Amicus Curiarum

VOLUME 29
ISSUE 12 DECEMBER 2012

A Publication of the Office of the State Reporter

Table of Contents

Return to ToC

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Gerald Isadore Katz, AG No. 86, September Term 2011, filed November 19, 2012. Opinion by Harrell, J.

Battaglia, Adkins and Barbera, JJ., dissent.

http://mdcourts.gov/opinions/coa/2012/86a11ag.pdf

ATTORNEY DISCIPLINE – RECIPROCAL DISCIPLINE – INDEFINITE SUSPENSION – WILLFUL FAILURE TO FILE MARYLAND TAX RETURNS

IN A RECIPROCAL DISCIPLINARY ACTION, ATTORNEY WHO WILLFULLY FAILED, WITHOUT FRAUDULENT INTENT, TO FILE INCOME TAX RETURNS WAS SUSPENDED INDEFINITELY, WITH THE RIGHT TO APPLY FOR REINSTATEMENT TO THE MARYLAND BAR NO SOONER THAN WHEN HE IS READMITTED TO ALL OF THE OTHER JURISDICTIONS, SAVE THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, WHICH HAVE DISCIPLINED HIM FOR THE MISCONDUCT UNDERLAYING THIS CASE.

Facts:

Gerald Isadore Katz, an attorney admitted to practice in Maryland on 2 June 1983, was charged on 18 June 2010 in the Circuit Court for Anne Arundel County with willful failure to file Maryland state income tax returns for 2004 and 2005. He pled guilty and, on 13 January 2011, a judgment of conviction was rendered. Katz was sentenced to three years' imprisonment on each count, all suspended, five years' supervised probation, restitution of $713,957.80, and 100 hours of community service at a pro bono legal services corporation or entity. On the day of sentencing, Katz and the Maryland Comptroller's Office entered into a settlement agreement for the payment of taxes, interest, and penalties owed by Katz for 1992 through 2009. Katz sought modification. The Circuit Court granted his motion on 22 September 2011, vacated the sentence, and entered probation before judgment on the two counts of failure to file, with the original suspended sentence remaining in effect. The other jurisdictions in which Katz was admitted to practice law – Virginia, the Court of Appeals of the District of Columbia, the U.S. District Court for the District of Maryland, the U.S. District Court for the District of Columbia, and the U.S. Court of Federal Claims – took interlocutory and/or formal disciplinary actions, each issuing sanctions that ranged from a six-month suspension to one year. A final disciplinary action decision is pending currently in the present case and the U.S. Court of Appeals for the District of Columbia Circuit, where Katz is also admitted, although the latter court, by order of 16 March 2011, suspended Katz pending its final action.

On 22 March 2012, Maryland Bar Counsel filed, under Maryland Rules 16-773(b) and 16-751(a)(2), a reciprocal discipline petition for disciplinary or remedial action, asserting that Katz's willful failure to file Maryland tax returns for 2004 and 2005 violated Rules 8.4(a), (b), and (d) of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), as adopted in Maryland Rule 16-812. A show cause order was issued, based on Virginia's six-month suspension (as the first jurisdiction to have acted), requiring Katz to show cause (pursuant to Maryland Rule 16-773(e)) by 25 May 2012 why corresponding discipline should not be imposed. On 2 March 2012, Bar Counsel and Katz (through counsel) filed a joint petition for six-month suspension by consent, agreeing that a suspension of six months was consistent with relevant Maryland precedent. Oral argument was held on 10 September 2012, at which Bar Counsel and Katz , at the Court's invitation, addressed whether relevant cases of the Court support a six-month suspension or something greater as reciprocal discipline for the misconduct.

Held:

The appropriate sanction was determined to be indefinite suspension, with the right to apply for reinstatement at such time as Katz is readmitted to practice before each of the other jurisdictions, save the U.S. Court of Appeals for the District of Columbia Circuit. The Court first observed that, in reciprocal discipline cases, it had the discretion to impose a discipline consistent with the sister jurisdiction's factual findings and conclusions, or to order a different or more serious alternative if Bar Counsel or Katz presented clear and convincing evidence that "the imposition of corresponding discipline would result in grave injustice" or that the attorney's misconduct "warrants substantially different discipline in this State," pursuant to Maryland Rule 16-773(e), in addition to other exceptions. Maryland attorney disciplinary jurisprudence dictates that the sanction imposed depends not only on the decision of the sister jurisdiction, but also on the specific facts of each case, balanced against Maryland precedent for the same or similar misconduct occurring in Maryland.

In failure to file cases, an intentional and voluntary violation of a known legal duty is sufficient to constitute a willful failure to file, while a deceitful or fraudulent motive is not necessary, but is a relevant factor in deciding the severity of the sanction for such misconduct. After assessing a range of factually-similar discipline cases, the Court determined that Katz's misconduct warranted suspension from the practice of law because he failed willfully to file federal or state income taxes, but did so apparently without fraudulent intent. The Court reached this decision after considering several factors. First, Katz has been disciplined and reinstated (or will be in short order) in each of the four jurisdictions where he is barred, saving the U.S. Court of Appeals for the District of Columbia Circuit, in which court the disciplinary matter remained pending. Second, Katz has been consistent and current in meeting his obligations under the payment agreement for all taxes, penalties, and interests owed to the State of Maryland. Third, Katz's misconduct, though serious, appears not to have involved fraudulent intent. Lastly, Katz has had an otherwise successful and ethically uneventful history as an attorney. Although the Court recognized that Katz's repayment of his tax obligations does not mitigate his misconduct, his lack of fraudulent intent and his acceptance of responsibility for his actions before the Maryland

Comptroller and the Attorney Grievance Commission were relevant to the Court's determination of the proper sanction.

Return to ToC

Angela Jones Kendall v. State of Maryland, No. 2, September Term 2012, filed November 27, 2012. Opinion by McDonald, J.

Bell, C.J., Battaglia and Greene, JJ., dissent.

http://mdcourts.gov/opinions/coa/2012/2a12.pdf

CRIMINAL LAW & PROCEDURE – DOUBLE JEOPARDY – APPEAL BY STATE OF TRIAL COURT RULING TERMINATING PROSECUTION BASED ON PURELY PROCEDURAL GROUND

Facts:

Based on her alleged operation of a vehicle while impaired by alcohol, Angela Kendall was charged with violating three provisions of Maryland Code, Transportation Article §21-902, as well as failure to control vehicle speed to avoid a collision in violation of §21-801. She pled not guilty and a trial was held at the District Court. At the close of the State's case, defense counsel made a "motion for judgment," arguing that the State's failure to obtain a blood sample in accordance with Maryland Code, Courts & Judicial Proceedings Article §10-305 required a favorable finding as to the charge of driving while under the influence of alcohol. Her motion was granted as to that charge but denied as to the remaining three. Defense counsel then argued that the State had improperly served the criminal citations, and the court permitted the State to present testimony about the service of these documents. After further argument, during which only the service issue was discussed, the court granted the "motion" as to the remaining three charges, explaining that the State had not complied with the rule on service of process. As to each charge, the court recorded "NG" on the docket sheet. Construing the disposition of the three charges as a dismissal on the basis of improper service, the State appealed the decision to the circuit court; the State conceded that Kendall had been acquitted of driving under the influence and did not appeal that charge. Contending instead that the District Court had acquitted her of all the charges, Ms. Kendall argued that the appeal was barred by her constitutional and common law protection against double jeopardy. The circuit court agreed with the State that the three charges in question had been dismissed and permitted the State's case to continue. The Court of Appeals granted Ms. Kendall's petition for certiorari to consider her double-jeopardy claim.

Held:

If a defendant succeeds in having a prosecution terminated without any submission to a judge or jury as to the defendant's guilt or innocence, further prosecution is not barred. Whatever the label of the trial judge's ruling, further prosecution only violates the constitutional and common-law protection from double jeopardy when that ruling resolves some or all of the factual elements of the offense charged. Because the trial court's grant of the defendant's "motion for judgment" was based purely

on a procedural issue, and not the substance of the charges, the ruling did not resolve any of the factual elements of those charges. The State was therefore permitted to appeal the decision.

State of Maryland v. Latresha L. Weems, No. 20, September Term 2012, filed November 20, 2012. Opinion by Barbera, J.

