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COURT OF APPEALS

Karen McDonell v. Harford County Housing Agency, No. 16, September Term 2018, filed January 22, 2019. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/coa/2019/16a18.pdf

PRESERVATION FOR APPELLATE REVIEW – MEMORANDA AND PLEADINGS – MARYLAND RULE 8-131

MARYLAND ADMINISTRATIVE PROCEDURE ACT – CONTESTED CASE HEARINGS

CONSTITUTIONAL LAW – PROCEDURAL DUE PROCESS – HOUSING CHOICE VOUCHER PROGRAM – INFORMAL HEARINGS – ADEQUATE DECISION

ADMINISTRATIVE LAW – REVIEW OF ADMINISTRATIVE DECISIONS – SUBSTANTIAL EVIDENCE REVIEW

Facts:

Karen McDonell was enrolled in Housing Choice Voucher Program ("HCVP," but commonly "Section 8"), a federally-funded program administered by the Harford County Housing Agency ("HCHA"). In November 2015, the HCHA sent McDonell a notice informing her that her voucher was being terminated for the following reasons: (1) failing to provide access to her unit for inspection, (2) failing to notify the HCHA that she was not residing in the unit during a period of incarceration, (3) being found guilty of two charges of second-degree assault, and (4) failing to make restitution payments per her restitution agreement with the HCHA. The notice advised McDonell of her right to an informal hearing before termination.

In December 2015, McDonell received an informal hearing. Both McDonell and the HCHA presented evidence and the Hearing Officer ("HO") rendered a written decision after the hearing. The decision upheld McDonell's termination for each of the reasons stated above. McDonell sought review in the Circuit Court for Harford County. In her memorandum to that court, McDonell stated that she received "an unfair hearing" and rebutted each allegation made supporting her termination. The Circuit Court upheld her termination on all four grounds listed in the notice of termination and the HO's decision.

McDonell appealed to the Court of Special Appeals. She claimed, first, that the hearing was insufficient because she was entitled to additional procedures under the Maryland Administrative Procedure Act ("MD APA") and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Additionally, McDonell argued that the HO's decision to terminate her housing voucher was not based on substantial evidence in the record. In an unreported decision, the intermediate appellate court held that McDonell failed to preserve her due process claims. Yet, the court went on to hold that, even if the claims were preserved, McDonell was not entitled to MD APA protections, received all process she was due under the Constitution, and that the HO's decision was based on substantial evidence on all counts.

Held: Affirmed.

First, the Court of Appeals addressed the preservation issue. Under Maryland Rule 8-131(a), the Court will typically decline to hear an issue "unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." In her *pro se* memorandum to the Circuit Court, McDonell stated that she "was given an unfair hearing." Both the United States Supreme Court and the Maryland Court of Appeals have emphasized that fundamental fairness underlies the due process guarantee. Thus, the context in which McDonell raised her "fairness" argument preserved the due process issue on appeal. The Court also considered the necessity and importance of deciding the issue when it decided that it was preserved.

Next, the Court turned to the procedural questions. The HCVP is funded by the federal government, regulated and overseen by the Department of Housing and Urban Development ("HUD"), and administered by state and local public housing agencies ("PHAs")—here, the HCHA. Under HUD regulations, a "PHA must give a participant family an opportunity for an informal hearing" to consider whether the PHA's decision to terminate a voucher is "in accordance with the law." 24 C.F.R. § 982.555(a)(1)(v). Informal hearing procedures, outlined in the HUD regulations and detailed in the PHA's Administrative Plan, entitle voucher recipients to a hearing before their vouchers can be terminated. Additionally, the voucher recipient must be given an opportunity to, *inter alia*: (1) examine evidence against him, (2) present evidence on his own behalf, (3) present and cross-examine witnesses, and (4) have a lawyer present at his own expense. After the informal hearing, voucher recipients are also entitled to a written decision telling the recipient what was decided and the reasons for the decision.

The MD APA, Md. Code (1984, 2014 Repl. Vol.), §§ 10-201–226 of the State Government Article ("State Gov't"), provides for contested case procedures for some hearings. These procedures are more rigorous than the ones dictated by HUD for the informal hearing. Under the MD APA, "'contested case' means a proceeding before an **agency** to determine . . . a right, duty, statutory entitlement, or privilege of a person" that, under the Constitution, can only be "determined" once given the opportunity for a hearing. State Gov't § 10-202(d)(1) (emphasis added). The term "agency" means "a unit that: (i) is created by general law; (ii) operates in at least 2 counties; and (iii) is authorized by law to adjudicate contested cases." *Id.* § 10-202(b)(2). The HCHA does not operate in two counties; therefore, a contested case hearing could never

come before it. In *Walker v. Department of Housing and Community Development*, 422 Md. 80, 92 (2011), the parties stipulated that the Respondent was an agency under the MD APA. Because the HCHA is not an agency, the MD APA does not require it to hold contested case hearings.

Next, the Court of Appeals evaluated whether McDonell should have received more protective procedures according to constitutional due process. The central issue concerned whether McDonell received an "adequate" decision. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), provides that "the decision maker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." In the HCVP termination context, the Court determined that this means a decision should depend only on reliable evidence presented at the informal hearing, respond to that evidence sufficiently, cite a legal basis for the actions taken, and do so in enough detail as not to be conclusory.

The Court noted that some aspects of the HO's decision likely fell short of this standard. Yet, the HO's decision informed McDonell that her voucher was being terminated because she was found guilty of two counts of second-degree assault, responded to her assertion that the convictions were faulty, and, while seeming to weigh this evidence, concluded that the assaults occurred by a preponderance of evidence. Therefore, the HO's decision was adequate as to the second-degree assault convictions.

Finally, the Court addressed whether there was substantial evidence in the record to support the HO's findings. The purpose of substantial evidence review is to determine whether the HCHA's action was "arbitrary, illegal, capricious or unreasonable." *Harvey v. Marshall*, 389 Md. 243, 280 (2005). Using this standard, the Court concluded that a reasoning mind could have determined that McDonell attacked or threatened the health, safety, or peace of the neighbor and her daughter. Thus, her termination was supported by substantial evidence of qualifying criminal activity. Because the HCHA could have "terminat[ed] program assistance for a participant[] for any" of the allowable grounds under the regulation, 24 C.F.R. § 982.552(c)(1), the Court did not address the remaining substantial evidence arguments.

Attorney Grievance Commission of Maryland v. Scott A. Conwell, Misc. Docket AG No. 22, September Term 2017, filed January 23, 2019. Opinion by Battaglia, J.

https://mdcourts.gov/data/opinions/coa/2019/22a17ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On behalf of the Attorney Grievance Commission, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Scott A. Conwell, Respondent, a member of the Bar of Maryland, charging him with violating Maryland Lawyers' Rules of Professional Conduct ("MLPRC") 1.1 (Competence), 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.16 (Declining or Terminating Representation), 3.1 (Meritorious Claims and Contentions), 3.3 (Candor Toward Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 8.1 (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct), stemming from his representation of Julie D. Brewington, Gino A. DeSerio, and Dennis Olsen.

