any service or the taking of any action necessary for the child's health and welfare, including services to obtain ongoing care that may be needed after the guardianship case ends.

The Court of Appeals held that, here, the juvenile court acted in accordance with the express authority conferred on it by FL § 5-324(b)(1)(ii)(7)(B). In the September 27, 2013 order, the juvenile court directed DHMH to take action to ensure that Dustin continued receiving ongoing services necessary for his health and well-being. As discussed above, because Dustin was twenty years old at the time, the juvenile court had jurisdiction over the guardianship case. And, as Dustin is disabled, FL § 5-324(b)(1)(ii)(7)(B) directed the juvenile court to take action before Dustin turned twenty-one years old to obtain the ongoing care that Dustin would need after the guardianship case ended on his twenty-first birthday.

The Court of Appeals concluded that, by its plain language, FL § 5-324(b)(1)(ii)(8) authorizes the juvenile court to order DHMH to submit a plan of clinically appropriate services in the least restrictive setting for a child who is co-committed to DHMH. The Court of Appeals held that that is exactly what occurred here. Dustin was already co-committed to DHMH as of April 2013, and the juvenile court ordered DHMH to develop and approve a plan of clinically appropriate services—including "24/7, one-on-one skilled nursing care provided by registered nurses"—to serve Dustin in the P. home, which the juvenile court determined to be the least restrictive setting. Indeed, given the juvenile court's factual findings—which DHMH has not challenged in this Court—the Court of Appeals had no difficulty in concluding that the juvenile court was correct in ordering DHMH to develop and provide a plan for the minimum level of clinically appropriate services necessary for Dustin in the P. home. FL § 5-324(b)(1)(ii)(8) is unambiguous, and the juvenile court adhered to it in this case.

The Court of Appeals also held that, in addition to having both jurisdiction and statutory authority to issue the September 27, 2013 order and the December 2, 2013 order, the juvenile court had authority to act in accord with Dustin's best interests pursuant to its common law *parens patriae* authority.

The Court of Appeals held that, although the juvenile court had statutory authority under FL §§ 5-324(b)(1)(ii)(7)(B) and (8) to act as it did, that statute serves to provide a bridge in services as a child transitions from the juvenile guardianship system and into the adult guardianship system. The juvenile court may order services pursuant to FL §§ 5-324(b)(1)(ii)(7)(B) and (8) to bridge the gap as Dustin transitions from a juvenile guardianship to an adult guardianship and obtains services through the adult guardianship system. The services ordered by the juvenile court cannot and do not continue necessarily until Dustin's demise. Rather, services ordered by the juvenile court to bridge the gap continue only until such time as the child transitions into an adult guardianship and his or her guardian(s) seeks authorization for the provision of the same or substantially similar services as those ordered by the juvenile court through the Medicaid fair hearing process.

The Court of Appeals held that the juvenile court did not violate the separation of powers. The Court of Appeals concluded that FL §§ 5-328(a)(2), 5-324(b)(1)(ii)(7)(B), and 5-324(b)(1)(ii)(8) expressly authorized and empowered the juvenile court to act as it did. The Court of Appeals determined that the issue is not whether the juvenile court improperly exercised judicial power to the detriment of the executive branch, but instead the issue is one of statutory interpretation, *i.e.*, whether the General Assembly delegated the authority to the juvenile court to act as it did in this case. The Court of Appeals stated that, absent any argument by DHMH that the statutes at issue are unconstitutional or that the General Assembly improperly delegated authority to the juvenile court, it discerned no basis on which to conclude that the juvenile court violated the separation of powers in the instant case, where it acted according to express statutory authority.

Kathleen Clough v. Mayor & Council of Hurlock, No. 15, September Term 2015, filed December 16, 2015. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2015/15a15.pdf

LOCAL GOVERNMENT LAW – MUNICIPAL CHARTERS – EMPLOYMENT AGREEMENTS

Facts:

According to the complaint, on November 25, 2009, the Mayor-elect of Hurlock, Joyce Spratt, met with Kathleen Clough and requested that Ms. Clough serve as the Clerk-Treasurer of Hurlock, MD. Ms. Clough indicated her willingness to serve as Clerk-Treasurer provided that she had the security of an employment agreement. Ms. Spratt and Ms. Clough agreed to the terms of an agreement, and Ms. Clough prepared a written employment agreement, dated November 25, 2009, setting forth the agreed-upon terms, which included a four-year term of employment.

On December 8, 2009, the Hurlock Council convened in executive session. Ms. Spratt presented Ms. Clough to the Hurlock Council for appointment to the position of Clerk-Treasurer. The Hurlock Council approved the appointment of Ms. Clough pursuant to the terms of the employment agreement.

On July 9, 2012, Ms. Spratt terminated Ms. Clough from the position of Clerk-Treasurer without cause. At that time, there were approximately 18 months remaining of the four-year term in the written employment agreement.

On July 5, 2013, Ms. Clough filed a complaint against the Mayor & Council of Hurlock ("Town") with the Circuit Court, which she later amended. The Town moved to dismiss the amended complaint. Among other reasons, the Town contended that the four-year term in the employment agreement conflicted with the Hurlock Charter, and as a result, the employment agreement was void *ab initio* – that is, void from the beginning. Following a hearing, the Circuit Court granted the Town's motion in part on the ground that the four-year term in the employment agreement was inconsistent with the Hurlock Charter.

Ms. Clough noted a timely appeal to the Court of Special Appeals. The intermediate appellate court affirmed in an unreported opinion. It reasoned that the provision in the Hurlock Charter that all agency heads "serve at the pleasure of the Mayor" meant that the position of Clerk-Treasurer was an at-will position. Therefore, that court held that it was inconsistent with the Hurlock Charter for the Town to enter into an employment agreement that conferred a term of years on the Clerk-Treasurer.

Held: Affirmed.

The Court of Appeals considered whether the Hurlock Charter precluded the Town from entering a four-year term of employment with the Clerk-Treasurer. The Hurlock Charter provides that "[a]ll office, department, and agency heads shall serve at the pleasure of the Mayor." Ms. Clough contended that the operative phrase in that provision, "serve at the pleasure of," allowed the mayor to exercise that discretion to enter into an employment agreement with the Clerk-Treasurer for a fixed term of years.

The Court, however, concluded that the operative phrase precluded the Town from entering into an employment agreement with the Clerk-Treasurer for a fixed term of years. The Court reasoned that the operative phrase is commonly understood to refer to at-will employment and the Hurlock Charter did not indicate a contrary intent. The Court pointed out that Ms. Clough's interpretation would create inconsistencies with other provisions of the Hurlock Charter. Lastly, the Court noted that the Hurlock Charter embodied a public policy that a mayor should have the ability to assemble key personnel and that Ms. Clough's interpretation contradicted that public policy.

After determining that the Hurlock Charter precluded the Town from entering into an employment agreement with Ms. Clough for a fixed term of years, the Court concluded that neither Ms. Spratt nor the Hurlock Council had authority to enter into the four-year employment agreement with Ms. Clough. Because municipalities are not bound by contracts entered into by agents who exceed their authority, the Court held that the employment agreement was void and unenforceable.

Board of Education of Howard County v. Howard County Education Association-ESP, Inc., No. 18, September Term 2015, filed December 21, 2015. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2015/18a15.pdf

STATUTORY CONSTRUCTION – EDUCATION LAW ARTICLE

Facts:

In January 2010, a school nurse was terminated from her position with the Howard County Public School System. The school nurse is a noncertificated employee, because she does not have a professional teaching certificate from the Maryland State Board of Education. Respondent, the Howard County Education Association-ESP, Inc. is the exclusive bargaining representative for noncertificated employees of the Howard County Public School System.