Harrell, J., dissents.

http://mdcourts.gov/opinions/coa/2012/20a12.pdf

CRIMINAL LAW – THEFT OVER $500 – KNOWLEDGE OF PROPERTY BEING LOST, MISLAID, OR DELIVERED BY MISTAKE

Facts:

Respondent Latresha L. Weems went to Anchor Check Cashing in Annapolis in February 2009 to cash a check. The check, in the amount of $3,250, was made payable to Respondent, drawn from an attorney escrow account. Employees of the check cashing business examined the check, and, after making phone calls regarding its authenticity, gave Respondent the money. Later, the owner of Anchor Check Cashing learned that the check was counterfeit, and called Respondent demanding that she return the funds. Respondent never returned the money.

Respondent came on for a bench trail on charges of theft of more than $500, uttering a forged document, and possession of a forged document. After hearing evidence from two employees at the check cashing business, and reviewing documents submitted into evidence by the State, the trial court found Respondent guilty of theft, but acquitted her of the remaining charges. Respondent appealed to the Court of Special Appeals, which reversed the conviction. The Court of Special Appeals noted that under Maryland Code (2002, 2012 Repl. Vol.), § 7-104(d) of the Criminal Law Article, it appeared that a person must know that property is lost, mislaid, or delivered under a mistake at the time he or she obtains the property.

Held: Affirmed.

The Court of Appeals first examined the statutory language and legislative history behind § 7-104(d), which prohibits a person from obtaining control over property "knowing that the property was lost, mislaid, or was delivered under a mistake." The Court noted that the provision is part of the consolidated theft statute, which was enacted in 1978 to combine various larceny offenses into the one crime of theft. The Court observed that the General Assembly intended to change the common law in order to allow convictions for theft even if defendants did not have the intent to steal at the time they obtained the property.

The Court determined that the language of § 7-104(d) was ambiguous, though, as to whether a person must have the knowledge that property is lost, mislaid, or delivered by mistake at the time the property is obtained. The Court noted that the legislative history of § 7-104(d), other subsections surrounding it, and other portions of the criminal code failed to resolve the ambiguity. Given this

ambiguity and the potential contrary interpretations of the statute, the Court held that the rule of lenity required that the law be construed in favor of the accused.

Baltimore County Fraternal Order of Police Lodge No. 4 v. Baltimore County, Maryland, No. 3, September Term, 2012, filed November 19, 2012. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2012/3a12.pdf

ARBITRATION – ARBITRABILITY OF DISPUTES ARISING UNDER A COLLECTIVE BARGAINING AGREEMENT BUT AFTER ITS EXPIRATION

ARBITRATION – ARBITRABILITY

Facts:

A collective-bargaining agreement between Baltimore County and Baltimore County Fraternal Order of Police, Lodge 4 ("FOP") contained an arbitration clause and a retiree health-insurance provision. FOP believed the provision locked in place the health-insurance subsidy, as it existed at the time of an officer's retirement.

After the agreement expired and the County decreased the health-insurance subsidy, FOP initiated arbitration. The County protested, arguing that it had no duty to arbitrate because the collective-bargaining agreement had expired. The County also maintained that the health-insurance subsidy was not locked in place but was subject to change from year to year. FOP was successful in arbitration and on appeal before the circuit court, but the Court of Special Appeals vacated the arbitration award.

Held:

The fact that the agreement expired does not mean the County had no duty to arbitrate disputes arising out of that agreement. A dispute may be arbitrable after the expiration of the underlying agreement, if the agreement contained a broad arbitration clause and the rights that are the subject of the dispute accrued or vested during the life of the agreement.

Because both the arbitrability and the merits of FOP's grievance depend on whether retirees' rights in the 85/15 health-insurance premium split vested prior to the agreement's expiration, the issue of whether FOP's grievance was arbitrable was an issue for the arbitrator to decide in the first instance.

The agreement's arbitration clause was broad. It did not exclude grievances arising after the expiration of the agreement but pertained to "[a]ny dispute concerning the application or interpretation" of the agreement. The arbitrator found that FOP's grievance was arbitrable even after the agreement's expiration because—based on the arbitrator's reading of the agreement's health-

insurance clause—retirees' rights to an 85/15 health-insurance premium split had vested at the time of their retirement. The Circuit Court was legally correct in granting summary judgment in FOP's favor after subjecting the arbitrator's findings to a deferential standard of review.

Veronica Tinsley v. Washington Metropolitan Area Transit Authority, No. 1, September Term 2012; *Kim Hodge v. Washington Metropolitan Area Transit Authority*, No. 25, September Term 2012, filed October 26, 2012. Opinion by Battaglia, J.

Harrell and McDonald, JJ., concur.

http://mdcourts.gov/opinions/coa/2012/1a12.pdf

STATUTORY INTERPRETATION – WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY COMPACT – SOVEREIGN IMMUNITY

Facts:

The Court of Appeals resolved two appeals concerning the Washington Metropolitan Area Transit Authority (WMATA). In Case No. 1, Veronica Tinsley, Petitioner, used the WMATA subway system to travel to the Cheverly Station in Prince George's County. Upon arriving at the Cheverly station, Ms. Tinsley noticed that the entire floor was wet and, while attempting to exit the station, she slipped, fell, and injured herself. She sued WMATA in the Circuit Court for Prince George's County for its allegedly negligent cleaning of the subway platforms. Prior to trial, the Circuit Court denied WMATA's motion for summary judgment on the ground that WMATA was immune from suit under the WMATA Compact, Section 10-204(80) of the Transportation Article, Md. Code (1977, 2008 Repl. Vol.). The jury returned a verdict in Ms. Tinsley's favor, and WMATA appealed to the Court of Special Appeals, which held that WMATA was immune from suit under the Compact.

In Case No. 25, Kim Hodge, Petitioner, sued WMATA for injuries she sustained after slipping and falling on a wet escalator at the Prince George's County Plaza Metro Station. Ms. Hodge alleged that WMATA had negligently failed to clean its station, allowing water to pool, which caused her fall. WMATA responded by arguing it was immune from suit for its maintenance actions and denying that it had breached any duty it did owe, regardless of whether it was immune. The trial court denied WMATA's motion for summary judgment on the ground of sovereign immunity prior to trial, but reserved judgment on the same issue when WMATA renewed its motion at the conclusion of Ms. Hodge's case. The jury returned a verdict in favor of Ms. Hodge, but, on the day the jury returned its verdict, the Court of Special Appeals issued its decision in the Tinsley matter, *Washington Metropolitan Area Transit Authority v. Tinsley*, 202 Md. App. 115, 32 A.3d 75 (2011). WMATA filed a motion for judgment notwithstanding the verdict, which the trial judge granted based on the Court of Special Appeals' opinion in *Tinsley*.

Held: Affirmed.

Return to ToC

The Court of Appeals affirmed the Court of Special Appeals in Case No. 1 and the Circuit Court's grant of judgment notwithstanding the verdict in case No. 25. The Court held that WMATA was immune for its maintenance decisions – such as where, when, and how to clean – based on the plain meaning of the language of Section 80 of the WMATA Compact. Under Section 80 of the Compact, WMATA retains immunity for governmental actions, but is liable for its proprietary actions. The Court held that, because the challenged maintenance activities involved the exercise of discretion involving economic and policy concerns, WMATA was acting in a governmental and not proprietary fashion and was, therefore, immune from suit.

Mercy Medical Center, et al. v. Emerson R. Julian, Jr., et al., No. 118, September Term 2011; *Wycinna L. Spence, et vir. v. Emerson R. Julian, Jr., et al.*, No. 119, September Term 2011, filed November 27, 2012. Opinion by Battaglia, J.

Bell, C.J., Harrell, and McDonald, JJ., concur and dissent.

http://mdcourts.gov/opinions/coa/2012/118a11.pdf

TORTS – MARYLAND UNIFORM CONTRIBUTION AMONG JOINT TORT-FEASORS ACT – SECTION 3-1405 OF THE COURTS & JUDICIAL PROCEEDINGS ARTICLE – CONTRIBUTION LIABILITY

Facts:

Petitioners Wycinna and Christopher Spence brought a medical malpractice action against Mercy Medical Center, Inc., also a Petitioner, and Respondents Emerson R. Julian, Jr., M.D., and his practices Emerson R. Julian, Jr., M.D., P.A., and Harbor City OB/GYN Associates, LLC (collectively "Dr. Julian"). Prior to trial, the Spences and Mercy entered into a settlement release. The release sought to relieve Mercy Medical Center's potential contribution liability to co-defendant Dr. Julian, pursuant to the Maryland Uniform Contribution Among Joint Tort-Feasors Act, Section 3-1405 of the Courts & Judicial Proceedings Article. Citing that provision, the release provided that if Mercy Medical Center was adjudicated liable as a joint tort-feasor, then the Spences would reduce a subsequent judgment against Dr. Julian, representing Mercy Medical Center's share of liability. Mercy Medical Center, however, was dismissed as a party prior to trial and the case proceeded against Dr. Julian. The Spences were ultimately awarded $2,186,342.50, which Dr. Julian satisfied in full.