A hearing judge found the following facts: Julie Brewington retained Conwell to represent her in a case before the Equal Employment Opportunity Commission. After the initial few months of representation, however, the hearing judge found that Conwell's work on Ms. Brewington's case became sporadic and his communications with her erratic. On three separate occasions, Ms. Brewington requested a copy of a letter Conwell purportedly drafted to opposing counsel, but she never received it nor was there any evidence adduced at the hearings that such a letter was ever drafted. Ms. Brewington also testified that Conwell inconsistently replied to her emails and was vague when asked about the status of her case. Conwell also failed to provide Ms. Brewington with an accounting or a copy of her client file upon her termination of the representation.

Gino DeSerio retained Conwell to represent him in a child custody action. In connection with that representation, the hearing judge found that Conwell filed pleadings with the circuit court that were improper, without legal purpose and prejudiced Mr. DeSerio by not advancing his case in any meaningful way, as all the filings were deemed frivolous or moot. The hearing judge also found that Conwell charged Mr. DeSerio an unreasonable fee of $14,060, because Conwell failed to advance Mr. DeSerio's cause of action and filed frivolous pleadings. The hearing judge also found that, in Conwell's action for attorney's fees against Mr. DeSerio, Conwell offered an inflated invoice to Mr. DeSerio in the District Court in order to request a jury trial where the payment sought was wholly unearned.

Dennis Olsen retained Conwell to represent him in some real estate matters. He also later retained Conwell to represent him in a divorce proceeding. Conwell posited, upon the

conclusion of the representations, that Mr. Olsen owed him $37,580 for legal services. Conwell filed an attorney's lien against Mr. Olsen's assets to secure payment. Mr. Olsen, however, filed for bankruptcy. In turn, Conwell filed two motions in the circuit court in an attempt to enforce those liens, which were denied. As a result, Conwell filed a Notice of Appeal with the Court of Special Appeals. Having previously closed Mr. Olsen's bankruptcy matter, the bankruptcy court reopened the case to allow Mr. Olsen to file a Motion for Contempt and Sanctions against Conwell for Violation of the Automatic Stay and Discharge Injunction ordered by that court. The bankruptcy court ordered Conwell to show cause and appear before it, but Conwell failed to respond to the bankruptcy court's order and also failed to appear. Conwell also filed an extension of time to file a brief with the Court of Special Appeals in the collection action against Mr. Olsen, in clear violation of the bankruptcy court's directive.

The hearing judge concluded that Conwell had violated MLRPC 1.1, 1.3, 1.4, 1.5(a), 3.1, 3.3(a)(1), (a)(2), and (a)(4), 3.4(c), 8.4(a), 8.4(c), and 8.4(d).

Held: Disbarred.

In sustaining the hearing judge's conclusions of law, the Court of Appeals overruled all exceptions to those conclusions filed by Conwell and Bar Counsel.

The Court disbarred Conwell and explained that disbarment follows as a matter of course when an attorney is shown to have intentionally engaged in conduct with dishonest or selfish motive. Conwell exhibited this type of behavior when he ignored the cease-and-desist and show cause orders from the bankruptcy court and continued to pursue his fee collection action against Mr. Olsen in Maryland courts. The Court also held that disbarment was appropriate because Conwell engaged in conduct prejudicial to the administration of justice by offering the inflated client invoices to the District Court in the DeSerio matter and inadequately represented Ms. Brewington. While the hearing judge found mitigation in the fact that Conwell's wife was experiencing pregnancy complications, which were accompanied by financial strain, during a large portion of the time in question, the Court, nonetheless, held that this finding did not rise to the level of compelling extenuating circumstances that would obviate the Court's decision to disbar.

The Court also took into account Conwell's various other forms of misconduct, including his failures of competence, diligence and communication, and his collection of an unreasonable fee. Additionally, a number of aggravating factors were implicated, including prior attorney discipline, dishonest or selfish motive, a pattern of misconduct, and bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with Bar Counsel's request for information. The Court determined that, considered together, all of these circumstances merited disbarment.

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Attorney Grievance Commission of Maryland v. Jerome P. Johnson, Misc. Docket AG No. 36, September Term 2017, filed January 22, 2019. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2019/36a17ag.pdf

ATTORNEY DISCIPLINE — SANCTIONS — DISBARMENT

Facts:

On November 3, 2017, the Attorney Grievance Commission of Maryland, acting through Bar Counsel ("Petitioner"), filed a Petition for Disciplinary or Remedial Action against Jerome P. Johnson ("Respondent"). The misconduct stemmed from Respondent's failure to properly manage his attorney trust account and Respondent's failure to promptly and sufficiently respond to Bar Counsel. Petitioner alleged violations of Maryland Attorneys' Rules of Professional Conduct ("MARPC") 19-301.15 (Safekeeping Property), 19-407 (Attorney Trust Account Record-Keeping), 19-308.1 (Disciplinary Matters), and 19-308.4 (Misconduct).

Respondent was admitted to the Maryland Bar on June 23, 1998. Pursuant to an Opinion and Order filed December 14, 2016 in Misc. Docket AG No. 68, September Term, 2015, this Court suspended Respondent from the practice of law in Maryland for one year. *Attorney Grievance Commission v. Johnson*, 450 Md. 621, 150 A.3d 338 (2016), *reconsideration denied* Jan. 19, 2017. Respondent's one-year suspension took effect January 13, 2017.

The misconduct charges at issue involved events that preceded Respondent's suspension. During a period of approximately eight months prior to his suspension, while the disciplinary matter resulting in that suspension was pending, Respondent repeatedly ignored Petitioner's inquiries and lawful requests for information based on PNC Bank's reported overdraft in Respondent's attorney trust account. When Petitioner's efforts to obtain a response from Respondent proved fruitless, Petitioner filed the additional disciplinary charges that are currently at issue.

On or about April 21, 2016, Petitioner received a notice from PNC Bank, reporting an overdraft on Respondent's Attorney Trust Account. On April 28, 2016, Petitioner sent Respondent identical letters by both regular and certified mail to the address maintained by Respondent with the Client Protection Fund of the Bar of Maryland. Petitioner requested a written explanation for the overdraft, as well as account records specified in the letter. Though the envelope containing the certified letter was returned to Petitioner, the letter sent by regular mail was not returned and presumably was delivered to Respondent's post office box. However, Respondent failed to respond to Petitioner's April 28, 2016 correspondence.

On June 6, 2016, an investigator for Petitioner, spoke to Respondent and received verbal agreement that Respondent would provide a response by June 10, 2016. Respondent failed to respond by that date.

On July 12, 2016, the investigator sent Respondent a letter describing their previous communication and directing him to respond to Petitioner's overdraft inquiry by July 22, 2016. Respondent failed to respond by that date. On August 15, 2016, following further communication with the investigator, Respondent faxed copies of his trust account bank statements for the months of February through May 2016, without any written explanation concerning the cause of the February 22, 2016 overdraft. Respondent failed to provide other account records previously requested in Petitioner's April 28, 2016 correspondence.