Respondent, acting on behalf of the school nurse in this case, proceeded with the grievance process as outlined in a collective bargaining agreement ("CBA") that was negotiated between Respondent and Petitioner, Board of Education of Howard County. The CBA provides that an employee may only be discharged for cause and establishes a three-step grievance procedure. After completing the first step, the nurse's grievance was denied at step two by the Superintendent's designee for the Howard County Public School System, who reasoned that a superintendent's decision to terminate a noncertificated employee is an illegal subject of a CBA. Respondent then filed a demand for arbitration against Petitioner pursuant to the third and final step of the CBA's grievance procedure.

Upon receiving the demand for arbitration, Petitioner sought injunctive relief in the Circuit Court for Howard County to enjoin the arbitration. Petitioner argued that under the Education Article the superintendent has the sole authority to terminate noncertificated employees, and therefore a superintendent's decision to terminate an employee cannot be subject to binding arbitration. In opposition, Respondent argued that a superintendent's termination decisions may be reviewed by a binding arbitrator and therefore the arbitration clause is enforceable. The Circuit Court temporarily stayed the arbitration until the parties requested an opinion from either the Maryland State Board of Education ("State Board") or the Public School Labor Relations Board ("PSLRB"). Respondent requested an opinion from the PSLRB, and Petitioner requested an opinion from the State Board.

The State Board and the PSLRB issued conflicting opinions on the legality of an arbitration provision concerning the discharge of a noncertificated employee. The State Board opined that a superintendent has the exclusive authority to terminate noncertificated employees, and therefore an arbitration provision on this subject is illegal. The PSLRB opined that the collective bargaining statutes, as recently revised, permit parties to negotiate a binding arbitration clause to

review a noncertificated employee's termination and thus concluded that the arbitration clause in this case was enforceable.

After the two State agencies issued their opinions, Petitioner and Respondent sought judicial review before the Circuit Court. The Circuit Court agreed with the State Board's interpretation of the Education Article. Accordingly, the Circuit Court granted Petitioner a permanent injunction, affirmed the State Board's opinion, and reversed the PSLRB's opinion. Respondent appealed to the Court of Special Appeals, which reversed the judgments of the Circuit Court.

The Court of Appeals granted certiorari to decide whether the PSLRB has the exclusive authority to decide the legality of an arbitration clause to review a discharged employee's grievance. The resolution of this question required the Court of Appeals to interpret the statutes in the Education Article regarding the interplay of the State Board and the PSLRB.

In 2010, the General Assembly created the PSLRB. In creating the PSLRB, the General Assembly expressly transferred the power to interpret Subtitles 4 and 5 of Title 6 from the State Board to the PSLRB (i.e., the collective bargaining statutes). Md. Code (2010, 2014 Repl. Vol., 2015 Supp.), § 2-205 of the Education Article. Under Subtitle 5 of Title 6, the General Assembly granted to the PSLRB the power to resolve a dispute between a public school employee and an employee organization concerning the legality of a topic of bargaining. § 6-510(c)(5).

Section 6-510 of the Education Article governs negotiations. Subsection (b) permits the parties to "provide for binding arbitration of the grievances arising under the agreement that the parties have agreed to be subject to arbitration." Subsection (c)(1) provides the mandatory topics of negotiation, which includes "discharge of an employee for just cause." Subsection (c)(2) specifies the permissive topics of negotiation. And, subsection (c)(3) provides the illegal topics of negotiation, which includes "any matter that is precluded by applicable statutory law."

Petitioner argued that the Court of Appeals should affirm the State Board's opinion. In support, Petitioner asserted that the State Board interpreted § 6-201(c)(1) of the Education Article as conferring to the superintendent the exclusive power to terminate noncertificated employees. Mirroring the State Board's ruling, Petitioner argued that a binding arbitration provision reviewing the superintendent's decision to terminate an employee was an illegal encroachment on the superintendent's exclusive power to discharge. Petitioner therefore contended that § 6-201(c)(1) was "applicable statutory law" under § 6-510(c)(3), thereby rendering the arbitration clause in this case an illegal topic of bargaining.

Respondent, in turn, argued that the Court of Appeals should affirm the PSLRB's opinion. After reviewing the legislative history on the section governing mandatory topics of negotiation—§ 6-510(c)(1) which requires the parties to negotiate "discharge for just cause"—the PSLRB concluded that negotiating an arbitration provision on this mandatory subject was legal. The PSLRB, moreover, concluded that § 6-201(c)(1) did not constitute applicable statutory law.

Held: Affirmed.

The Court of Appeals, relying on principles of statutory construction, concluded that the provisions of the Education Article at issue are unambiguous and guide the decision in this case. Under the plain language of these statutes, the General Assembly's intent was clear and is readily confirmed by the ample legislative history on these collective bargaining statutes.

The Court of Appeals held that the PSLRB is the agency with the jurisdiction to decide the legality of a provision in a CBA that submitted an employee's discharge grievance to binding arbitration. Section 6-510(b) clearly permits parties to provide for a binding arbitration clause for grievances arising under their CBA. The Court, moreover, rejected Petitioner's argument that § 6-201(c)(1) constituted "applicable statutory law" under § 6-510(c)(3) because the General Assembly explicitly mandated parties to negotiate "discharge of an employee for just cause." The Court concluded that the General Assembly clearly granted the PSLRB, not the State Board, the power to decide the illegal topics of bargaining as "precluded by applicable statutory law." The Court of Appeals further concluded that the PSLRB properly resolved the legality of the arbitration provision.

Ruth Belche May, Individually and as Executrix of the Estate of Philip Royce May v. Air & Liquid Systems Corp., etc., et al., No. 5, September Term 2015, filed December 18, 2015. Opinion by Adkins, J.

Battaglia and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/5a15.pdf

PRODUCTS LIABILITY – FAILURE TO WARN – STRICT LIABILITY – NEGLIGENCE

Facts:

Air & Liquid Systems Corp., Warren Pumps LLC, and IMO Industries, Inc. manufactured steam pumps that were sold to the Navy. The Navy used these pumps to move extremely hot and highly pressurized steam through the ship's steam propulsion system. In accordance with the Navy's specifications, the manufacturer's pumps contained asbestos gaskets and packing when they first delivered the pumps to the Navy. Asbestos was used in gaskets and packing as an insulating material because it could withstand the extremely high temperatures and pressures produced by the steam propulsion system.

Philip Royce May served on active duty in the United States Navy from 1956 until 1976. As a machinist mate, May worked in the engine room of Navy ships. May testified that he would go to the log room and consult the instruction manuals on any piece of equipment he serviced. The manuals did not contain any warnings regarding the danger of inhaling asbestos dust or directions to wear protective gear. May's duties aboard Navy ships included replacing asbestos gaskets and packing in the pumps of the ships' steam propulsion systems. This work exposed him to airborne asbestos fibers. When removing gaskets, May used tools that generated respirable dust. When installing a new gasket, May would have to shape it into the proper size, which also generated respirable dust.

May, however, was never exposed to the asbestos gaskets and packing that Air & Liquid Systems, Warren Pumps, and IMO Industries used in their products. He was exposed only after other Navy mechanics, who performed maintenance on the manufacturers' pumps, replaced the' gaskets and packing with new components acquired from third parties—also containing asbestos.