In the Circuit Court for Baltimore City, Dr. Julian filed a complaint for contribution against Mercy Medical Center and two of its nurses (collectively "Mercy"). Mercy moved to dismiss, arguing that its release extinguished Dr. Julian's right to contribution under the Maryland Uniform Contribution Among Joint Tort-Feasors Act (the "Act"), Section 3-1405 of the Courts & Judicial Proceedings Article, and that by failing to pursue contribution in the underlying medical malpractice action, Dr. Julian waived his right to contribution. The Circuit Court granted Mercy's motion to dismiss.

Also in the Circuit Court for Baltimore City, before a different judge, the Spences contemporaneously filed a complaint for declaratory and injunctive relief, seeking a declaration that Dr. Julian was barred from the right to pursue contribution from Mercy because he had failed, in the original action brought by the Spences, to prove that Mercy was negligent or, alternatively, to affirmatively plead release as an affirmative defense. The Spences and Dr. Julian moved for summary judgment, and the Circuit Court Judge granted summary judgment in Dr. Julian's favor.

Agreeing that the Circuit Court for Baltimore City issued two seemingly-contrary orders, the Spences, Mercy and Dr. Julian collectively filed a Joint Motion to Consolidate Appeals. Affirming the decision in the declaratory judgment action, but reversing the decision in the contribution action, the Court of Special Appeals ultimately held that Dr. Julian was not prohibited from pursuing contribution from Mercy in a separate action. The Court of Appeals granted Mercy's Petition for Certiorari, as well as the Spences' Petition for Certiorari.

Held: Affirmed.

The Court of Appeals affirmed the decision of the Court of Special Appeals. The Court acknowledged that the Maryland Uniform Contribution Among Joint Tort-Feasors Act was drafted to reverse the common law's bar on contribution and to allow one who paid the damages caused by several to be able to spread the loss among the group of tort-feasors. Under the Act, the Court observed that contribution required the determination of joint tort-feasor liability, by either the defending party's own admission of liability or the court's adjudication thereof. The Act also provides, under Section 3-1405, that this contribution liability may be relieved, pursuant to a release of one defending party, under certain conditions, including subsection (2), which provides that the release must provide for a reduction in damages representing the released party's liability.

Looking to *Swigert v. Welk*, 213 Md. 613, 133 A.2d 428 (1957), the Court concluded that a release that conditions the reduction in damages required under Section 3-1405(2) but does not address the liability of the released defending party will comply with Section 3-1405(2) only if if the released party is adjudicated liable. Mercy's joint tort-feasor liability was not determined. Thus, the Court held the release did not operate to extinguish Dr. Julian's right to contribution under the Act.

The Court then held that Dr. Julian was not required to file a cross-claim for contribution in the original medical malpractice action and therefore he did not waive his right to contribution by choosing to pursue it in a separate action. Finally, the Court addressed the Spences' separate argument that Dr. Julian waived his right to contribution by failing to plead "Release" as an affirmative defense under Rule 2-323(g)(12) because the right to contribution is derived from the Maryland Uniform Contribution Among Joint Tort-Feasors Act, not the release of Mercy. The Court therefore affirmed the Court of Special Appeals.

Return to ToC

COURT OF SPECIAL APPEALS

Sharon McKlveen v. Monika Courts Condominium, No. 1926, September Term 2011, filed November 28, 2012. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2012/1926s11.pdf

CIVIL PROCEDURE – JURY TRIAL – AMOUNT IN CONTROVERSY

Facts:

Monika Courts Condominium ("Monika Courts") filed a complaint in district court against McKlveen, a condominium owner, for $4,000 in unpaid assessments and costs. McKlveen filed a counterclaim for $26,000 and requested a jury trial. The case was then transferred to the circuit court. Monika Courts moved to dismiss McKlveen's counterclaim or, in the alternative, strike the jury demand and the circuit court found that the value of a counterclaim did not count toward the amount in controversy required for a jury trial. Without the value of McKlveen's $26,000 counterclaim, the amount in controversy was only $4,000, and the circuit court struck the demand for a jury trial and remanded the case to the district court.

Held: Affirmed.

The Court first reviewed Maryland and federal caselaw and determined that the value of the amount in controversy is drawn solely from the plaintiff's complaint. The Court next considered McKlveen's argument that the circuit court denied her fundamental right to a jury trial. It determined that although *Davis v. Slater*, 383 Md. 599 (2004), found that the Legislature has not definitively abrogated the right to trial by jury for any class of cases, the Legislature has nonetheless required that the amount in controversy must be at least $15,000 in order for a jury trial to be available, as set out in Articles 5 and 23 of the Maryland Declaration of Rights. Finally, the appellate court said that when a defendant files a counterclaim in the district court seeking monetary relief in excess of the amount in controversy needed for a jury trial and prays a jury trial, upon motion, the court should strike the jury trial demand. If the counter-claimant wants to obtain a jury trial, he or she should pursue a separate action in the circuit court and, if faced with a genuine threat of *res judicata*, the party should seek a stay or continuance of the district court action.

Dynacorp Ltd., et al. v. Aramtel Ltd., et al., No. 1077, September Term 2011, filed November 28, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/1077s11.pdf

FRAUDULENT INDUCEMENT – SUFFICIENCY OF EVIDENCE – STANDING TO BRING DERIVATIVE CLAIMS – JUDICIAL ESTOPPEL – CONTRACT INTERPRETATION – PERSONAL JURISDICTION – SPECIFIC PERSONAL JURISDICTION – GENERAL PERSONAL JURISDICTION – CONSENT TO PERSONAL JURISDICTION – PURPOSEFUL AVAILMENT – DERIVATIVE CLAIMS – DAMAGES

Facts:

This case involves the Circuit Court for Howard County's grant of judgment against appellants, Dynacorp Limited ("Dynacorp"), Moutiny Limited ("Moutiny"), and Faisal Fadul, in favor of appellees, Aramtel Limited ("Aramtel"), Jay Salkini, and Tecore Wireless Systems Middle East and Africa FZ-LLC ("TWS"), as to counterclaims alleging a direct claim of fraudulent inducement and seven derivative claims–for breach of contract, fraud, constructive fraud, negligent misrepresentation, breach of fiduciary duty, conversion, and usurpation of corporate opportunity and corporate waste–as a result of a failed joint venture to provide a wireless telecommunications network in Iraq.

Appellants fraudulently induced appellees to enter into an agreement to invest and loan money to Moutiny, the joint venture, based on Fadul's promise to transfer a company named VitalTel, whose Arabic name was "Al Khat Al Hayawi," to Moutiny. At trial, direct and circumstantial evidence demonstrated that Fadul falsely represented his intent to transfer VitalTel to Moutiny, and that Fadul, instead, transferred VitalTel under its Arabic name to a competing company.

On February 12, 2008, Dynacorp and Fadul filed a complaint in the circuit court against appellees. On May 2, 2008, appellants filed a verified amended complaint, adding Moutiny as a plaintiff. On June 2, 2008, appellees filed a motion to dismiss the verified amended complaint, which the circuit court granted, in part, on February 10, 2009.

On January 27, 2009, Aramtel filed a counterclaim against Fadul and Dynacorp, alleging fraudulent inducement, fraud (intentional misrepresentation and concealment/non-disclosure), constructive fraud, and negligent misrepresentation. On May 28, 2009, Arametl, individually and in a derivative capacity on Moutiny's behalf, filed a first amended complaint against Fadul and Dynacorp and a third-party complaint against TeckTel, asserting a direct claim for fraudulent inducement in Count I, and seven derivative claims in Counts II-VIII. On June 12, 2009, Dynacorp, filed a motion to dismiss the first amended counterclaim, arguing that the first amended counterclaim failed to state a claim upon which relief could be granted and failed to allege any facts upon which Dynacorp could be held liable. On the same day, TeckTel filed a motion to strike or dismiss the third-party complaint, arguing, in part, that it was not subject to the circuit court's jurisdiction because it is an

Iraq-based company with a branch in Virginia. Also on June 12, 2009, Fadul and Moutiny filed a motion to dismiss the first amended counterclaim or, in the alternative, a motion for summary judgment, arguing, in part, that the first amended counterclaim failed to state a claim upon which relief could be granted, that Aramtel was contractually precluded from pursuing derivative claims, and that the circuit court lacked jurisdiction.