On August 31, 2016, Petitioner wrote to Respondent and again requested an explanation for the overdraft, as well as trust account records that attorneys are required to maintain in accordance with the Maryland Rules. The letter requested a response by September 16, 2016. Respondent emailed a request for a two-week extension and by letter dated September 27, Petitioner acknowledged the extension request and confirmed that a response was due by September 30, 2016. Respondent failed to respond by September 30.

On November 14, 2016, Petitioner received a copy of a letter from Respondent dated September 30, 2016, with an enclosure identified by Respondent as "my **client chronological transaction record** for my trust account which has been requested in your previous correspondence." (emphasis in original). The copy of the September 30, 2016 letter received by Petitioner on November 14, 2016, bore a handwritten post-it note on which Respondent wrote, in part, "Copy of original mailed 9-30-16." This correspondence from Respondent was not fully responsive to Petitioner's requests, nor was it timely.

Held:

The Court of Appeals found that Respondent violated MARPC 19-301.15 (Safekeeping Property), 19-407 (Attorney Trust Account Record-Keeping), 19-308.1 (Disciplinary Matters), and 19-308.4 (Misconduct). The Court accepted the facts and aggravating factors as presented given that Respondent did not participate in the disciplinary hearings in any meaningful way: he failed to file an answer to the Petition for Disciplinary or Remedial Action, resulting in an order of default; he did not move to vacate the order; he failed to appear before the hearing judge; he did not file exceptions to the hearing judge's findings of fact or conclusions of law, nor did he appear before the Court of Appeals.

The Court found that Respondent's cumulative violations warranted disbarment. While awaiting the disposition of his former disciplinary charges that included his lack of responsiveness, *Johnson*, 450 Md. 621, 150 A.3d 338, Respondent again failed to fully respond to Petitioner's lawful requests for information, resulting in the present action. In aggregate, Respondent's violations represented a neglect for his professional responsibilities. Respondent's failure to create and maintain records relating to the funds in his trust account, knowing and repeated failure to respond to Petitioner's lawful demands for information in a timely manner, and prejudicial conduct towards the legal profession, in conjunction with a number of aggravating factors including prior misconduct, required the Court to contemplate a sanction that was

commensurate with Respondent's conduct. *Attorney Grievance Commission of Maryland v. Walker-Turner, Sr.*, 428 Md. 214, 233, 51 A.3d 553, 564 (2012). In crafting a sanction, the Court considered a sanction that was not only "commensurate with the gravity and intent of the misconduct[,]" but also cognizant of "protect[ing] the public and the public's confidence in the legal profession[.]" *Id*. Given the specific facts of the case, the Court held that the appropriate sanction that protects the public and the public's confidence in the legal profession and was commensurate with the gravity of Respondent's violations was disbarment.

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Mark Armacost v. Reginald J. Davis, No. 69, September Term 2017, filed January 25, 2019. Opinion by McDonald, J.

Hotten and Getty, JJ., concur and dissent.

https://www.courts.state.md.us/data/opinions/coa/2019/69a17.pdf

CIVIL PROCEDURE-JURY INSTRUCTIONS – MEDICAL MALPRACTICE

CIVIL PROCEDURE-JURY INSTRUCTIONS – MODIFIED ALLEN CHARGE

Facts:

Mark Armacost was a patient of Dr. Reginald Davis, a neurosurgeon at the Greater Baltimore Medical Center (GBMC). Mr. Armacost underwent surgery and developed a post-surgical infection. He brought an informed consent and medical malpractice suit against Dr. Davis in the Circuit Court of Baltimore County.

The trial court told the jurors that the case would last seven days. Throughout the trial, jurors expressed concern about the length of the trial. Three jurors asked for letters, presumably for their employers, and another was excused because he was a caregiver for his elderly grandfather.

At the close of evidence, the Circuit Court instructed the jury. The trial court gave general negligence and foreseeability instructions, stating that "[n]egligence is doing something that a person using reasonable care would not do or not doing something that a person using reasonable care would do," and explained "[r]easonable care means that caution, attention or skill a reasonable person would use under similar circumstances." It also provided this foreseeability instruction: "[a] reasonable person changes conduct according to the circumstances and the danger that is known or would be appreciated by a reasonable person. Therefore, if the foreseeable danger increases, a reasonable person acts more carefully." The trial court then gave the Maryland Pattern Jury Instruction on the standard of care for physicians, explaining that health care providers must use the "degree of care and skill which a reasonably competent health care provider engaged in a similar practice and acting in similar circumstances would use."

On the seventh day of trial and third day of its deliberations, the jury sent a note to the trial judge asking what would occur should the jury not be able to reach a verdict. The trial court gave a modified Allen charge, instructing the jurors to have an open mind while continuing to follow their conscience. It explained that a failure to reach a verdict would end in a mistrial. At the end of the instruction, the trial court added:

> So I'm going to ask you to deliberate another hour. I know that you have been at it pretty hard. We have been in the courtroom and have heard you from time to time. We can't hear what you say. We just hear words being said.... And

> we will see if you can reach a verdict today.... I'm not going to ask you to return tomorrow, but I do want you to try again.

An hour later, as the trial court was about to send the jury home, the jury came back with a verdict in favor of Mr. Armacost on the malpractice claim and in favor of Dr. Davis on the informed consent issue.

Dr. Davis appealed to the Court of Special Appeals, which overturned the jury verdict in favor of Mr. Armacost. The Court of Special Appeals reasoned that the trial court erred by including instructions on general negligence and foreseeability principles, and abused its discretion when it imposed a one-hour "deadline" on the jury.

Held: Reversed

The Court of Appeals held that the trial court did not abuse its discretion when it gave standard general instructions on negligence and foreseeability in addition to an instruction particularizing the relevant standard of care in a medical malpractice case. Considered as a whole, the trial court's instructions were not misleading.

In the taxonomy of civil actions, a medical malpractice action is a species of negligence action. As such, a trial court does not err in stating the general principles that apply to a negligence action but it must take care to ensure those principles are particularized to the case at hand. Thus, in a case against a health care provider, the trial court should include an instruction that relates the reasonable person standard to a reasonably competent health care provider acting in the same or similar circumstances. In the present case, the trial court might have used transition sentences or phrases to clarify the relationship between the instructions. But in light of the record as a whole, the trial court did not inappropriately mislead the jury by including generally applicable negligence principles.

Nor was Dr. Davis able to show prejudice in this case. As a physician, Dr. Davis was to be judged against his similarly skilled peers. He would only have received a windfall were he to be compared to a reasonable lay person rather than a comparable health care provider.

The trial court did not abuse its discretion giving a modified Allen charge. Throughout the trial, jurors had expressed concern about the length of the trial and one juror had already been excused. The trial court had appropriately kept the jury informed of the trial schedule throughout the proceedings. When the modified Allen charge was delivered, the jury was already in its third day of deliberation. Given this context, it was not coercive for the trial court to provide the jury with the standard modified Allen charge, nor to inform the jury that it would not be asked to return the next day if it were unable to reach a verdict after additional deliberation that day.