In January 2012, May learned he was suffering from mesothelioma, a form of cancer that is commonly caused by asbestos exposure. May and his wife filed suit in the Circuit Court for Baltimore City in March 2012. After completion of discovery, the Respondents moved for summary judgment on the ground that, as a matter of law, they had no duty to warn of the dangers of the asbestos-containing replacement parts that they neither manufactured nor placed into the stream of commerce. The Circuit Court granted the motions and the Court of Special Appeals affirmed.

Held: Reversed.

The Court first addressed petitioner's negligent failure to warn claim. The Court observed that a prima facie products liability failure to warn claim grounded in negligence requires a showing of duty of care. The manufacturers argued that they did not owe May a duty of care because they did not manufacture or sell the injurious asbestos parts. The Court, however, analyzed several factors that are used to determine the existence of a duty of care and concluded that the manufacturers had a duty to warn. The Court stated the foreseeability of harm factor weighed heavily in factor of imposing a duty, but emphasized that foreseeability alone is not sufficient to establish a duty. The Court noted that the degree of certainty that the plaintiff suffered the injury factor also weighed in favor of imposing a duty. Next, the Court determined that the closeness of the connection between the defendant's conduct and the injury suffered strongly favored finding a duty to warn. The Court cited several out-of-state decisions in which courts found that manufacturers had a duty to warn where asbestos was crucial to the operation of the defendant's product. The Court highlighted that there was sufficient evidence to permit a reasonable inference that the manufacturers' pumps required asbestos to function properly in the high-heat applications in which they were used by the Navy.

The Court then examined the extent of the burden to the defendant and the consequences to the community of imposing a duty to warn. The Court stated that the burden on the manufacturers in placing a warning in the instruction manuals would have been negligible and agreed with May that this factor weighed against Air & Liquid, Warren Pumps, and IMO Industries. Turning to the moral blame factor, the Court stated that this factor tilted slightly in favor of the manufacturers. The Court stated that the manufacturers' supplying critical equipment to the Navy as part of a war effort mitigated moral blame. The Court then stated the policy of preventing future harm was a neutral factor. Finally, regarding the availability, cost and prevalence of insurance, the Court concluded that this factor counseled in favor of imposing a duty.

The Court then balanced the factors and determined that finding a duty becomes the clear choice. The Court explicated that a duty to warn in this context exists when (1) a manufacturer's product contains asbestos components, and no safer material is available; (2) asbestos is a critical part of the pump sold by the manufacturer; (3) periodic maintenance involving handling asbestos gaskets and packing is required; and (4) the manufacturer knows or should know of the risks from exposure to asbestos. Turning to the May's strict liability failure to warn claim, the Court cited Maryland case law recognizing that the framework for analysis in strict liability failure to warn cases substantially mirrors that of a negligent failure to warn action. Consequently, the Court determined that a manufacturer has a duty to warn of asbestos-containing replacement components that it has not placed into the stream of commerce in strict liability in the same narrow circumstances as in negligence. Applying this four-part test, the Court concluded that granting summary judgment on May's negligent and strict liability failure to warn claims was inappropriate.

Importantly, the Court repeatedly emphasized that a manufacturer is generally not liable for asbestos-containing parts it does not manufacture or place into the stream of commerce. The Court, however, recognized that narrow circumstances exist where a manufacturer can be liable for products it has not touched.

COURT OF SPECIAL APPEALS

Octavius Savage v. State of Maryland, No. 1387, September Term 2014, filed December 15, 2015. Opinion by Raker, J.

http://www.mdcourts.gov/opinions/cosa/2015/1387s14.pdf

CRIMINAL LAW – INCONSISTENT VERDICTS

Facts:

Octavius Savage was convicted in the Circuit Court for Baltimore City on April 10, 2008, of conspiracy to commit murder, and second degree murder. In 2011, on direct appeal, the Court of Special Appeals affirmed his convictions. This appeal involved appellant's third motion to correct an illegal sentence.

The central issue in this case was whether a conviction for conspiracy to commit murder is a legally inconsistent verdict with a conviction of second degree murder, following an acquittal of first degree murder—whether the circuit court erred or abused its discretion in imposing a sentence of life imprisonment for the conviction of conspiracy to commit murder.

Held: Affirmed.

As to the central issue in the case, the Court of Special Appeals held that the court did not err nor abuse its discretion in imposing a sentence of life imprisonment for the conviction of conspiracy to commit murder, holding that a conviction for conspiracy to commit murder is not legally inconsistent with the conviction for second degree murder and acquittal of first degree murder. Conspiracy to commit second degree murder is not a crime in Maryland—"conspiracy to murder" is conspiracy to commit first degree murder.

The Court of Special Appeals noted that the rules are different for legally inconsistent verdicts and factually inconsistent verdicts—a factually inconsistent verdict is merely illogical, while in contrast a legally inconsistent verdict occurs when acquittal of one charge is conclusive as to a necessary element of a charge of which the defendant was convicted.

The crime of conspiracy is complete when the agreement to undertake the illegal act is formed. The crime is unaffected by the performance of the act. Not only is the offense of conspiracy

complete when the unlawful agreement is reached, but a conspiracy to commit a crime is entirely separate from the substantive crime. It is legally possible for one to conspire to commit first degree murder even though the crime actually committed amounts only to second degree murder. The Court of Special Appeals held that guilty verdicts for conspiracy to commit murder and second degree murder in the case on appeal were not legally inconsistent.

Shaun D. Lindsey v. State of Maryland, No. 146, September Term 2015, filed December 16, 2015. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2015/0146s15.pdf

CRIMINAL LAW – FOURTH AMENDMENT – SEARCH AND SEIZURES – PROBABLE CAUSE – CONCLUSIVENESS OF WARRANT – CURTILAGE OR OPEN FIELDS

Facts:

On August 26, 2013, the Circuit Court for Baltimore County issued a search and seizure warrant for appellant, Shaun D. Lindsey's apartment located in Cockeysville, Maryland, in response to an affidavit filed by Baltimore City Police Officer, Jai Etwaroo ("Officer Etwaroo"). The affidavit contained information Officer Etwaroo received from confidential informants, who alleged that heroin was located in appellant's apartment, information regarding appellant's alleged drug-related activities provided by an acquaintance of appellant, Anthony Hall Thomas ("Mr. Hall"), and information discovered through an on-going police investigation, in which appellant was an alleged target.

The search of appellant's apartment was executed by members of the Baltimore County Police Department's Narcotics Unit, in conjunction with the Baltimore City Police Department's Northeast District Operation Unit/Flex. The search was initiated by a positive alert received from a K-9 dog in the area in front of appellant's apartment door. Detectives encountered appellant in the hallway of his apartment building and subsequently discovered large quantities of heroin and drug paraphernalia within his apartment.

As a result, appellant was indicted for possession of a large quantity of heroin, possession with intent to distribute, and possession of heroin, in violation of Md. Code (2002, 2013 Repl. Vol.) § 5-612 of the Criminal Law Article ("Crim. Law"), Crim. Law, § 5-602(2), and Crim. Law, § 5-601. Appellant filed a suppression motion, challenging the probable cause basis for the search warrant. Thereafter, a two-day motions hearing was held before the circuit court. After considering the evidence and testimony, the court denied appellant's motion. Thereafter, appellant entered a conditional guilty plea pursuant to Md. Rule 4-242(d)(2) to the count of possession with intent to distribute heroin in violation of Crim. Law, § 5-602(2). On March 2, 2015, appellant was sentenced to a ten-year term of incarceration without parole. Thereafter, appellant noted a timely appeal to the Court of Special Appeals.