On June 10, 2009, appellants filed a second amended complaint. On June 30, 2009, appellees filed a motion to strike the second amended complaint or, in the alternative, to dismiss or for summary judgment as to certain counts contained in the second amended complaint.

From August 3, 2009, to August 7, 2009; August 10, 2009, to August 14, 2009; November 23, 2009, to November 25, 2009; and January 14, 15, and 19, 2010, the circuit court held a sixteen-day bench trial. At the end of trial, the circuit court denied motions for judgments made by appellants and appellees, and directed counsel for the parties to submit closing arguments in writing within sixty days. On April 27, 2010, appellees and appellants submitted proposed findings of fact and conclusions of law. On May 27, 2010, both parties filed rebuttals as to the other's proposed findings of fact and conclusions of law.

On June 21, 2011, approximately thirteen months after receipt of the last post-trial filing, the circuit court issued a Memorandum Opinion and Order finding against appellants as to each of their claims, finding in favor of appellees as to each of its claims (the direct claim and the derivative claims), and ordering appellants to pay appellees damages in the amount of $41,637,099.46. In the Memorandum Opinion, the circuit court ruled that it had jurisdiction over the derivative claims brought by Aramtel on Moutiny's behalf, finding that appellants waived the defense of lack of personal jurisdiction, that appellants contractually consented to the jurisdiction of the circuit court, and that the exercise of personal jurisdiction over appellants was constitutionally reasonable. The circuit court ruled that Fadul and Dynacorp did not have standing to bring the claims asserted by Moutiny. The circuit court awarded damages in favor of appellees, finding that Aramtel initially invested $500,000 in Moutiny and then promised to loan $5,000,000 to be used for operating expenses, and that Aramtel then loaned Moutiny $25,000,000 to be used to fund the purchase of telecommunications equipment from TWS. Accordingly, the circuit court awarded Aramtel damages in the amount of $30,500,000, plus interest in the amount of $11,137,099.46, for a total of $41,637,099.46.

On July 5, 2011, appellees filed a motion to amend judgment, requesting that the circuit court amend the judgment to include interest through the date that the circuit court's order is paid in full. In total, appellees requested that an additional $3,452,293.35 be added to the judgment, and that the judgment be amended to include an award of $8,161.45 for each day that the judgment amount is unpaid. On July 20, 2011, appellants filed an opposition to the motion to amend judgment and noted an appeal of the judgment in the amount of $41,637,099.46. On August 12, 2011, the circuit court granted appellees' motion to amend and issued an amended order-increasing the amount of the judgment to $45,089,392.81, plus interest at a per diem rate of $8,161.45 beginning June 24, 2011. On August 25, 2011, appellants noted an appeal of the judgment in the amount of $45,089,392.81.

Held:

The Court of Special Appeals affirmed the judgment of the circuit court as to Count I, fraudulent inducement, and affirmed the award of $45,089,392.81, plus interest. The Court of Special Appeals vacated the judgments of the circuit court as to Count II through Count VIII, the derivative claims. To recover for fraudulent inducement, a plaintiff must show by clear and convincing evidence, the following: (1) that the representation made by the defendant is false; (2) that its falsity was either known to the defendant or the misrepresentation was made with such a reckless indifference for the truth as to be equivalent to actual knowledge; (3) that it was made for the purpose of defrauding the plaintiff; (4) that the plaintiff not only relied upon the misrepresentation, but also had a right to rely upon it, and that the plaintiff would not have done the thing from which the injury resulted had not such misrepresentation been made; and (5) that the plaintiff actually suffered damage directly resulting from the misrepresentation.

An appellate court may consider grounds that differ from a trial court's in deciding the issue of sufficiency of the evidence for fraudulent inducement. Where an appellate court finds sufficient evidence of fraudulent inducement on grounds that differ from the trial court's, the appellate court may affirm the trial court's ruling.

"A fraudulent pre-existing intent not to perform a promise made cannot be inferred from the failure to perform the promise alone. But, it may be considered with the subsequent conduct of the promisor and the other circumstances surrounding the transaction in sustaining such an inference. And it has been stated that under certain circumstances, a failure or refusal to perform is strong evidence of an intent not to perform the promise at the time it was made, as where only a short period of time elapses between the making of the promise and the failure or refusal to perform it, and there is no change in the circumstances."

Where a defendant negotiated an agreement with definite terms requiring transfer of a company owned by him to a joint venture of which he and the plaintiff were members, and the defendant failed or refused to transfer the company to the joint venture, withdrew funds of the joint venture without disclosure to the plaintiff, misled the plaintiff about the status of the transfer of the company to the joint venture, and unilaterally transferred the company to an entity other than the joint venture, the evidence was sufficient to establish that the defendant made a false representation–*i.e.* that he would transfer the company to the joint venture–with knowledge of the falsity of the representation, for the purpose of defrauding the plaintiff.

Where a promise to perform is not ambiguous, but rather is set forth clearly and definitively in the parties' agreement or contract, and the defendant refuses to or fails to perform, the evidence of the refusal or failure to perform constitutes evidence of the false representation and a defendant's knowledge of the falsity.

Where circumstantial evidence establishes that a defendant made a promise without intending to perform, such evidence constitutes evidence of the false representation and the defendant's knowledge of falsity.

Where circumstantial evidence establishes that a defendant had an ulterior motive for making a false representation to the plaintiff–for example, the evidence demonstrates the defendant used investment funds without disclosure to the plaintiff–the evidence may satisfy the element of purpose of defrauding for fraudulent inducement.

Where evidence demonstrates that a plaintiff would have acted differently but for a representation–which was part of a written contract signed by both parties–a plaintiff satisfies the element of reliance, and the right to rely, on a false representation.

Where evidence establishes that a plaintiff suffered monetary loss as a result of the defendant's false representation, the plaintiff satisfies the element of actual damages.

A defendant is judicially estopped from taking a position in a later action that is inconsistent with a position taken by him or her in an earlier action where: (1) the party took an inconsistent position–either legal or factual–in an earlier litigation; (2) a court accepted the earlier inconsistent position; and (3) the party intentionally misled the court to gain an unfair advantage, for example, by having the court grant summary judgment against the plaintiff.

Where a party previously contended that the other party was required to bring derivative claims not direct claims on behalf of a joint venture and the trial court granted summary judgment as to the direct claims, the party is judicially estopped from contending that the other party may not bring derivative claims on behalf of the joint venture.

Where the plain meaning of the agreement between the parties is clear when viewed from the perspective of a reasonable person in the parties' position, the plain meaning of the language is assigned to the agreement.

Where the plain language of the agreement demonstrates that the parties did not agree that mutual consent was required before either party could bring a derivative action on behalf of a joint venture, the plain language of the agreement is enforceable.

Where the record contains no information to suggest that the parties intended an agreement to prohibit one another from bringing a derivative action on behalf of a joint venture, then the agreement will not be interpreted to include that intent.

A party who signs a contract is presumed to have read and understood its terms and the party will be bound by the terms when the contract is executed. Where the parties sign an agreement containing a forum-selection clause-agreeing "to resolve any disputes arising under the agreement in a court of competent jurisdiction in the State of Maryland"–and the defendant, who signed the written contract after months of negotiation, is a competent, educated, adult business professional represented by counsel, the defendant consents to the personal jurisdiction of Maryland courts.

The trial court does not err in exercising personal jurisdiction over a defendant where the defendant transacts business in the State within the meaning of Section 6-103(b)(1) of the Courts and Judicial Proceedings Article of the Maryland Code.

A defendant purposefully avails itself of the privilege of conducting activities in the State where the defendant: (1) enters into a contract in Maryland with a Maryland resident; (2) prior to signing the contract, engages in negotiations by sending e-mails to the plaintiff in Maryland over the course of several months and signs an earlier agreement in Maryland; (3) after signing the contract, participates in meetings in Maryland and continues to correspond frequently with the plaintiff in Maryland; and (4) sues the plaintiff in a circuit court in Maryland after the relationship between the parties sours.
A plaintiff's claims arise out of activities directed at Maryland where: (1) a contract the parties signed in Maryland provided that the parties' conduct and any dispute concerning the joint venture were to be governed by Maryland law; (2) meetings of the joint venture occurred and were scheduled to occur in Maryland; and (3) status updates concerning the joint venture and the defendant's actions regarding the joint venture as well as requests for additional funds for the joint venture, were e-mailed to the plaintiff in Maryland and provided in person at the joint venture's meeting in Maryland.

Where the causes of action brought on the joint venture's behalf against the defendant arose out of the parties' contract, which was negotiated, signed, and performed, at least in part, in Maryland, then the plaintiff's claims may properly be found to be substantively connected to Maryland.