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State of Maryland v. Steven Young, No. 2, September Term 2018, filed December 18, 2018. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/coa/2018/2a18.pdf

PRESERVATION FOR APPELLATE REVIEW – MOTION IN LIMINE – AUTHENTICATION

PRESERVATION FOR APPELLATE REVIEW – MOTION IN LIMINE – OPORTUNITY FOR OBJECTION – MARYLAND RULES 8-131 AND 4-323

EVIDENCE – EXCLUSION OF EVIDENCE – HEARSAY – NON-HEARSAY "VERBAL ACTS" – PRESCRIPTIONS – POSSESSION OF CONTROLLED DANGEROUS SUBSTANCES

Facts:

In May 2014, Baltimore police officers executed a search warrant at the home of Steven Young. The officers recovered heroin, oxycodone, methadone, and alprazolam in the home. Young was arrested and charged with possession of controlled dangerous substances and possession with intent to distribute controlled dangerous substances, under Maryland Code (2002, 2012 Repl. Vol.), §§ 5-601 & 602 of the Criminal Law Article ("CR").

Young was tried in the Circuit Court for Baltimore City. He filed a motion to suppress the drug evidence, claiming that he possessed valid prescriptions for the oxycodone, methadone, and alprazolam. The State moved to exclude all evidence of the alleged prescriptions because they were hearsay. The Court granted the State's motion without providing Young an opportunity to respond and never ruled on Young's suppression motion. Ultimately, the jury found Young guilty of eight counts: possession of heroin, oxycodone, methadone, and alprazolam; and possession with intent to distribute heroin, oxycodone, methadone, and alprazolam.

Young appealed to the Court of Special Appeals, which affirmed in part and reversed in part. *See Young v. State*, 234 Md. App. 720 (2017). The intermediate appellate court held that "[v]alid prescriptions provide the basis of a statutory defense to the charges for possession of and possession with intent to distribute methadone, alprazolam, and oxycodone. Introducing them for such purpose, when properly authenticated, is not hearsay." *Id*. at 736. As a result, it reversed each of Young's convictions, except for his two convictions for possession of heroin and possession with intent to distribute heroin. *See id*. at 741.

Held: Affirmed.

Before reaching the merits, the Court of Appeals addressed two preservation issues. First, the Court concluded that the State's references to Maryland Rule 5-803(b)(6), the business record exception, were not sufficient to preserve an objection to authentication. Second, the Court determined that Young had "no opportunity to object," per Md. Rule 4-323(c), to the Circuit Court's decision to exclude the evidence of prescriptions. Thus, the issue of whether the prescriptions should be admitted as non-hearsay was preserved for review.

The Court then turned to the hearsay issue—specifically, whether the prescriptions were offered for the truth of the matter asserted within them. Under *Stoddard v. State*, 389 Md. 681 (2005), implied assertions are statements, and are hearsay if their only relevant use is as an implicit statement of something that would not be admissible if stated directly. Yet, Maryland cases allow legally operative verbal acts to be admitted as non-hearsay, even if they contain an implied assertion. Verbal acts "have relevance even if the declarant was insincere or inaccurate," as they are "necessary to the creation of certain types of claims, charges, and defenses." 6A Lynn McLain, *Maryland Evidence State and Federal* § 801:9, at 240 (3d ed. 2013).

CR § 5-601(a)(1) provides that a person may not "possess or administer to another a controlled dangerous substance, unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice[.]" CR § 5-602(2) also requires "possession," and incorporates by reference the statutory defense in CR § 5-601(a)(1). Prescription evidence is an element of a statutory defense under both charges. Thus, introducing an alleged prescription to establish the prescription element of this statutory defense constitutes a verbal act, and the fact of prescription is relevant regardless of whether its particular components are "true."

In this circumstance, Young attempted to introduce prescription evidence, which could conceivably have been offered for a non-hearsay purpose. For this reason, the Court of Appeals held that Young should have been allowed to offer the prescriptions as evidence establishing the prescription element of the statutory defense.

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Craig Williams v. State of Maryland, No. 13, September Term 2018, filed January 18, 2019. Opinion by Greene, J.

Watts and Getty, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2019/13a18.pdf

CRIMINAL PROCEDURE – MARYLAND RULE 4-331(a) – MOTION FOR NEW TRIAL

Facts:

A jury in the Circuit Court for Montgomery County convicted Petitioner Craig Williams ("Mr. Williams") of first-degree child abuse on November 21, 2016. The conviction stemmed from actions Mr. Williams took toward his son I.W. sometime after Mr. Williams was awarded sole custody of I.W. in 2012. As a result of traumas I.W. suffered from physical and sexual abuse in his previous home, I.W. began to display disruptive behavior upon moving in with Mr. Williams. This behavior included throwing tantrums, hitting himself and sexually attacking the other children in the home.

On November 30, 2015, in an attempt to stop I.W. from hurting himself and his siblings, Mr. Williams wrapped I.W. in plastic wrap from his shoulder to the knee and secured I.W.'s hands with zip ties. The following morning I.W.'s wrists were chaffed and by the evening I.W. had "puffy wrists, was drooling, and was not talking." Mr. Williams took I.W. to the hospital where I.W. was diagnosed with compartment syndrome, and doctors performed surgery on each of his wrists.

Thereafter, Mr. Williams was indicted on one count of first-degree child abuse on January 7, 2016. A conviction of first-degree child abuse requires the State to prove beyond a reasonable doubt that Mr. Williams abused I.W. and that the abuse resulted in "severe physical injury." "Severe physical injury" is a physical injury that:

1. Creates a substantial risk of death; or
2. Causes permanent or protracted serious:
    A. Disfigurement;
    B. Loss of the function of any bodily member or organ; or
    C. Impairment of the function of any bodily member or organ.

Crim. Law Art. § 3-601(a)(5)(iii). When instructing the jury, the judge relied on the Maryland Criminal Pattern Jury Instructions to define what "severe physical injury" was for purposes of first-degree child abuse. The Maryland Pattern Jury Instructions defined "severe physical injury" as:

[P]hysical injury that (a) causes a substantial risk of death, (b) permanent or protracted serious disfigurement, or (c) causes loss or impairment of a member or organ of the body or its ability to function properly.

The jury found Mr. Williams guilty of first-degree child abuse. After the trial, Mr. Williams's counsel concluded that the pattern instruction was incorrect because it did not make clear that the terms "permanent or protracted serious" applied to both loss of function and impairment as well as disfigurement. On December 1, 2016, Mr. Williams filed a Motion for New Trial pursuant to Maryland Rule 4-331(a) which was denied by the Circuit Court. On February 17, 2017, Mr. Williams noted an appeal to the Court of Special Appeals, which affirmed his conviction. The Court of Special Appeals noted that the trial court "reviewed the erroneous instruction in light of the defense's theory of the case and in conjunction with the evidence adduced at trial."

Held: Reversed.