Held: Affirmed.

The Court determined there was a substantial basis for probable cause to issue the search warrant and that the K-9 dog alert received in the area in front of appellant's apartment door was not curtilage and did not violate his Fourth Amendment rights.

The Court concluded that the affidavit contained several objective facts from which a judge could reasonably conclude that there was probable cause to search appellant's apartment. In exercising his professional judgment, Officer Etwaroo reasonably believed that the averments outlined in the affidavit related to appellant's present and continuing violation of the law and that the evidence sought would likely be found in appellant's apartment.

The Court further held that appellant failed to demonstrate that the area in front of his apartment door was curtilage, thereby warranting Fourth Amendment protection. In defining the extent of a home's curtilage, courts examine four factors: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. Although the area outside of appellant's door was in close proximity to the apartment, the Court determined that appellant had not demonstrated that the circumstances satisfied all factors.

Accordingly, the Court concluded that although the area within the apartment building was secured by a lock and a buzzer system, whether entry into the building was, in fact, secure could not be determined because it was unclear how the detectives gained entry into the building. Moreover, appellant's arguments never established that he maintained exclusive control of the area in question. The Court observed that common areas, such as the hallways of a multi-unit apartment building, are generally not areas in which a tenant was deemed to have exclusive control.

Dana Russell Stallard v. State of Maryland, No. 1412, September Term 2014, filed October 28, 2015. Opinion by Thieme, J.

http://www.mdcourts.gov/opinions/cosa/2015/1412s14.pdf

CRIMINAL LAW – PRODUCTION OF CONTROLLED DANGEROUS SUBSTANCES – PERSONAL USE EXEMPTION – SUFFICIENCY OF THE EVIDENCE

Facts:

Upon obtaining a search warrant (the validity of which is not contested in this appeal) for the home of Dana Russell Stallard, appellant, police officers from the Garrett County Narcotics Task Force recovered two plastic bottles containing a "white powder" substance; a pipe believed to be a "marijuana smoking device"; a bag containing plant material believed to be marijuana; a pouch with various items (tweezers, a spoon, a "pen body," a hypodermic syringe, and "suboxone strip") containing suspected methamphetamine; a Coleman fuel container; a Red Devil lye container; several "aluminum foil homemade smoking pipes"; a "silver metal grinder" which appeared to contain marijuana residue; "cold packs"; a "red plastic grinder"; a clear plastic bottle inside a plastic cup containing a liquid resembling "separated oil and water"; a clear plastic bottle "with a liquid inside, along with black lithium battery strips"; a bottle with a "muriatic acid" label; and a bottle of Claritin brand pills. While that warrant was being executed, Stallard also made inculpatory statements to the police (the admissibility of which is not contested in this appeal), including a warning to one of the officers that there was a "bottle underneath the kitchen table" and that the officer should not "tighten the lid on it" or it "might blow up and catch the house on fire"; that he had recently "learned to cook methamphetamine," using the "cold cook method"; and that he both injected the methamphetamine as well as smoked it because he was addicted to it.

At Stallard's ensuing bench trial in the Circuit Court for Garrett County, the State introduced into evidence, in addition to the physical evidence and inculpatory statements outlined above, testimony of a forensic chemist, establishing that methamphetamine residue was found on the various items seized from Stallard's home; and that the plant material recovered was marijuana. A police expert in the identification of methamphetamine and its production and manufacture further testified that the items recovered from Stallard's home were consistent with the manufacture of amphetamine.

The circuit court found Stallard guilty of manufacturing methamphetamine, possession of plastic bottles adapted for the production of methamphetamine, possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia. The court imposed a sentence of five years' imprisonment for manufacturing methamphetamine, a consecutive two-year term for possession of plastic bottles adapted for the production of methamphetamine, and a consecutive four-year term for possession of methamphetamine, as well as separate $500 fines for possession of marijuana and for possession of drug paraphernalia.

Stallard appealed, presenting two questions for review: (1) whether the evidence was sufficient to sustain his convictions for manufacturing methamphetamine and for possession of plastic bottles adapted for the production of methamphetamine; and (2) whether he was entitled to merger of the convictions and sentences for manufacturing methamphetamine and for possession of plastic bottles adapted for the production of methamphetamine.

Held: Affirmed in part and vacated in part.

As to sufficiency of the evidence to prove that he was engaged in the manufacture of methamphetamine, Stallard maintained that, because the evidence established that he was "cooking" the substance for his personal use and that, under Criminal Law Article, §§ 5-101(p) and 5-603, the manufacture of a controlled dangerous substance ("CDS") for personal use is not a crime, the evidence was therefore insufficient. The Court of Special Appeals rejected that argument, reasoning that the "personal use" exception applies only to preparing or compounding a dose for one's personal use but that it does not apply to the production of CDS; and that, because Stallard was "producing" methamphetamine, the "personal use" exception did not apply.

As to sufficiency of the evidence to prove that Stallard possessed plastic bottles adapted for the production of methamphetamine, Stallard maintained that the evidence failed to establish that his possession of the bottles was under circumstances that reasonably indicated an intent to distribute methamphetamine and that, therefore, the evidence was insufficient. The Court of Special Appeals rejected that argument, reasoning that it was necessary only that the circumstances reasonably indicated an intent to produce, sell, or dispense methamphetamine and that the evidence was sufficient to prove that Stallard intended to use the plastic bottles to produce the drug.

As to the sentencing issue, the Court of Special Appeals held that, for sentencing purposes, Stallard's convictions for manufacturing methamphetamine and for possession of plastic bottles adapted for the production of methamphetamine should have merged under the rule of lenity. Accordingly, the appellate court vacated the shorter sentence, for possession of plastic bottles adapted for the production of methamphetamine, but otherwise affirmed the judgments.

Robert Anthony McGhie v. State of Maryland, No. 2540, September Term 2011, filed November 24, 2015. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2015/2540s11.pdf

CRIMINAL PROCEDURE – JURY VERDICT – SPECIFYING THE DEGREE OF MURDER – FIRST-DEGREE FELONY MURDER

Facts:

The evidence adduced at trial supported a finding that appellant conspired with several others to rob a store in Montgomery County, and during the attempted robbery, one of appellant's co-conspirators shot and killed one store owner and shot and wounded another person. Appellant was not in the store when the attempted robbery and shootings took place.

The State argued that appellant was an accomplice to the robbery and proceeded on the murder charge under the theory of felony murder. At the conclusion of the evidence, the proposed verdict sheet initially had two options for the murder charge, felony murder and premeditated murder, both of which constitute first-degree murder. After defense counsel objected to the verdict sheet referring to premeditated murder, State agreed to withdraw its request to have premeditated murder appear on the verdict sheet. The court instructed the jury on first degree felony murder, use of a handgun in a crime of violence or felony, and related attempt charges.

When the jury completed their deliberations, they returned to the courtroom, and the Clerk of the court asked the jury Foreman: "How do you find the defendant as to Count One, Murder?" The Foreman responded: "Guilty." The jury was polled, but the polling was not transcribed for the record.

On appeal, appellant contends that his life sentence for murder should be vacated because it is an "illegal" sentence. He argues that the guilty verdict was a nullity because the jury failed to announce whether it found him guilty of murder in the first degree or in the second degree.

Held: Affirmed.