The exercise of personal jurisdiction is constitutionally reasonable where the record demonstrates that: (1) the burden on the defendant to defend against the claims is minimal; (2) Maryland–the parties' chosen forum State–has an interest in efficiently resolving the controversy and claims between the parties related to the contract; and (3) Maryland has a significant interest in protecting the rights of its residents and in resolving disputes related to a contract signed in Maryland, performed–at least in part, in Maryland, and by its very terms, governed by Maryland law.

Damages generally must be proven with reasonable certainty, or some degree of specificity, and may not be based on mere speculation or conjecture. A trial court errs in entering judgment in the plaintiff's favor where it finds that it cannot make a determination as to damages incurred by the joint venture–*i.e.* that the joint venture's damages were speculative and uncertain.

Tyrone Francis v. State of Maryland, No. 908, September Term 2011; *Milton Smith v. State of Maryland*, No. 913, September Term 2011, filed November 21, 2012. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2012/0908s11.pdf

CLOSING ARGUMENT – FAIR COMMENT – INVITED RESPONSE – APPEAL TO JUROR INTERESTS – MISCONDUCT – MALFEASANCE – MISFEASANCE – SEVERANCE

Facts:

The two appellants, Tyrone Francis and Milton Smith, and their co-defendant, Gregory Hellen, were detectives in the Baltimore City Police Department. On May 4, 2009, they encountered Shawnquin Woodland, a fifteen-year-old City resident. After driving around for some time with him, the detectives deposited Woodland in east Baltimore, approximately three miles from his home. The detectives then encountered another fifteen-year-old, Michael Johnson, whom they later left in Howard County, approximately ten miles from his home.

The defendants were charged with kidnapping, false imprisonment, assault in the second degree, conspiracy, and misconduct in office. They moved to sever all charges and all co-defendants, but the circuit court denied their motion. Appellants elected to be tried by jury while Hellen chose a bench trial. At the close of the State's case, the circuit court granted Hellen's motion for a continuance of his bench trial while it proceeded with appellants' jury trial and verdict.

Appellants objected to the court's proposed misconduct instruction on the grounds that the crime of malfeasance includes only "unlawful" acts. The court denied appellants' objection and instructed the jury that the State had to prove that each appellant "corruptly did the unlawful or wrongful act" of transporting each victim against his will to a location not of his choosing.

In closing, the State argued that the detectives' failure to follow proper police procedures was evidence that they were not conducting a legitimate investigation on the night in question and posed a rhetorical question to the jury: "Yet in their arrogance these Defendants suggest that because these kids live in - can you imagine this argument being made in Howard County or Baltimore County?" The court sustained the defense's objection to this comment, without explanation. The State then asked, "Do you think if there was any legitimacy to [the defendants'] taking these 15-year-olds and dropping them off miles from their homes that [the defendants] would have been suspended without even . . ." Again, the defense interrupted with an objection and the court ordered the statement struck. The court denied appellants' motion for mistrial, holding that the State's attorney was interrupted during its first question and that striking the second question was a sufficient remedy.

In closing argument, counsel for Smith argued to the jury members that the defendants had never been "rogue detectives." Counsel for Francis similarly argued that the detectives were "good officers" against whom no complaints had been filed. The State took up this issue in its rebuttal and argued: "We are not saying . . . that all of [a] sudden their behavior just changes. We're saying this time they got caught." The defense objected, but the court overruled the objection and the State continued: "This time they got caught. Because these two brave young men had the courage to come forward and tell us what happened."

The jury deliberated and returned its verdict acquitting appellants of all counts except misconduct. The court sentenced each appellant on June 1, 2011 to eighteen months of confinement, all suspended, and to eighteen months of probation.

Held:

The Court of Special Appeals affirmed. Comments in closing—both from the defense and the State—on the inference to be drawn from defendants' lack of prior disciplinary history was fair comment or, in the alternative, the State's arguments were a proper invited response to the defense's improper comment. State's comment insinuating that city residents should be treated no differently by police than county residents was improper. State's comment that defendants' suspensions indicate wrongdoing was improper. In light of the weight of the evidence of misconduct, the trial court's instructions to ignore struck arguments, and the court's swift action interrupting the State's improper—but indirect—comments, the defendants were not unfairly prejudiced.

Although the Maryland Pattern Jury Instruction Committee and a majority of states define "malfeasance" to exclude conduct that is merely "wrongful" and requires an "unlawful" act, the Court of Appeals in *Duncan v. State*, 282 Md. 385, 387 (1978), defined malfeasance as "the doing of an act which is wrongful in itself." Even if the Court of Appeals were to overrule *Duncan*, appellants' convictions would stand because appellants did not preserve an objection to the charging documents. Appellants' indictments alleged *general* misconduct and that appellants acts were "unlawful and improper;" as such, the State could have failed to prove that the impugned acts were unlawful, but nonetheless proved that the acts were improper and obtained a conviction for misconduct consistent with the charging documents.

The trial court did not err when it suspended the bench trial of one co-defendant and continued with appellants' jury trial and verdict. Appellants had the right only to exclude inadmissible evidence from their trial and no authority supports their argument that they were entitled to have the jury hear their co-defendant's defense. Moreover, appellants did not explain how or why they were prevented from introducing favorable evidence from their co-defendant's bench trial in their own trial.

Carlton Everette Joyner v. State of Maryland, No. 1173, September Term 2011, filed November 29, 2012. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2012/1173s11.pdf

CRIMINAL LAW – APPEALS – REVIEWABILITY – DISCRETIONARY REVIEW

Facts:

On November 4, 2010 at about 6:00 A.M., officers and agents with the District of Columbia Metropolitan Police Department participated in the execution of a search and seizure warrant at an apartment located in Oxon Hill, Maryland. The warrant had been issued for the search and seizure of marijuana. Carlton E. Joyner ("appellant") was present when officers and agents arrived and entered the residence. Officers and agents searched the apartment and uncovered a loaded rifle magazine as well as a Ziploc bag that contained marijuana and cocaine. As police officers were in the process of transporting appellant to police barracks, appellant was advised his rights. Appellant had no questions about his rights and never requested to speak with an attorney. Thereafter, appellant made some statements during this interval, admitting that the drugs belonged to him and that he was selling them.

Prior to trial, appellant filed a motion to suppress statements that he provided to law enforcement officers while being transported to the police station. Appellant claimed that he was never asked at any point in time for any kind of written waiver and that his rights were given in an informal manner. After conducting a hearing, the circuit court denied appellant's motion to suppress.

At trial, the State called Nicole Edwards ("Ms. Edwards"), a senior forensic chemist with the Drug Enforcement Administration. Over appellant's objection, Ms. Edwards was accepted as an expert in forensic chemistry. Based on Ms. Edwards' analysis, she concluded that the contraband that had been recovered consisted of cocaine base and marijuana. The State also called Officer Christopher Schultz ("Officer Schultz") who was accepted as an expert in identification, packaging, valuation, and distribution for cocaine and marijuana. Officer Schultz concluded that the contraband recovered was indicative of possession with intent to distribute both the marijuana and cocaine. Further, the circuit court permitted the State to play an alleged audiotape of telephone calls from prison by appellant. Following the close of the State's case, the circuit court excluded appellant's mother from testifying as a witness for failing to notify the State and listing her in voir dire. At the close of trial, a jury convicted appellant of possession with intent to distribute marijuana and possession with intent to distribute cocaine. This appeal followed.

Held: Affirmed.

The Court of Special Appeals held that when an appellant fails to raise a claim at the trial level that an arresting officer did not advise appellant that appointed counsel would be available at no expense, the argument is not preserved for appellate review. Md. Rule 8-131(a). The Court explained that a failure to raise a suppression issue at the trial level constitutes a waiver if there is a hearing on the motion and the defendant fails to present any grounds to support the motion. *Carroll v. State*, 202 Md. App. 487, 510 (2011), *aff'd on other grounds*, 2012 Md. LEXIS 613 (Sept. 27, 2012). Accordingly, the Court concluded that appellant's specific challenge to the admission of his statement had been waived.

Further, the Court held that the circuit court did not abuse its discretion in refusing to permit appellant's mother from testifying because her exclusion in no way influenced the verdict of the case.

Additionally, the Court held that the circuit court did not err in permitting Ms. Edwards's testimony because the State sufficiently disclosed her name, written conclusions, and qualifications to appellant prior to trial.