The Court of Appeals held that the trial court erred in denying Mr. Williams's motion for new trial. The error, supplying the jury with an instruction that was an incorrect statement of law, was not harmless. In order for the error to be harmless, the error must have in no way influenced the verdict. Respondent, the State, presented the jury with only one charge of first-degree child abuse and the jury was given an erroneous instruction on that charge. The lack of clarity in the instruction prejudiced Mr. Williams because it lowered Respondent's burden to establish Mr. Williams's guilt. Accordingly, the Court concluded that it could not say, beyond a reasonable doubt, that the error in no way influenced the verdict.

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Commissioner of Labor and Industry v. The Whiting-Turner Contracting Company, No. 30, September Term 2018, filed January 23, 2019. Opinion by Hotten, J.

Watts, J., joins in judgment only.
Getty and Adkins, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2019/30a18.pdf

LABOR AND EMPLOYMENT – RECOGNIZED HAZARDS – SUBSTANTIAL EVIDENCE

Facts:

Whiting-Turner was involved in a construction project to increase the size of a parking garage by constructing new floors on top of the existing garage structure. The construction plan included lifting and relocating several concrete double-tees, each weighing 42,800 pounds, in order to make space for a crane tower. Each double-tee was held up by four shoring or safety towers, one located under each corner of the double-tee. In the process of raising one of the double-tees using a hydraulic jack, the shoring towers collapsed, resulting in the death of one construction worker and the pinning and severe injury of another.

The Maryland Occupational Safety and Health Unit ("MOSH"), with assistance from Dr. J. Scott Jin, a civil engineer in the Federal Occupational Safety and Health Administration ("OSHA"), and KCE Structural Engineers ("KCE"), initiated an investigation into the incident. Reports from both Dr. Jin and KCE concluded that Whiting-Turner should have installed gooser braces in the shoring towers and that their failure to do so contributed to the accident. Dr. Jin also concluded that Whiting-Turner's use of an eight-inch high spacer beam between the double-tee and the upper beam weakened the stability of the system and made the shoring tower unable to support the actual load of the double-tee.

Whiting-Turner was cited for violating Maryland Code, Labor and Employment Article, § 5-104(a), also known as the General Duty Clause, which requires an employer to "provide each employee of the employer with employment and a place of employment that is . . . free from each recognized hazard that is causing or likely to cause death or serious physical harm to the employee." Whiting-Turner contested the citation and after a three-day hearing, an Administrative Law Judge (ALJ) recommended the citation be affirmed. Upon review of the ALJ's proposed decision, the Commissioner of Labor and Industry (the "Commissioner") concluded that Whiting-Turner's failure to install gooser braces and use of an undersized spacer beam constituted recognized hazards and subsequently affirmed the citation.

Whiting-Turner petitioned for judicial review and the Circuit Court for Baltimore County affirmed the Commissioner's decision, concluding that it was legally correct and supported by substantial evidence. On appeal, the Court of Special Appeals reversed the Commissioner's

decision, determining that the Commissioner lacked substantial evidence to conclude that those hazards were "recognized." *Whiting-Turner Contracting Company v. Commissioner of Labor and Industry*, 237 Md. App. 24, 183 A.3d 799 (2018).

Held: Reversed.

The Court of Appeals held that the Commissioner had substantial evidence to determine that Whiting-Turner's failure to install gooser braces and use of an undersized spacer beam both constituted recognized hazards in violation of the General Duty Clause. The Court clarified that a hazard is "recognized" where there is substantial evidence that the employer had actual or constructive knowledge of the hazard, or where there is "proof that the condition is generally known to be hazardous in the industry." *Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 25, 684 A.2d 845, 849 (1996); *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984).

The Commissioner was presented with an assembly manual providing for the installation of gooser braces on the shoring towers, plans from Whiting-Turner's own engineers calling for the use of proper support beams, as well as the expert opinion of Dr. Jin and investigation reports from MOSH and KCE identifying Whiting-Turner's alleged violations as contributing to the accident. Thus, the record clearly included "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[]" that Whiting-Turner violated § 5-104(a) of the Labor and Employment Article by failing to install gooser braces and using an undersized spacer beam. *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978).

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WV DIA Westminster, LLC v. Mayor & Common Council of Westminster, No. 22, September Term 2018, filed January 18, 2019. Opinion by Watts, J.

http://www.mdcourts.gov/data/opinions/coa/2019/22a18.pdf

APPLICATION TO AMEND GENERAL DEVELOPMENT PLAN – QUASI-JUDICIAL ACT VS. LEGISLATIVE ACT – JUDICIAL REVIEW – ERROR OF LAW – SUBSTANTIAL EVIDENCE – REMEDY

Facts:

The case concerns the denial of an application to amend the General Development Plan for Wakefield Valley ("the Wakefield Valley GDP"), located in the City of Westminster in Carroll County, Maryland. In July 2016, WV DIA Westminster, LLC ("Developer"), Petitioner, filed an application to amend the Wakefield Valley GDP to permit construction of fifty-three homes on what is designated as "Parcel W" of a former golf course ("the Application"). In December 2016, the Mayor and Common Council of Westminster ("the Council"), Respondent, held a public hearing on the Application. In January 2017, the Council held another public hearing to consider whether to approve the Application; at the end of the hearing, the Council voted to deny the Application, and the president of the Council directed staff to prepare a written decision to that effect. In February 2017, Developer filed in the Circuit Court for Carroll County a petition for judicial review. In March 2017, the Council adopted Ordinance No. 876, denying the Application and incorporating an attached written decision, which set forth findings. Developer then filed an amended petition for judicial review.

In July 2017, the circuit court heard argument on the amended petition for judicial review, and held the matter *sub curia* for review of the record. In November 2017, the circuit court issued a memorandum opinion and order, affirming the Council's decision as set forth in Ordinance No. 876. In December 2017, Developer filed a notice of appeal. While the case was pending in the Court of Special Appeals, Developer filed in the Court of Appeals a petition for a writ of *certiorari*, which the Court granted. See *WV DIA Westminster v. Mayor & Common Council of Westminster*, 459 Md. 401, 187 A.3d 36 (2018).

Held: Affirmed.

The Court of Appeals held that the Council's decision denying the Application was a quasi-judicial act, not a legislative act, and, as such, the decision was subject to judicial review to determine whether substantial evidence in the record as a whole supported the Council's findings and conclusions and to determine whether the Council's decision was premised upon an error of law. The Court concluded that the Council's decision denying the Application satisfied the two-part test for determining whether a given action was quasi-judicial in nature because it was

reached on individual, as opposed to general, grounds, involving one parcel—Parcel W—and the decision was reached through a deliberative fact-finding process involving testimony and the weighing of evidence.

The Court of Appeals explained that the process by which the Application was filed and considered strongly suggested a quasi-judicial process because it: (1) involved scrutiny of one particular parcel—Parcel W; (2) for consideration of property-specific uses—the addition of 53 new homes on Parcel W; (3) at Developer's initiative—Developer filed the Application. That the Application could possibly have had an impact on the entire Wakefield Valley GDP area, by affecting the open space or otherwise, did not mean that the Council's decision was reached on general grounds, as opposed to individual grounds scrutinizing a single property. Indeed, deciding whether to grant or deny the Application necessarily involved scrutiny of Parcel W. Thus, the Court concluded that the first part of the test strongly suggested that the Council's decision was quasi-judicial in nature.