The verdict unequivocally established that the jury unanimously found appellant guilty of first-degree felony murder. The evidence presented, and the State's argument, related only to first-degree felony murder, and the parties agreed that the court should instruct the jury on the murder charge only with respect to felony murder. And because neither second-degree murder nor manslaughter are lesser included offenses of first-degree felony murder, the verdict of the jury had to be "first-degree murder or nothing." Therefore, under these circumstances, where the jury's verdict clearly was a unanimous verdict of guilty of first-degree murder, the failure of the jury to specifically use the words "first degree" in its verdict did not render the verdict invalid.

Sharon Marie Mason v. State of Maryland, No. 2340, September Term 2012, filed November 24, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/2340s12.pdf

CRIMINAL LAW – PERJURY – TWO-WITNESS RULE – SUFFICIENT EVIDENCE TO CONVICT UNDER TWO-WITNESS RULE

Facts:

On May 29, 2011, appellant and her fiancé, Jason Winnegar, were the occupants of a Ford Ranger pick-up truck that was stopped for speeding by Maryland State Police Trooper Edward Mersman. When Trooper Mersman arrived at the driver's side window, Winnegar was in the driver's seat wearing a seat belt. Trooper Mersman detected an odor of an alcoholic beverage on Winnegar's breath and person, and then asked Winnegar to perform three field sobriety tests. When Winnegar failed those tests, the trooper arrested him for driving under the influence of alcohol ("DUI").

At Winnegar's DUI trial, Trooper Mersman testified that, when he observed the Ford Ranger speed past his patrol car, he saw that a male, later identified as Winnegar, was driving and a female was in the passenger seat. According to the trooper, Winnegar was still in the driver's seat when he approached the truck after it had stopped. Appellant, however, testified that she was driving the pick-up truck and that, when the truck was stopped, the two switched seats. Despite such testimony, Winnegar was convicted of DUI.

Later, appellant was indicted for perjury, and a bench trial was held on December 6, 2012. Trooper Mersman again testified that he saw a male driving the truck, with a female in the passenger seat, and the male was still in the driver's seat when the truck came to a stop and the trooper exited his vehicle. The trooper testified that he saw no movement in the truck when he approached it.

In addition to Trooper Mersman's testimony, the State introduced a video taken by the dashboard camera in the trooper's vehicle. The video showed the entire stop of the truck and the interaction of the trooper with Winnegar and appellant. Appellant did not testify, but the written transcript of her testimony was introduced into evidence. The trial court convicted appellant of perjury.

Held: Affirmed.

Appellant first challenged the trial court's factual inference from the video that there was no switching of seats by Winnegar and appellant. The trial court based its inference on the following observations: (1) the truck did not move from the time that the trooper exited his vehicle and arrived at the driver's side window; (2) appellant was a "fairly large individual," and

the truck moved when she got out of the truck and again when she sat on the tailgate; and (3) the vehicle was "a very small two person pick-up truck." The Court of Special Appeals determined that the trial court's factual inference from the video was reasonable and rational. In addition to the trial court's observations, the Court of Special Appeals noted, from its own viewing of the video, that only nine seconds elapsed from when the brake lights went off until Trooper Mersman arrived at the driver's side door and that, when appellant shifted her weight while sitting on the truck's tailgate, the truck visibly shook.

Appellant next challenged the sufficiency of the evidence for appellant's conviction under the common law two-witness rule. The Court of Special Appeals responded by observing first that, although the two-witness rule has been widely criticized, Maryland still adheres to such rule, and any change must come from the Court of Appeals or the General Assembly. The Court then noted that in Maryland a perjury conviction must be based on the direct testimony of two witnesses, or the testimony of one witness combined with other independent corroborative evidence. Maryland courts, however, have not yet determined what evidence will suffice as independent and corroborative to meet the two-witness standard.

In the instant case, the Court held that the video recording of the traffic stop was sufficient independent and corroborative evidence to sustain appellant's perjury conviction. The video evidence was independent, because it came from a source other than the direct testimony of Trooper Mersman. The trooper did not create the images; the video switched on automatically when the traffic stop began, and contemporaneously recorded the stop.

The video was also sufficiently corroborative, because it substantiated that part of Trooper Mersman's testimony that was material in showing that appellant's testimony at the DUI trial was false. Trooper Mersman testified to seeing Winnegar as the driver when the truck passed his patrol car, when he exited his police vehicle, and when he arrived at the driver's side window of the truck. The video corroborated such testimony by showing Winnegar exiting the vehicle from the driver's side and by showing no movement in the truck for the nine seconds it took the trooper to reach the driver's side window.

Finally, the Court considered the direct testimony of Trooper Mersman together with the independent corroborative evidence of the video and came to the conclusion that there was sufficient evidence to prove beyond a reasonable doubt that appellant's testimony at the DUI trial was false. Accordingly, appellant's perjury conviction was upheld.

Jovan Maurice Brice v. State of Maryland, No. 1620, September Term 2014, filed November 25, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/1620s14.pdf

CRIMINAL PROCEDURE – VOIR DIRE – RETRACTION OF WAIVER – SUFFICIENCY OF THE EVIDENCE

Facts:

Appellant, Jovan Maurice Brice, was charged with illegal possession of a regulated firearm. At the outset of the trial, defense counsel submitted requested *voir dire* questions that included the police witness questions. The trial court did not pose those questions to the jury venire, and defense counsel did not object to their omission. Midway through the *voir dire* process, defense counsel realized that the police witness questions had not been asked. Defense counsel requested that the trial court supplement the initial *voir dire* by asking the police witness questions to the remaining jurors. The court denied this request. At trial, the State produced evidence that appellant had been found with a handgun magazine during a traffic stop. A subsequent investigation revealed that appellant had two prior convictions that disqualified him from possessing a regulated firearm. A warrant was obtained and executed on appellant's residence. The search of appellant's residence resulted in the discovery of a handgun in appellant's closet. Appellant admitted to the police officers that he had acquired the handgun from a junkie by trading him crack cocaine for it. Appellant was convicted of illegal possession of a regulated firearm after a jury trial and sentenced to five years in prison, with all but three years suspended and five years of probation.

Appellant challenged his conviction on appeal. He argued that the trial court abused its discretion by denying his requested police witness questions during *voir dire*. He also argued that the evidence was insufficient to sustain a conviction, because he did not know that he was disqualified from possessing a firearm.

Held: Reversed and remanded.

The Court of Special Appeals held that the trial court abused its discretion by refusing to give appellant's requested police witness questions. Although appellant waived his right to the requested questions when defense counsel affirmatively advised the court that he had no objection to the *voir dire* questions that had been asked, he later retracted that waiver when defense counsel requested the police witness questions midway through the *voir dire* process. It was a valid retraction of appellant's waiver because it did not prejudice the State in its approach to *voir dire*, there was a sufficient jury pool remaining at the time of the retraction, and defense counsel was not attempting to manipulate the judicial process. Furthermore, the Court of

Appeals' holdings in *Langley v. State*, 281 Md. 337, 349 (1977) and *Bowie v. State*, 324 Md. 1, 11 (1991), established that, when there are police officer witnesses for the State, police witness questions requested by a defendant are mandatory. Therefore, the trial court was required to pose those questions to the jury venire after appellant retracted his waiver.