Finally, the Court held that the circuit court did not err in permitting the State to play an audiotape of alleged telephone calls from prison by appellant because it was incumbent upon the appellant claiming error to produce a sufficient factual record for the Court to determine whether error was committed. *Mora v. State*, 355 Md. 639, 650 (1999). Accordingly, the Court of Special Appeals affirmed the judgment of the circuit court.

Leroy Poole v. State of Maryland, No. 2126, September Term 2010, filed September 26, 2012. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/2126s10.pdf

SEQUESTRATION OF LAW ENFORCEMENT OFFICER IN A CRIMINAL CASE

Facts:

On June 27, 2009, K.G., a 15-year-old-girl, was visiting Ocean City from Kansas. That morning, while at a lemonade stand on the boardwalk, appellant approached her, introduced himself as "Leroy," told her he was a personal trainer, and asked for her name. She gave him her name and returned to the beach with her friends.

After a few hours, Ms. G. returned to the lemonade stand. A posted sign indicated that the stand was closed but would reopen in five minutes. Ms. G. went into a nearby store to pass the time. Appellant entered the store, told her that he wanted to show her something, and then led her to the back "with his arm behind me, guiding me to the back." Ms. G just "kind of went with it, because I didn't know what to do." He took her to a closet, shutting the door behind him, and locking it. He then pushed her into a small bathroom, shut the door, and locked it. There was no one else around. Appellant's body blocked the door to the bathroom, which was the only exit. Once they were inside the bathroom, appellant attempted to kiss Ms. G, touched her hair, and lifted her dress and put his finger in her vagina. Appellant then pushed her down to the toilet seat, unbuttoned his pants, and started fondling himself with his hand on the outside of his underwear. She repeatedly asked him to stop, which he eventually did.

Before trial began, appellant asked the court to sequester the investigating detective. The prosecutor asked that the detective remain in the courtroom as the State's representative. The court denied the motion, and the trial proceeded. The jury convicted appellant of third and fourth degree sexual offenses, second degree assault, false imprisonment, and sexual solicitation of a minor.

Held: Affirmed in part, reversed in part.

Pursuant to Rule 5-615(a), when a party requests sequestration prior to the beginning of testimony, the court is required to grant the motion to sequester witnesses, subject to certain exceptions. One exception, set forth in Rule 5-615(b), is that a court shall not exclude "an officer or employee of a party that is not a natural person designated as its representative by its attorney." A law enforcement officer involved in a criminal prosecution falls within the "officer or employee" exception to the mandatory sequestration requirement of Rule 5-615(a), and pursuant to Rule 5-615(b), the officer may remain in the courtroom if designated as the State's representative. Thus, the court properly denied the motion to sequester the detective.

Appellant's conviction for sexual solicitation of a minor is reversed. There was insufficient evidence that appellant solicited Ms. G. Prior to the assault in the locked room, appellant's contact with Ms. G. consisted of telling her that he wanted to show her something, putting his arm behind her back, and guiding her to the room he locked. He then told her that she was beautiful, and he touched her hair. Appellant did not "command, authorize, urge, entice, request, or advise" Ms. G. to engage in any sexual activity with him. Instead, he just acted, cornering Ms. G. and inserting his fingers in her vagina. After the incident, appellant obtained her phone number and told her that he hoped to see her again. He later sent her a text message, which said "good afternoon." She did not reply to it. This conduct does not qualify as solicitation to engage in sexual activity.

Ronald L. Bradley, Jr. v. Dara Lawrence Bradley, No. 560, September Term 2011, filed November 27, 2012. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2012/0560s11.pdf

DAMAGES – MISREPRESENTATION – BREACH OF PROMISE TO MARRY

Facts:

Ronald L. Bradley, Jr. ("appellant") and Dara Lawrence Bradley ("appellee") met in 2003. At the time, appellant was married and had three children. In 2004, appellant told appellee that he had been separated from his wife for several years and that he had instituted divorce proceedings. A courtship ensued, and several months later appellant moved in with appellee. Appellant thereafter proposed marriage to appellee. In September 2006, appellant announced that his divorce was finalized. He produced a plaque that contained a "Judgment of Absolute Divorce," which included the circuit court's gold seal, the typed name of a judge, and the forged signature of the clerk of court. Appellant again proposed marriage to appellee, and she agreed. On April 11, 2007, the couple participated in a wedding ceremony at a chapel in Las Vegas, Nevada, before about 30 of appellee's friends and family who traveled to Las Vegas for the wedding.

In 2008, after two incidents of battery, appellee searched the Maryland Judiciary Case Search website to research previous domestic violence cases involving appellant. Appellee then discovered that appellant's divorce was not listed in the database. Appellee confronted appellant, who eventually confessed that he was still married to his first wife. The two separated, and appellee began therapy with a psychiatrist. Appellee was diagnosed with anxiety, depression, post-traumatic stress disorder, and adjustment disorder.

Thereafter, appellee sought to reconcile with appellant, and indicated her desire that appellant divorce his first wife, annul appellant and appellee's marriage, reimburse the wedding guests for their expenses, and "re-marry" appellee. Appellant moved back into appellee's house briefly. Appellant filed for divorce from his first wife, but did not fulfill appellee's other requests. In May 2008, appellant moved out of appellee's house.

Appellee filed a complaint for annulment of the marriage on May 23, 2008. Appellee and two other witnesses testified that after filing the complaint, appellant attempted to make verbal and written contact with appellee, followed appellee in his vehicle, drove his vehicle past appellee's house, sat in his vehicle in appellee's driveway and a neighbor's driveway, flickered his vehicle lights on and off near appellee's house in the middle of the night, and stared at appellee from behind a fence near her house. In August 2008, the police responded to an altercation that occurred between the parties. Thereafter, appellee obtained a protective order against appellant, but he continued to make contact with appellee until the summer of 2010.

In August 2008, appellee amended her complaint for annulment to include various tort claims. At the conclusion of the trial, the jury returned a verdict in favor of appellee in the amount of $287,000 in compensatory damages, aggregated for counts of intentional misrepresentation, negligent misrepresentation, and intentional infliction of emotional distress. The jury also awarded $1,000 each for two counts of battery, and $180,000 in punitive damages.

After trial, appellant filed a "Motion for New Trial, Judgment Not Withstanding the Verdict, and to Alter or Amend Judgment." The circuit court denied all relief. On appeal, appellant argued that appellee's claims for intentional and negligent misrepresentation were simply a refitting of the abolished action for breach of promise to marry, and that the trial judge erred by failing to *sua sponte* dismiss the claims. Additionally, appellant argued that there was insufficient evidence to support the claim for intentional infliction of emotional distress, and that the circuit court erred by sending that claim to the jury. Finally, appellant argued that the circuit court abused its discretion by denying a motion for mistrial and denying a motion for a continuance of the trial.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err in sending the intentional and negligent misrepresentation claims to the jury because there was no reason to contort the claim into one for breach of promise to marry. Appellant's claim that he was divorced constituted a false statement, and appellee changed her position in reliance on that misrepresentation, which resulted in damages. The trial judge carefully distinguished between breach of promise to marry and tort causes of action at trial, and on that basis determined which evidence could be presented to the jury. Evidence pertaining to unfulfilled promises regarding children, standard of living, and other future plans was properly excluded, because such damages were more properly construed as arising out of the statutorily-barred action for breach of promise to marry. Evidence of damages involving emotional and psychological distress, on the other hand, were ruled admissible as damages arising out of the misrepresentation. Further, the Court of Special Appeals held that the issue was preserved for appellate review because although appellant never raised the breach of promise to marry issue at trial, the trial judge decided the issue sua sponte.

Regarding the intentional infliction of emotional distress claim, the Court of Special Appeals held that the sufficiency of evidence issue was not preserved for review because it was raised for the first time in a motion for new trial and for judgment notwithstanding the verdict.

Additionally, the Court of Special Appeals held that the circuit court did not abuse its discretion in declining to order a mistrial because appellant failed to articulate any prejudice, much less prejudice so great that he was denied a fair trial.

Finally, the Court of Special Appeals held that the circuit court did not abuse its discretion in declining to grant a continuance of the trial in order for appellant to obtain new counsel. Appellant was on actual notice of his attorney's withdrawal as counsel more than six months prior to trial.

Moreover, that attorney had completed all discovery prior to withdrawing as counsel, making it more than feasible for new counsel to be retained and prepare for trial.