The Court of Appeals concluded that, as to the second part of the test for determining whether an action is quasi-judicial in nature—*i.e.*, whether there is a deliberative fact-finding process with testimony and the weighing of evidence—the process utilized in the case resulting in the adoption of Ordinance No. 876 and the incorporated written decision of the Council undeniably was a deliberative fact-finding process involving testimony and the weighing of evidence.

The Court of Appeals held that the Council was not prohibited from considering, among other things, the zonal classification of Parcel W when determining whether to grant the Application. The Court determined that, in considering the Application, the Council was not limited to consideration of the six factors set forth in § 164-188J of the Code of the City of Westminster ("Westminster Code") and nothing else. Rather, in accord with Westminster Code § 164-188J, in considering an application to amend a GDP, the Council could make "any other findings which may be found to be necessary and appropriate to the evaluation[,]" and nothing in Westminster Code § 164-133B prohibited the Council from considering the zonal classification of Parcel W. The Court thus concluded that the Council did not legally err in considering, among other things, the conservation zoning designation of Parcel W in evaluating the Application.

The Court of Appeals held that substantial evidence in the record as a whole supported the Council's denial of the Application and, specifically, its determination that the Application failed to satisfy Westminster Code § 164-188J(1)—"That the zone applied for is in substantial compliance with the use and density indicated by the Master Plan or sector plan and that it does not conflict with the general plan, the City's capital improvements program or other applicable City plans and policies." The Court concluded that, given the evidence in the record and applying the substantial evidence test, a reasoning mind reasonably could have reached the factual conclusion the Council reached—namely, that the Application failed to substantially comply with the use and density indicated by the Wakefield Valley GDP, as amended over the years, and that it conflicted with the general plan or other applicable City plans and policies.

As a final matter, the Court of Appeals concluded that, because it affirmed and held that there was substantial evidence in the record as a whole to support the Council's findings and conclusions and that the Council's decision was not premised upon an error of law, it need not determine whether a remand or a reversal was the proper remedy, as neither remedy was applicable under the circumstances.

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COURT OF SPECIAL APPEALS

Mona H. Pinner v. Randy R. Pinner, No. 1231, September Term 2017, filed January 31, 2019. Opinion by Eyler, James R.

https://mdcourts.gov/data/opinions/cosa/2019/1231s17.pdf

CIVIL PROCEDURE – JURISDICTION AND LEGAL MALPRACTICE

Facts:

Prior to this suit, Edwin Pinner, appellant's late husband, and appellant filed suit against several defendants, seeking damages for personal injuries caused by asbestos exposure. After Edwin Pinner's death, the case was converted to a wrongful death and survival action on behalf of appellant. In violation of Md. Rule 15-1001, appellant did not serve notice of the suit on appellee, her stepson, until more than three years after Edwin Pinner died. Appellee attempted to intervene in the suit, but his claim was barred by limitations. Appellant received settlement proceeds from the wrongful death/survival action. Appellee brought this suit against appellant to recover a portion of the settlement proceeds. Appellee also sued the lawyers who represented appellant in the wrongful death/survival action. The trial court entered judgment in favor of appellee against appellant and granted the lawyers' motion to dismiss.

Held:

The circuit court lacked personal jurisdiction over appellant. The filing and prosecution of a single law suit by appellant, a North Carolina resident with no other connection with Maryland, was insufficient to confer jurisdiction over her.

Appellees' claims against the lawyers was properly dismissed because of the absence of privity between appellee and appellant's lawyers and the third party beneficiary exception did not apply

Khalid Azam v. Carroll Independent Fuel, Inc., No. 1793, September Term 2017, filed January 2, 2019. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2019/1793s17.pdf

THE FOUR CENT RULE – THE FOUR CENT RULE DOES NOT APPLY TO JOBBERS – A REQUIREMENT OF A MARKETING AGREEMENT

Facts:

The appellant, Khalid Azam, owns and operates Liberty BP, a BP branded gasoline service station in Baltimore. The appellee, Carroll Independent Fuel, Inc. ("CIF"), purchases fuel from BP Products North America, Inc. ("BP"), which it resells to numerous service stations—including both Azam's and service stations which CIF owns and leases to operators.

A "Branded Jobber Contract" governs the terms under which CIF purchases fuel from BP. That contract conditions the use of BP's trademark and other brand identifications—by both CIF and the dealers it supplies—on BP's prior written approval and adherence to the other terms of the contract. A "Dealer Supply Agreement," in turn, governs the terms under which Azam purchases fuel from CIF. According to that agreement, in consideration for Azam's use of BP identifications, CIF reserves the right to set the per gallon price for all BP fuel that it sells to Azam.

Azam filed a complaint seeking declaratory judgment and injunctive relief against CIF, alleging that it is required to afford Azam the benefit of the "Four Cent Rule," which provides:

> A distributor who sets the retail price of gasoline through controlled outlets shall provide those noncontrolled outlets that it supplies with gasoline products at a wholesale price of at least 4 cents per gallon under the lowest price posted for each grade of gasoline at any controlled outlet.

Md. Code, Commercial Law Article ("CL"), § 11–304(l). CIF moved for declaratory judgment, claiming that as an "independent jobber," it is exempt from the Four Cent Rule. Mr. Azam, in turn, filed a cross-motion, seeking a declaration that his Dealer Supply Agreement with CIF constitutes a "marketing agreement" within the meaning of CL § 11–304(l). The circuit court found that (i) CIF is an "independent jobber" as defined by § 11–301(h), and is therefore exempt from the Four Cent Rule, and (ii) the Supply Agreement is not a "marketing agreement" as defined by CL § 11–301(i) because it does not grant Azam the right to use CIF-owned trademarks, and, accordingly, the Four Cent Rule is inapplicable. Azam appealed those rulings.

Held: Affirmed.

The Court of Special Appeals held that CIF is an "independent jobber," and as such is exempt from the Four Cent Rule. Even if, *arguendo*, CIF were not an independent jobber, the "Dealer Supply Agreement" between CIF and Azam does not meet the definition of a "marketing agreement," rendering the Four Cent Rule inapplicable.

CL § 11–304(l)(2) expressly exempts "independent jobbers" from the Four Cent Rule. CL § 11–301(h), in turn, defines an "independent jobber" as "an individual or corporation who purchases gasohol or gasoline products from a wholesaler for resale to a dealer." The tripartite relationship among Liberty BP, CIF, and BP is identical to that among Walker's Chevron, Bay Oil, Inc., and Chevron U.S.A. in *Chevron, U.S.A. v. Lesch*, 319 Md. 25 (1990). In that case, Walker's Chevron purchased gasoline from Bay Oil, Inc., which, in turn, purchased gasoline wholesale form Chevron, U.S.A, a national oil company. Just as Bay Oil, Inc. satisfied the definition of an independent jobber in that case, so too does CIF do so in this case. Accordingly, CIF is exempt from the Four Cent Rule.