The Court also held that the evidence was sufficient to sustain appellant's conviction. Section 5-144(a)(1) of the Public Safety Article provides that a defendant may not "knowingly participate in . . . possession of a regulated firearm." Pursuant to *McNeal v. State*, to satisfy the *mens rea* requirement for a violation of this statute, the State was required to prove only that defendant knew that he was in possession of a handgun. 200 Md. App. 510, 524 (2011), *aff'd*, 426 Md. 455 (2012). Appellant's statements at the time of his arrest established his knowledge that he was in possession of a firearm. Moreover, even if knowledge of disqualification was required, the jury could have inferred knowledge on the part of appellant based on his two prior convictions, his trade of illegal drugs for the gun, and his admission that he had wiped down the gun.

In re: A.N., B.N., and V.N., No. 637, September Term 2015, filed December 16, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/0637s15.pdf

FAMILY LAW – CHILD IN NEED OF ASSISTANCE – CHANGE OF PERMANENCY PLAN – USE OF POLYGRAPH TEST RESULTS IN PERMANENCY HEARING

Facts:

Two of the children in this case, two-month-old twin boys A.N. and B.N., were found to have multiple fractures in various stages of healing. The preliminary assessment by doctors at Howard County Hospital and Johns Hopkins Hospital was that the injuries were consistent with abuse. The Howard County Department of Social Services immediately removed all three children from the physical care and legal custody of their parents and placed them in shelter care. In subsequent CINA hearings, all three children were found CINA and placed in the custody of their paternal grandmother.

Throughout the next year, the parents willingly participated in various treatment and evaluation programs, and Department reports indicated that the parents were "appropriate with the children during visits." Psychological evaluators concluded that neither parent presented risk or danger to the children. As late as August 28, 2014, the Department and the court-appointed special advocate recommended beginning a monitored transition to custody with the parents. However, the parents have consistently maintained that they did not cause the children's injuries and that they have no idea how the children were so severely injured.

On April 7, 2015, the juvenile court held a permanency planning and review hearing and received a Department report, which recommended that the permanency plan for all three children be changed to a sole plan of custody and guardianship with paternal relatives. The Department's recommendation changed away from reunification with parents, in part, because of the results of an October 9, 2014, polygraph examination that indicated that Mother was not being truthful. After testimony about the polygraph was elicited during the hearing, the Court concluded that it could consider the polygraph results, and, noting that "[b]oth parents deny causing the injuries and continue to be a 'united force' in their denial," the Court found that reunification with Father and Mother was not in the best interest of the children. The juvenile court then modified the children's permanency plan to remove the goal of reunification. The parents appealed the detrimental change in the permanency plan, arguing that the court was not permitted to consider the polygraph evidence.

Held: Vacated and Remanded.

The Court of Special Appeals reiterated that, because "[i]t is well-settled in Maryland that the results of a polygraph test are inadmissible," and even "mere references to the fact that a test was taken . . . may be grounds for reversal if results can be inferred from the circumstances or if the references are prejudicial," *Murphy v. State*, 105 Md. App. 303, 309-10 (1995) (citations omitted), the juvenile court erred in considering Mother's polygraph results. The Court determined that, under the facts of this case, that consideration was prejudicial, and the court erred in changing the CINA permanency plan based, in part, on consideration of that inadmissible evidence.

The Court of Special Appeals recognized that a polygraph examination is an important investigative tool, widely used by the Department and law enforcement agencies, and did not discourage its appropriate investigative use. However, the Court noted that there is a distinction between appropriate investigative use for Department or Agency purposes and use as evidence in a court proceeding. The Court of Special Appeals also acknowledged the heightened responsibility of the juvenile court in child abuse cases; however, it determined that "[t]o countenance the admission of inherently unreliable evidence, such as a polygraph test, would set a dangerous precedent, especially in cases like this, where a child has been abused and there is no direct evidence identifying the abuser, or the circumstances surrounding the occurrence of abuse." The Court observed that "where critical portions of the narrative are unavailable for the court's analysis (who committed the abuse and the surrounding circumstances), unreliable polygraph evidence should not substitute for what is missing—especially given that an abuser may be able to manipulate the test." Therefore, due to the juvenile court's improper reliance on the polygraph examination in reaching its decision, the Court of Special Appeals vacated the orders changing the children's permanency plan and remanded.

Teresa N. Rigby, et al. v. Allstate Indemnity Company, No. 263, September Term 2014, filed September 30, 2015. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2015/0263s14.pdf

INSURANCE – INSURED PERSONS – DEPENDENTS

Facts:

Appellants, Baltimore City police Officer Teresa Rigby and tow truck operator Herman E. Griffiths, were assisting a disabled motorist, appellant Ashley Sims, along the shoulder of the Jones Falls Expressway, when a vehicle driven by Robert Vanderford and owned by Lawrence Archembeault, struck Officer Rigby's police cruiser. The force of the impact caused the police cruiser, in turn, to strike both Officer Rigby and Mr. Griffiths, as well as the disabled vehicle, in which Ms. Sims was then sitting. All three injured parties filed, in the Circuit Court for Baltimore City, separate negligence actions against Vanderford and Archembeault, which were subsequently consolidated. During ensuing discovery, it was learned that Archembeault maintained two separate insurance policies with appellee Allstate: one was an automobile insurance policy that provided up to $500,000 of liability coverage, and the other was an "umbrella" policy that supplied up to $5,000,000 of coverage for negligence.

Because the economic damages sustained by appellants exceeded the $500,000 policy limit of Archembeault's automobile insurance policy, they sought recovery under Archembeault's "umbrella" policy. That policy defined an "insured person" to include "any dependent person in your care, if that person is a resident of your household." Thus, the contested issue in the case was whether Vanderford, a twenty-two-year-old man who was gainfully employed, was free to come and go as he pleased, covered most of his living expenses, and performed household chores; but who was permitted to live, in Archembeault's Roland Park home, at a reduced rent, and was permitted to drive Archembeault's automobile, was a "dependent person" "in the care of" Archembeault.

Allstate, after obtaining a stay in the consolidated negligence action, filed a declaratory judgment action in the circuit court, seeking a ruling on whether Vanderford was an "insured person" under Archembeault's "umbrella" policy. The circuit court ruled that Vanderford was not a "dependent person" "in the care of" Archembeault and that, consequently, appellants could not recover under the "umbrella" policy. This appeal followed.

Held: Affirmed.

As to the legal issues presented, the Court of Special Appeals held that: (1) in the context of the insurance policy at issue, the term "dependent person" means "one who relies on another to

provide substantial contributions, without which he would be unable to afford the reasonable necessities of life"; and (2) the meaning of the colloquial term "in the care of" another, where both live in the same household, is determined by applying a multi-factor test, which considers, among other things, whether one person is legally responsible for the other, whether there is financial dependency, whether one person exercises supervisory control over the other, whether the living arrangement is temporary or permanent, and the age, health (both physical and mental), and employment status of the person purportedly in the care of the other.

Applying those definitions to the facts of the case, the Court of Special Appeals determined that Vanderford, a twenty-two-year-old man, who was gainfully employed, was free to come and go as he pleased, covered most of his living expenses, and performed household chores; but who was permitted to live, at a reduced rent, in Archembeault's home, and was permitted to drive his automobile, was not a "dependent person" "in the care of" Archembeault, for purposes of the "umbrella" policy at issue.

Christine Fisher a/k/a Christine Cermak v. Carrie M. Ward, et al., Trustees, No. 108, September Term 2014, filed December 2, 2015. Opinion by Sharer, J.