In Re: Victoria C., No. 174, September Term 2012, filed November 26, 2012. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2012/0174s12.pdf

FAMILY LAW – CHILD CUSTODY – VISITATION – THIRD PARTIES – EXCEPTIONAL CIRCUMSTANCES ANALYSIS

Facts:

Victoria C. was born on August 25, 1993. After Victoria's mother died, her father, George, married Kieran, Victoria's stepmother, in 2005. George and Kieran have two sons, age five and three. Victoria lived with father from birth until March 2009, when she was sent to live with a maternal aunt in Texas. Victoria went to live with her aunt after an abuse allegation against George was sustained. Victoria remained in Texas with her aunt for a period of one year and then returned to Maryland in March 2010. Upon Victoria's return from Texas, George did not allow Victoria to return home and Victoria was taken into the care and custody of the Carroll County Department of Social Services. Victoria was adjudicated to be a child in need of assistance ("CINA").

As an ancillary action to the CINA proceeding, Victoria sought visitation with her two minor siblings, which George and Kieran opposed. A hearing was held before a Master. Victoria testified that she wanted visitation with her brothers. George and Kieran both testified that they opposed visitation because of the poor relationship between Victoria and George. Kieran expressed concern that, if visitation were permitted, the hostility between Victoria and George would adversely affect the relationships between George and his sons as well as between Kieran and her sons. Victoria's social worker recommended against visitation, as did a therapist who had worked with Victoria and George.

The Master recommended visitation, finding that Victoria had proved exceptional circumstances as required by Maryland law. George and Kieran filed timely exceptions. Before the exceptions hearing, Victoria turned eighteen years old and terminated Department of Social Services custody. The circuit court denied George and Kieran's exceptions. This appeal followed.

Held: Reversed.

Case remanded for entry of an order denying Victoria's petition for visitation.

The Court of Special Appeals held that when a third party, including an adult sibling, seeks visitation with a minor child, the third party must satisfy the standard articulated in *Koshko v. Haining*, 398 Md. 404 (2007). Parents possess a constitutionally protected fundamental right to direct and control the upbringing of their children. In order to safeguard the parent's liberty interest, *Koshko* requires a threshold showing of either parental unfitness or exceptional circumstances

indicating that the lack of third-party visitation has a significant deleterious effect upon the children who are the subject of the petition.

Exceptional circumstances are evaluated on a case-by-case basis. In the context of third-party visitation cases, the Court of Special Appeals has focused on the ability of the party seeking visitation to show future detriment upon the minor children if visitation is not permitted. A finding of future detriment must be based on solid evidence in the record; harm to a minor child will not be presumed.

Harm suffered by an adult as the result of a denial of visitation with minor children is not a consideration in the exceptional circumstances analysis. The focus instead must be on whether a minor child is harmed by the absence of visitation.

The Court of Special Appeals determined that the circuit court had improperly applied *Koshko* in assessing Victoria's visitation petition. There was no evidence in the record of any harm to the minor children due to the lack of visitation with Victoria. Rather, there was testimony indicating potential harm to the minor children from lack of visitation. The circuit court improperly considered harm to Victoria due to the denial of visitation. Victoria is an adult and harm suffered by adults as the result of a denial of visitation should not be considered. Accordingly, the Court reversed the circuit court and remanded for entry of an order denying visitation.

In Re: Adriana T., No. 433, September Term 2012, filed November 29, 2012. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2012/0433s12.pdf

EVIDENCE – TELEPHONE TESTIMONY – EXPERT & LAY WITNESSES – OPINION TESTIMONY – FAMILY LAW – PARENTAL DUTIES & RIGHTS – TERMINATION OF PARENTAL RIGHTS – INVOLUNTARY TERMINATION

Facts:

In November 2009, the Prince George's County Department of Social Services ("Department") filed a Child In Need of Assistance ("CINA") Petition for minor child, Adriana T., alleging that Adriana T.'s mother, Monet T. ("Mother"), was a risk to herself and to others, and recommended that she not be left alone with Adriana T. While in labor, Mother attempted to leave the hospital, despite her physician's medical advice. She was involuntarily committed to the hospital's mental unit, and Adriana T. was placed in the temporary care and custody of the Department. The Circuit Court for Prince George's County, sitting as a juvenile court, determined that Adriana T. was a CINA and could be placed with a relative.

Several years earlier, in December 2001, Mother suffered from a psychiatric episode and believed that her mother, Mary T. ("Grandmother") was complicit in a conspiracy against her. Mother fired two shots at Grandmother, but Grandmother survived. Mother was arrested and charged, but found not criminally responsible, and committed to Clifton T. Perkins Hospital Center.

In May 2010, the Department placed Adriana T. with Grandmother in North Carolina. During this time, a social worker, Ms. Joyce Trott, visited Grandmother's residence once a month, monitored Adriana T.'s care, and provided reports to the Department. In October 2010, the Department filed a Petition for Guardianship with Right to Consent to Adoption. Although Adriana T.'s father, Detuan J., consented to the petition, Mother noted her objection. In April 2011, the court determined that the matter was a contested guardianship, and ordered a hearing on the merits.

In June 2011, Adriana T.'s counsel, pursuant to Md. Rule 2-513, filed a motion to take Ms. Trott's testimony by telephone. Mother opposed, arguing that (1) the motion was not timely and deprived her of the opportunity to cross-examine the witness, resulting in substantial prejudice; and (2) the court could not assess the witness' demeanor and credibility. The trial court granted Adriana T.'s motion. Additionally, over Mother's objections of relevancy, the court permitted Grandmother to testify regarding her medical recovery from the gunshot wounds that Mother inflicted. In April 2012, the court ordered that Mother's parental rights be terminated pursuant to § 5-323(d) of the Family Law Article.

Held: Affirmed.

The Court of Special Appeals held that there was good cause to allow the motion to be filed because Adriana T. lacked funds to finance Ms. Trott's travel and hotel expenses. Mother received notice of the content of Ms. Trott's status reports and accordingly, was aware of what she would communicate through her testimony. Concerning Mother's inability to contact Ms. Trott, the court willingly assessed the lack of the required contents of Md. Rule 2-513, and determined that Adriana's failure to include the contents were immaterial. Ms. Trott was a disinterested party, who testified to Adriana's general welfare during her placement with Grandmother, and thereby, Ms. Trott's demeanor and credibility were not likely to be critical to the outcome of the proceedings, to the extent that her physical presence was required. Mother's ability to effectively cross-examine was not stifled because Ms. Trott testified by telephone. Mother had a full and fair opportunity to cross-examine, but chose to limit that examination to one question. We concluded that the trial court did not abuse its discretion in permitting the telephone testimony.

Regarding Grandmother's testimony concerning her recovery, we held that it was relevant to the termination of parental rights proceeding because Grandmother's recuperation demonstrated the extent of the damage caused by Mother's violent conduct. Grandmother's testimony also denoted her ability to care for Adriana T., despite the shooting incident, Mother's inability to raise Adriana T., and the potential peril Mother posed to Adriana T.'s health and well-being. As a result of the plausibility of Mother's future violent conduct, the court did not err in admitting the testimony.

Noel Tshiani v. Marie-LouiseTshiani, No. 2655, September Term 2010, filed November 21, 2012. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2012/2655s10.pdf

FAMILY LAW – MARRIAGE – VALIDITY – PROOF – CEREMONIAL MARRIAGES – PRESUMPTIONS

FAMILY LAW – MARRIAGE – VALIDITY – PROXY MARRIAGE/MARRIAGE BY PHONE

GOVERNMENT – COURTS – JUDICIAL COMITY – PUBLIC POLICY

Facts:

Marie-Louise Tshiani filed for absolute divorce, alimony, property division, child support, and attorney's fees against Noel Tshiani. Marie-Louise testified that the parties were married in the Democratic Republic of the Congo ("Congo") on December 23, 1993. She further testified that Noel was not present at the wedding but participated by phone and had his cousin stand in his place. She produced business records from the World Bank (Noel's employer) which included a marriage certificate from the Congolese Embassy. Noel testified that he did not participate in the ceremony and he was not even aware of it. He also argued that the type of ceremony described is not recognized outside the Congo. Marie-Louise testified that the day after the ceremony, she moved in with Noel, who lived in Virginia. Marie-Louise further stated that in January 1994, the parties participated in a renewal of vows ceremony at a catholic church in Virginia. Noel admitted that he participated in this ceremony but said it was not a wedding ceremony.

The parties acted like a married couple. Noel applied for a dependancy allowance and health insurance for Marie-Louise based on her status as his spouse. He also applied for Marie-Louise to obtain permanent resident alien status. Since 1994, Noel has listed Marie-Louise as his spouse on his tax returns. Additionally, Noel admitted several times under oath that he was married to Marie-Louise. Moreover, the parties have had three children together. After hearing the testimony, the Circuit Court for Montgomery County concluded that a valid marriage existed between the parties and that the marriage took place in the Congo on December 23, 1993.