The thirteen requirements set forth in CL § 11–304—including the Four Cent Rule—apply only to "marketing agreements." CL § 11–301(i) defines a "marketing agreement" as "an oral or written agreement between a distributor and a dealer under which the dealer is granted the right … to: [u]se a trademark, trade name, service mark, or other identifying symbol or name owned by the distributor...." In this case, however, the Branded Jobber Contract between CIF and BP does not authorize the use of BP's trademark and other brand identifications—by CIF or by the dealers it supplies—without (i) BP's prior written approval and (ii) strict adherence to the requirements set forth therein. Given that the trademark and other identification are owned exclusively by BP, the "Dealer Supply Agreement" between CIF and Azam did not grant the latter the right to "use a trademark … *owned by the distributor*." Accordingly, the Dealer Supply Agreement does not constitute a "marketing agreement," and the Four Cent Rule does not apply.

In an attempt to evade the plain meaning of CL § 11–301(i), Azam evokes the Last Antecedent Rule, according to which if a series of nouns or phrases is followed by a limiting provision, that provision applies *exclusively* to the final noun or phrase in that series. Because the limiting phrase "owned by the distributor" follows the final noun "name," he contends that CIF need not have owned BP's trademark in order for the Dealer Supply Agreement to constitute a "marketing agreement." In this case, the Last Antecedent Rule—which the Court considers a grammatical guideline rather than a "rule," *per se*—succumbs to the Series Qualifier Rule, according to which "[w]hen there is a straightforward parallel construction that involves all nouns or verbs in a serious, a preposition or postpositive modifier normally applies to the whole series." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, 147 (2012).

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James McLaughlin, et al. v. Carrie M. Ward, et al., Substitute Trustees, No. 1827, September Term 2017, filed January 30, 2019. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2019/1827s17.pdf

APPELLATE JURISDICTION – FINAL JUDGMENT RULE – EXCEPTIONS TO FINAL JUDGMENT RULE – APPEAL FROM ORDER DENYING EXCEPTIONS TO FORECLOSURE SALE

Facts:

A property was sold at a foreclosure auction on January 21, 2015, but the sale was not ratified because of errors in the affidavit of service. The problems could not be remedied, so the case was dismissed. Appellant Dominion Rental Holdings, LLC ("Dominion"), the purchaser, had obtained access to the property and had made improvements to secure it prior to the dismissal of the case.

The property was sold at a second foreclosure sale on September 7, 2017. Dominion was again the successful purchaser, but disputed the increased cost and claimed that the increase was due to the improvements it had made after the first sale. It filed exceptions to the sale and a motion to abate the purchase price, requesting a refund of the difference between the purchase prices.

The trial court denied the exceptions and the motion to abate on October 27, 2017. Dominion promptly noted an appeal. However, the second sale was not ratified until January 8, 2018, and Dominion did not note a second appeal after ratification.

Held: Dismissed.

The Court of Special Appeals held that the appeal must be dismissed because it was filed before the entry of a final judgment, and no exceptions to the final judgment rule apply.

Generally, parties may appeal only upon the entry of a final judgment. See Md. Code (1974, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article. In a foreclosure case, a court does not enter a final judgment at least until it has ratified the foreclosure sale. *See Balt. Home Alliance, LLC v. Geesing*, 218 Md. App. 375, 383 & n.5 (2014); Md. Rule 14-305(e); *see also Hughes v. Beltway Homes, Inc.*, 276 Md. 382, 384 (1975) (stating that an order ratifying a foreclosure sale is a judgment because it is an order of the court final in its nature). Moreover, if the court refers the matter to an auditor to state an account, as it may under Rule 14-305(f), it may not enter a final judgment until it has adjudicated any exceptions to the auditor's report. *See Balt. Home Alliance, LLC v. Geesing*, 218 Md. App. at 383 n.5.

As of the date of Dominion's appeal in this case, the circuit court had neither ratified the foreclosure sale, nor referred the matter to an auditor, nor adjudicated any exceptions to an auditor's report. Dominion, therefore, noted a premature appeal, before the entry of a final judgment. The Court of Special Appeals holds no appellate jurisdiction over premature appeals.

Dominion next argued that the appeal from the order denying the exceptions and motion to abate the purchase price qualified as an interlocutory appeal for transfer of real property under Md. Code, § 12-303(3)(v) of the Courts and Judicial Proceedings Article. The Court of Special Appeals held that because a court does not consider exceptions to a sale until after the sale has actually occurred, an order denying exceptions to a foreclosure sale cannot possibly be an order "[f]or the sale, conveyance, or delivery of real . . . property" under § 12-303(3)(v).

The Court rejected Dominion's third argument that the appeal was valid under Md. Rule 2-602(b). Dominion argued that the order denying the exceptions and motion to abate the purchase price qualified as a final judgment that adjudicated less than an entire claim and adjudicated the rights and liabilities of fewer than all the parties to the action. The Court held that the order failed to satisfy the requirements of the rule because the court did not expressly determine in a written order that there was no just reason to delay the entry of a final judgment as to Dominion. Even if the court had made the required certification, it would have abused its discretion. Allowing the trial court to delay the entry of a final judgment as to one party when the ratification of the sale and end of the case for all parties is at hand would violate Maryland's policy against piecemeal appeals.

Finally, the Court rejected Dominion's argument that the appeal was valid under the collateral order doctrine. To qualify as a collateral order, a ruling must satisfy four criteria: (1) it must conclusively determine the disputed question; (2) it must resolve an important issue; (3) it must be completely separate from the merits of the action; and (4) it must be effectively unreviewable on appeal from a final judgment. The Court held that the order denying the exceptions and the motion to abate failed to satisfy the third and fourth requirements, because the denial went to the very heart of the foreclosure proceedings and the rights of the parties are neither lost nor impaired by waiting for the entry of a final judgment before obtaining appellate review.

State of Maryland v. Daniel Joseph Greene, No. 2199, September Term 2018, filed January 31, 2019. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2019/2199s18.pdf

CONSTITUTIONAL IDENTIFICATION LAW – CONFIRMATORY VS. SELECTIVE IDENTIFICATION – THE RELIABILITY FACTORS ARE INAPPLICABLE

RELEVANCE — "I THINK SO" VERSUS "I KNOW SO" – "I THINK SO": GOOD, RELEVANT EVIDENCE

Facts:

In the early morning hours of November 29, 2017, Jon Hickey was murdered in his Fells Point apartment. The police later recovered night vision surveillance footage depicting a figure attempting to enter Hickey's apartment on the morning in question. At the request of the police, Jennifer McKay viewed the footage in the hope of identifying the figure. At the time of the murder, McKay was romantically involved with Hickey. Prior to their courtship, McKay had been in an intimate relationship with the appellee, Daniel Greene, for five years.