Leahy, J., concurs.

http://www.mdcourts.gov/opinions/cosa/2015/0108s14.pdf

JUDICIAL SALES – FORECLOSURE – ATTENDANCE OF PERSON AUTHORIZED TO MAKE SALE AT PLACE AND TIME OF SALE

Facts:

Appellant's residential property was sold at public sale in foreclosure action. Appellant excepted to the Trustees' Report of Sale on the ground that no Trustee was present at the place and time of sale. Absence of the Trustees is not disputed. However, one of them was in constant telephone contact with the auctioneer throughout the actual calling and closing of the sale. The property was bought in by the note holder, the only bidder.

Held:

1. Absent an attendance requirement imposed by statute or rule, and relying on *Wicks v. Westcott*, 59 Md. 270 (1883), the Court of Special Appeals held that physical presence of a trustee is not required.

2. The Court further held that the Trustee's telephone connection to the auctioneer was constructive presence that satisfied the Trustee's obligation, absent a showing by the exceptant that mere constructive presence caused prejudice.

3. A concurring opinion urged the Court to adopt a holding that the failure of attendance by a trustee creates an irregularity which, should actual prejudice result, would be fatal to the sale.

Henry Immanuel v. Comptroller of the Treasury, No. 1520, September Term 2014, filed November 25, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/1520s14.pdf

PUBLIC INFORMATION ACT – DISCLOSURE OF FINANCIAL INFORMATION – ABANDONED PROPERTY ACT

RULE 16-1009 – VACATING ORDER TO SEAL RECORD – FINAL JUDGMENT – LAW OF THE CASE

Facts:

Pursuant to the Abandoned Property Act, the Comptroller of the Treasury maintains a division for managing property reported unclaimed by banks and other financial institutions. Md. Code (1975, 2005 Repl. Vol., 2012 Supp.), §§ 17-101 to 17-326 of the Commercial Law (III) Article ("CL"). Henry Immanuel is engaged in the business of locating the owners of unclaimed property held by the Comptroller and, then, for a fee, reuniting them with their former possessions.

To further his business, Immanuel asked the Comptroller, under the Maryland Public Information Act ("MPIA"), to produce to him a list of the names and addresses of those entitled to the 5,000 most valuable property accounts, "formatted from largest account values to smallest account values," but excluding the precise value of each item. The Comptroller denied Immanuel's request on the grounds that producing the data as he requested would require the Comptroller to disclose the "financial information" of property owners to a third party, which is prohibited under the MPIA.

Immanuel petitioned the Circuit Court of Wicomico County for a judicial review of the Comptroller's decision. Immanuel also filed a motion to seal the case record under Md. Rule 16-1009 on the grounds that it contained his trade secrets, which the court granted. The court then ordered the Comptroller to "provide the unclaimed property records in the manner requested."

On appeal, the Court of Special Appeals reversed and remanded in a published opinion, *Immanuel v. Comptroller of Treasury*, 216 Md. App. 259 (2014) ("*Immanuel I*"). The Court recognized that the Abandoned Property Act independently requires the Comptroller to publish annually the same core information that Immanuel requested—an alphabetical list of abandoned property owners with claims greater than $100—for the purpose of notifying the owners of abandoned property to claim it. Although Immanuel's request sought information that the Comptroller was required to disclose, the Court concluded that a list ranked by value would reveal additional individual financial information that Immanuel was not entitled to have, and that his request potentially overreached by asking for the top 5,000 claims rather than tying the request to the $100 threshold prescribed in the Abandoned Property Act. The Court therefore

held in *Immanuel I* that Immanuel was not entitled to a list sorted by dollar value, and that a remand was required to determine whether Immanuel's request for the top 5,000 claims included claims worth less than $100. The Court reversed the judgment of the circuit court and remanded for further proceedings for the limited purpose of determining the precise scope and format of the list the Comptroller must produce, noting that "Immanuel should emerge on remand with a list of claims that tracks the Comptroller's disclosure obligations under the Abandoned Property Act." *Immanuel I*, 216 Md. App. at 275.

After the Court issued *Immanuel I*, Immanuel filed a second MPIA request with the Comptroller for the "top 100 accounts." Immanuel also filed two motions to seal and redact *Immanuel I* and to change its designation to unreported, which the Court denied. The Comptroller filed with the Court a motion for partial reconsideration, arguing that allowing MPIA requests for any "top number" of claims would "effectively allow these requesters to create their own ranking of claims by value—a type of information that this Court explicitly held was exempt from disclosure." The Court denied the Comptroller's motion on the grounds that "[t]he issues raised by the Comptroller . . . must be considered, in the first instance, by the circuit court and upon an appropriate record."

On remand, the circuit court ordered Immanuel to submit a modified MPIA request, limited to accounts received by the Comptroller within 365 days with a value of $100 or greater, without any sorting by value or other financial information. In addition, the court vacated its order to seal.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err or abuse the discretion delegated to it in *Immanuel I*, because the circuit court's order on remand properly tracked the Comptroller's disclosure obligations under the Abandoned Property Act, and thus complied with the instructions in *Immanuel I*.

The Court also concluded that a list of any specific number of claims ranked or identified by value, such as the 5,000 most valuable accounts as Immanuel requested, is barred from disclosure by the MPIA, as limited by the Abandoned Property Act, because releasing such information would reveal the relative value of such claims in comparison with other claims in the Comptroller's possession, which would constitute disclosure of individual financial information.

The Court noted that, to the extent that the holding revised or modified its prior holding in *Immanuel I*, such modification is proper, because, in denying the Comptroller's motion for partial reconsideration of *Immanuel I*, the Court stated that the issues raised in that motion needed to be considered by the circuit court in the first instance. The circuit court did just that, and the Court agreed with its decision.

As for the circuit court's order to unseal the record, the Court held that the circuit court did not err in vacating its prior order to seal, because that order was not a final judgment pursuant to Md.

Rule 2-535, and thus was subject to revision by the circuit court at any time. Furthermore, there is a presumption for open public records, and the circuit court's original order to seal did not contain the requisite findings under Rule 16-1009(d) to seal the case record. Finally, the law of the case doctrine does not preclude the vacating of the order to seal, because the Court had already published *Immanuel I*.

Patrick Long v. Injured Workers' Insurance Fund et al., No. 2615, September Term 2013, filed September 30, 2015. Opinion by Salmon, J.

http://www.mdcourts.gov/opinions/cosa/2015/2615s13.pdf

WORKERS' COMPENSATION – CALCULATION OF AVERAGE WEEKLY WAGE

Facts:

Patrick Long, a sole proprietor, was the owner of Long Floor Works. Except for Long, no one else worked for his company. In 2011, Long made an election, pursuant to section 9-227 of the Labor and Employment Article, to be a "covered employee" under the Maryland Workers' Compensation Act ("the Act"). While installing carpet on July 24, 2011, as a sub-contractor for Ryan Homes, Long suffered a severe back injury. Although he was able to return to work temporarily, he has not worked since November 2011 due to that injury.

The primary issue that arose when Long filed a claim with the Maryland Workers' Compensation Commission ("the Commission") was how to calculate his average weekly wage ("AWW"). Normally, the amount of compensation an eligible employee is entitled to recover is determined by the application of a simple formula, *i.e.*, two-thirds of the employee's AWW, provided, however, that the AWW does not exceed the State's AWW or equal less than $25. Usually the AWW is calculated by taking the gross wages paid to the worker in the 14 weeks immediately preceding the accident and dividing that figure by 14. Under certain circumstances, however, the Commission has discretion to use a longer or shorter period than 14 weeks to determine the AWW. The Act does not, however, specify how the AWW is to be determined if the injured worker is a sole proprietor and therefore is self-employed. The problem is that in reality sole proprietors are not employees and do not earn wages. A sole proprietor and the business are one legal entity and a person cannot be one's own employee.

In the subject case, Long contended that his AWW should be based upon the gross profits of the sole proprietorship without considering business expenses. On the other hand, Long's insurer, Injured Worker's Insurance Fund ("IWIF"), contended that AWW should be based upon the monies the claimant received from the sole proprietorship, after deducting the business expenses shown on claimant's federal income tax return.

Long filed a federal income tax return for the year 2011 in which he reported that he received no "wages." He did, however, declare $16,879 in business income for that year. This was shown on Schedule C of his federal tax returns, which showed that gross receipts of the business for 2011 equaled $44,606 but that he had incurred business expenses totaling $27,727. Thus, according to Schedule C, the net profits for the sole proprietorship was $16,879 ($44,606 less $27,727).

The Commission held a hearing on August 13, 2013 and ruled that Long's 2011 tax returns provided the "best evidence" of his AWW for 2011. The Commission calculated Long's AWW by taking the net income of the sole proprietorship for the year 2011 ($16,879) and dividing that figure by 34 weeks, which was the number of weeks Mr. Long had worked in the year 2011. This formula yielded an AWW of $496.49.

Long filed a petition for judicial review of the Commission's decision concerning his AWW. Prior to a hearing on the petition, both sides moved for summary judgment after agreeing that there were no material issues of fact. In support of his petition for judicial review, Long filed in the circuit court an affidavit in which he said that after his injury, a representative of IWIF told him that his premiums for the year 2012 (the year after the accident) would be based upon gross profit. No explanation was given in the affidavit, however, as to why Long would even need workers' compensation insurance for 2012, in view of the fact that he maintained before the Commission that he hadn't worked since October 31, 2011 and, according to his counsel, was not expected to work ever again.

The motions judge delivered an oral opinion in which he concurred in the views set forth in the Commission's order and granted summary judgment in favor of IWIF.

Held:

The Court of Special Appeals upheld the grant of summary judgment in favor of IWIF. The Court held that the Commission did not err when it rejected Long's contention that his AWW should be based on the gross profit of his sole proprietorship as shown on his federal tax returns. Instead, according to the Court, the Commission correctly ruled that AWW should be calculated based on the sole-proprietorship's gross profits less business expenses as shown on Schedule C of his tax returns. In support of this affirmance, the Court relied on out-of-state cases that reached a similar result.

Additionally, the Court ruled that even if a claimant can show that his or her workers' compensation insurance carrier charged him or her premiums based on gross profits of the sole proprietorship for the year in which the injury occurred, such proof would not justify the Commission in disregarding business expenses of a sole proprietorship in calculating AWW.

Joyce E. Sizemore, et al. v. Town of Chesapeake Beach, Maryland, No. 1607, September Term 2014, filed November 25, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/1607s14.pdf

ZONING AND PLANNING – PERMIT REVOCATION

Facts:

In 2003, the Sizemores, Appellants in this case obtained a zoning permit for the construction of a restaurant on their property, which was, at that time, zoned for commercial high-density use. Approximately five months later, following a comprehensive rezoning, the property was downzoned to residential use. Nevertheless, the town permitted the Sizemores to proceed with construction of their restaurant under their validly issued zoning and building permits. Unfortunately, the Sizemores had trouble financing the project, and after a number of setbacks, construction on the restaurant stalled completely. In 2009, after numerous written warnings, the town zoning administrator revoked the 2003 permit pursuant to a local ordinance that required construction be complete within two years or be "satisfactorily proceeding." After an unsuccessful appeal of the 2009 decision, the Appellants applied for a new zoning permit in 2012. Appellants argued that they had a vested right in the zoning because of the construction that was undertaken pursuant to the 2003 permit. The Board of Zoning Appeals found this argument unpersuasive, determining instead that the Appellants had abandoned any vested right they may have had in the 2003 zoning permit.

Held: Affirmed.

The Court of Special Appeals first acknowledged that the Sizemores had a valid building permit when they began construction in October 2003 and, absent any indication to the contrary, that the Sizemores had a vested right to continue construction of their restaurant under the 2003 zoning permit after their property was downzoned in 2004.

The Court of Special Appeals then held that a vested right to proceed with construction under an existing zoning use may be abandoned pursuant to a statutory provision that establishes reasonable prerequisites for abandonment, or where there is ample evidence of an intent to abandon or relinquish the vested zoning right. Addressing such reasonable prerequisites, the Court observed that whether a zoning statute that permits the abandonment or termination of a vested right is reasonable will depend on the circumstances. The Court determined that, as applied, such a statute must allow reasonable and appropriate time for the completion of a construction project, taking into account the nature of the project and the prior zoning. The applicable zoning framework must also afford the permit holder notice of revocation that allows an opportunity to respond. The Court held that, in this case, because the Town Code of

Chesapeake Beach § 290-27(E)(2) applies to *all permits*, and places reasonable restrictions on the life of a zoning permit, the Sizemores' failure to comply with § 290-27(E)(2) correctly resulted in the expiration of their permit and the abandonment of any vested right in that permit.

The Court of Special Appeals also reasoned that, in 2009, by challenging the determination that the zoning administrator was empowered to revoke the zoning permit under § 290-27(E)(2) for failure to substantially complete or satisfactorily proceed with construction, the Sizemores had already challenged the Town's ability to extinguish their vested rights. Therefore, the Court held that the Board did not err in its determination that whether the Sizemores had vested rights in the C-HD zoning was a matter that was "disposed of" in 2009. Thus, when the Sizemores applied for a new zoning permit in 2012, a restaurant was no longer a permitted use in the R-V zone, and their application was properly denied.

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ATTORNEY DISCIPLINE

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By a Per Curiam Order of the Court of Appeals dated December 3, 2015, the following attorney has been disbarred:

GARRETT VINCENT WILLIAMS

*

By an Order of the Court of Appeals dated October 20, 2015, the following attorney has been indefinitely suspended by consent, effective December 4, 2015:

THEODORE N. NKWENTI

*

By an Order of the Court of Appeals dated December 16, 2015, the following attorney has been disbarred:

MARK R. GALBRAITH

*

By an Opinion and Order of the Court of Appeals dated December 22, 2015, the following attorney has been indefinitely suspended:

CHARLES STEPHEN RAND

*

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JUDICIAL APPOINTMENTS

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On December 1, 2015, the Governor announced the appointment of the **HONORABLE MICHELE D. HOTTEN** to the Court of Appeals of Maryland. Judge Hotten was sworn in on December 22, 2015 and fills the vacancy created by the retirement of the Hon. Glenn T. Harrell, Jr.

*

On December 17, 2015, the Governor announced the appointment of **STACY WIEDERLE McCORMACK** to the Circuit Court for Anne Arundel County. Judge McCormack was sworn in on December 29, 2015 and fills the vacancy created by the retirement of the Hon. Philip T. Caroom.

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Eighty-Eighth Report of the Standing Committee on Rules of Practice and Procedure was filed on December 7, 2015.

http://www.mdcourts.gov/rules/rodocs/188ro.pdf

A Rules Order pertaining to the One Hundred Eighty-Ninth Report of the Standing Committee on Rules of Practice and Procedure was filed on December 7, 2015.

http://www.mdcourts.gov/rules/rodocs/189ro.pdf

A Rules Order pertaining to the One Hundred Ninetieth Report of the Standing Committee on Rules of Practice and Procedure was filed on December 7, 2015

http://www.mdcourts.gov/rules/rodocs/190ro.pdf

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