Upon viewing the footage, McKay told the police that the figure looked like Greene, citing similarities in build and facial hair. Throughout the course of her videotaped interview, McKay consistently affirmed either that the figure *looked like* Greene or that she *thought* that the figure was Greene. Notwithstanding an officer's insisting "we just can't have the 'I think,'" McKay remained modest in her degree of certainty, maintaining only that "it looks like him."

On December 28, 2017, Greene was indicted for the first-degree murder of Hickey. He moved pre-trial to suppress both the out-of-court and an in-court identification of him by McKay as the man depicted in the surveillance video, contending that said identification had been elicited by impermissibly suggestive procedures on the part of the police. After viewing the videotape of McKay's interview, the court granted Greene's motion, ruling that the police had engaged in impermissibly suggestive conduct during the interview. The State appealed from that ruling.

Held: Reversed and remanded.

The Court of Special Appeals held that constitutional identification law was inapplicable to McKay's "confirmatory identification" of Greene.

In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the United States Supreme Court held that, under the Due Process Clause of the Fourteenth Amendment, evidence of an identification may be excluded if the "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The purpose of this doctrine

(and of constitutional identification law generally) is to ensure the reliability of "selective" identifications.

A "selective identification" is one in which a witness identifies a suspect based solely on his or her memory of having witnessed that suspect commit a crime. A "confirmatory identification," by contrast, is one in which a witness identifies someone known to him or her before the crime was committed. In the latter case, the purpose of the identification is to determine whether the identifier is able to identify the suspect as a person with whom he or she is well-acquainted—not because he or she witnessed the crime at issue. While police suggestiveness may adversely affect the reliability of a "selective identification," in the context of a "confirmatory identification" the identifier is so familiar with the accused that the likelihood of misidentification is so infinitesimal as to be legally insignificant. The constitutional law governing "selective identifications" is, therefore, inapplicable to "confirmatory identifications." Given that McKay's identification of Greene was a "confirmatory identification," the circuit court erred in excluding it pursuant to *Simmons v. United States*.

Even if McKay's identification of Greene had been a "selective identification," the Court would hold that it was erroneously excluded. Without more, a finding of impermissible suggestiveness does not warrant the exclusion of an identification. In order to justify the suppression of an identification, there must also be "a very strong likelihood of irreparable misidentification." It is clear from the record of the suppression hearing that the court focused exclusively on the suggestive behavior of the police, failing meaningfully to consider the ultimate reliability of the identification. Any impermissible suggestiveness on the part of the police, moreover, was not nearly as great as that found the have existed in *Manson v. Brathwaite*—which, the Supreme Court held, was inadequate to warrant exclusion.

Even had the court meaningfully considered the likelihood of misidentification and found that there was "a very strong likelihood of irreparable misidentification," the Court would hold that such a finding was erroneous. In *Neil v. Biggers*, 409 U.S. 188 (1972), the Supreme Court articulated various factors to be considered when evaluating the likelihood of misidentification. Those factors included: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199–200. In this case there was no evidence of misidentification, nor were the *Neil v. Biggers* factors even applicable. In fact, the inapplicability of these reliability factors to McKay's identification illustrates the general inapplicability of constitutional identification law to "confirmatory identifications."

At the very outset of the interview in this case, McKay identified the figure from the footage as resembling Greene, and she continued to do so consistently throughout. The only *possible* change was in the degree of certainty with which McKay made that identification—and not in who McKay would select. Even if the certainty with which McKay identified Greene had been strengthened by police suggestiveness, such coaching of a witness does not transform an identification into a misidentification. McKay's identification, moreover, would have been equally relevant regardless of whether she testified that she *thought* Greene was the figure

featured on surveillance footage or she testified that she *knew* it was him. The certainty with which an identification is made is a matter of weight to be assessed by a jury.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated November 30, 2018, the following attorney has been disbarred by consent, effective January 1, 2019:

SEAN REGAN HANOVER

*

By an Order of the Court of Appeals dated January 3, 2019, the following attorney has been disbarred by consent:

IFEOLU AMAKA FABAYO

*

By an Order of the Court of Appeals dated January 18, 2019, the following attorney has been disbarred:

RICHARD MURRAY

*

This is to certify that the name of

CHARLES BOILEAU BAILEY

has been replaced upon the register of attorneys in this State as of January 18, 2019.

*

By an Opinion and Order of the Court of Appeals dated December 20, 2018, the following attorney has been indefinitely suspended, effective January 22, 2019:

NEIL WARREN STEINHORN

*

*

By an Opinion and Order of the Court of Appeals dated January 22, 2019, the following attorney has been disbarred:

JEROME P. JOHNSON

*

By an Opinion and Order of the Court of Appeals dated January 23, 2019, the following attorney has been disbarred:

SCOTT A. CONWELL

*

By an Order of the Court of Appeals dated January 23, 2019, the following attorney has been indefinitely suspended by consent:

EDGAR FABRICE NGATCHA NDJATOU

*

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JUDICIAL APPOINTMENTS

*

On November 20, 2018, the Governor announced the appointment of **ShaRON MARIE GRAYSON KELSEY** to the Circuit Court for Prince George's County. Judge Kelsey was sworn in on January 4, 2019 and fills the vacancy created by the retirement of the Hon. Dwight D. Jackson.

*

On December 12, 2018, the Governor announced the appointment of **SIDNEY ALLEN BUTCHER** to the District Court of Maryland – Anne Arundel County. Judge Butcher was sworn in on January 4, 2019 and fills the vacancy created by the retirement of the Hon. Jonas D. Legum.

*

On December 19, 2019, the Governor announced the appointment of **JOHN JOSEPH KUCHNO** to the Circuit Court for Howard County. Judge Kuchno was sworn in on January 7, 2019 and fills the vacancy created by the retirement of the Hon. Lenore R. Gelfman.

*

On December 12, 2018, the Governor announced the appointment of **KERWIN ANTHONY MILLER** to the District Court of Maryland – Harford County. Judge Miller was sworn in on January 7, 2019 and fills the vacancy created by the retirement of the Hon. Victor K. Butanis.

*

On November 20, 2018, the Governor announced the appointment of **JARED MICHAEL McCARTHY** to the Circuit Court for Prince George's County. Judge McCarthy was sworn in on January 11, 2019 and fills the vacancy created by the retirement of the Hon. Toni E. Clarke.

*

On December 12, 2018, the Governor announced the appointment of **JOSEPH MICHAEL STANALONIS** to the Circuit Court for St. Mary's County. Judge Stanalonis was sworn in on January 11, 2019 and fills the vacancy created by the retirement of the Hon. Karen H. Abrams.

*

*

On December 19, 2019, the Governor announced the appointment of **LaTINA BURSE GREENE** to the District Court of Maryland – Baltimore City. Judge Greene was sworn in on January 16, 2019 and fills the vacancy created by the elevation of the Hon. Gregory Sampson to the Circuit Court for Baltimore City.

*

On December 19, 2019, the Governor announced the appointment of **CHRISTOPHER CURTIS FOGLEMAN** to the Circuit Court for Montgomery County. Judge Fogleman was sworn in on January 25, 2019 and fills the vacancy created by the retirement of the Hon. Michael D. Mason.

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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