On appeal, Noel argued that the circuit court erred in finding a valid marriage for two reasons. First, he claimed that Marie-Louise failed to provide any evidence that the type of marriage ceremony she described constituted a valid marriage in the Congo. Second, he asserted that because Marie-Louise presented no evidence of foreign law, Maryland law applied, and Maryland law does not recognize proxy marriages.

Held: Affirmed.

Proof of foreign law is not required to raise a presumption of a valid foreign marriage. Instead, when evidence suggests that the parties were lawfully married, it raises the presumption that the marriage was valid according to the law of the foreign state or country where it occurred. A certificate of marriage, testimony from the wife regarding the marriage ceremony, admissions from the husband under oath, three children, and the filing of joint tax returns was enough to raise the presumption of a valid foreign marriage. Noel did not present any evidence to rebut this presumption.

Because a valid foreign marriage existed, the Court of Special Appeals did not need to decide whether the marriage would be valid if performed in Maryland. Instead, the Court had to decide whether Maryland recognized this valid foreign marriage for the purposes of a divorce proceeding under Maryland law. Under the doctrine of comity, for the purposes of the application of Maryland domestic divorce laws, Maryland courts will honor foreign marriages that were valid where performed unless the General Assembly expressly prohibits the marriage or the marriage is repugnant to Maryland public policy. The Court found Maryland would recognize the Tshiani marriage because the General Assembly has not voided a marriage when one party participates over the phone and has another individual stand in for him. This type of marriage is not repugnant to Maryland public policy because it is not specifically prohibited by law, it does not harm the liberties of either spouse, and it is not inconceivable that in the future such a marriage may be valid when performed in Maryland. Indeed, distant marriages sometimes are a couples' only option. Not permitting marriages by proxy or by phone could deprive these couples of the emotional and legal benefits that accompany marriage.

Roberto Campusano, et al. v. Lusitano Construction, LLC, et al., No. 1529, September Term 2011, filed November 21, 2012. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2012/1529s11.pdf

MARYLAND WAGE PAYMENT AND COLLECTION LAW – MARYLAND WAGE AND HOUR LAW – "EMPLOYER" – ECONOMIC REALITY TEST

Facts:

Geoffrey de Oliveria was the sole owner of Lusitano Construction, LLC. Appellants worked as construction laborers on two of the LLC's projects, one of which was supervised by Geoffrey's father, Francisco. Francisco set appellants' work schedule, assigned their tasks, managed supplies, maintained work logs, and "occasionally" distributed paychecks drafted by Geoffrey or Lusitano Construction. Francisco testified that he purchased supplies for the Valley Terrace project with personal funds. Francisco also testified that he did not hire appellants or set their wages, and the only contrary testimony was that one of the appellants "thought" Francisco may have had some influence on his wages, as his supervisor.

At some point in 2007, Geoffrey stopped issuing payment to appellants. Francisco told the workers that Geoffrey would pay them with money from other projects once those projects finished. The evidence showed that Geoffrey had an unspecified $50,000.00 line of credit with his father discharged in bankruptcy in 2009. One appellant testified that Francisco paid some of his wages from personal funds, but Francisco denied this.

On February 10, 2010, appellants brought suit against appellees for violations of the federal Fair Labor Standards Act of 1938 ("FLSA"), §§ 206-207, as well as §§ 502 and 505 of the Maryland Wage Payment and Collection Law. At the conclusion of a one-day trial on October 27, 2010, the trial court found Geoffrey liable under the FLSA and the Payment and Collection Law, and found that Francisco was not an "employer" under either the FLSA or the Payment and Collection Law. Accordingly, the court entered judgment against Geoffrey and Lusitano Construction for treble damages of $57,400.00 on November 1, 2010. The judgment did not address appellants' claims for attorney's fees or their claims against Francisco. On November 10, 2010, appellants moved to amend the judgment to award attorney's fees and costs and to enter judgment in favor of Francisco. The court denied appellants' motion on September 8, 2011.

Held:

The Court of Special Appeals entered judgment under Maryland Rule 8-604(e) in favor of Francisco de Oliveira as to all claims and remanded only appellants' request for attorney's fees

to the trial court for consideration. Federal courts developed the "economic reality" test and its variants when applying terms such as "employer," "employee," and "independent contractor" in the Fair Labor Standards Act of 1938. In *Newell v. Runnels*, 407 Md. 578, 649-54 (2009), the Maryland Court of Appeals held that a defendant's status as an "employer" under the Maryland Wage and Hour Law can be determined by the economic reality test for "control," which examines whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. No case has yet decided whether any economic reality test applies to the Maryland Wage Payment and Collection Law. Because both the Wage and Hour Law and the Payment and Collection Law define "employer" broadly, in abrogation of common law, and have remedial purposes, the reasoning of *Newell* applies to both. It follows that the economic reality test for "control" should determine whether a defendant is an "employer" under either statute. Where a supervisor does not control hiring or wages, does not own or control the entity that employed the plaintiffs, and has not personally guaranteed payment or intentionally misled employees about the prospects of payment, the supervisor is not an "employer" under the economic reality test despite the fact that the supervisor set some conditions of employment, maintained employment records, distributed payment from the employer to the employees, and incurred some reimbursable expenses on behalf of the employer.

Fidelity First Home Mortgage Company v. Charlene Williams, No. 726, September Term 2011, filed November 27, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2012/0726s11.pdf

TORTS – NEGLIGENT RETENTION OF EMPLOYEE – FRAUD – BREACH OF FIDUCIARY DUTY – VIOLATIONS OF PROTECTION OF HOMEOWNERS IN FORECLOSURE ACT (PHIFA) – VICARIOUS LIABILITY – PUNITIVE DAMAGES

Facts:

In 2006, Charlene Williams, the appellee, was the victim of a fraudulent foreclosure rescue scheme perpetrated by James Fox, then an employee of Fidelity First Home Mortgage Company, the appellant, and James Dan, a former employee of that same entity. By virtue of the scheme, Williams lost title to her home and all equity in it. In the Circuit Court for Prince George's County, Williams sued Fidelity First, Fox, and Dan. As relevant here, she alleged that Fidelity First was vicariously liable for fraud, breach of fiduciary duty, violations of the Protection of Homeowners in Foreclosure Act (PHIFA), promissory estoppel, unjust enrichment, and intentional infliction of emotional distress. She further alleged that Fidelity First was directly liable for negligently hiring, supervising, and/or retaining Fox. She sought compensatory and punitive damages, attorneys' fees, and treble damages under PHIFA.

A jury found Fidelity First liable for negligent retention of Fox and vicariously liable for Fox's fraud, breach of fiduciary duty, and violations of PHIFA. It awarded compensatory and punitive damages. The court awarded attorneys' fees, but declined to award treble damages.

Fidelity First appealed from the judgment, arguing that the evidence was insufficient to support the jurors' verdicts as to fraud, breach of fiduciary duty and violations of PHIFA because Fox was not acting within the scope of his employment at the time of the allegedly wrongful conduct; that the evidence was insufficient to prove negligent retention or supervision; that punitive damages may not be awarded purely on the basis of vicarious liability; and that the attorneys' fees were duplicative of the punitive damages.

Held: Affirmed.

The evidence was legally sufficient for reasonable jurors to find by a preponderance of the evidence that Fidelity First continued to employ Fox when it had reason to know that Fox had engaged in a fraudulent foreclosure rescue scheme and would continue to do so. The evidence also was legally sufficient for the jurors to find that Fox was acting within the scope of his employment when he engaged in the fraudulent conduct.

Punitive damages legally could be awarded against Fidelity First, as the employer of Fox, based upon its vicarious liability for the fraud. When, as here, there is clear and convincing evidence that an employee committed fraud within the scope of his employment and acted with actual malice, that conduct may support an award of punitive damages against the employer.

There was no abuse of discretion in the award of attorneys' fees.

Return to ToC

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated October 26, 2012, the following attorney has been disbarred by consent, effective November 1, 2012:

STEVEN HAROLD BLOCK

*

By an Order of the Court of Appeals dated September 11, 2012, the following attorney has been indefinitely suspended by consent, effective November 10, 2012:

JONATHAN SETH SHURBERG

*

This is to certify that

DARYL D. JONES

has been replaced on the register of attorneys in this state as of November 16, 2012.

*

By an Order and Opinion of the Court of Appeals dated November 19, 2012, the following attorney has been indefinitely suspended:

GERALD ISADORE KATZ

*

By an Order of the Court of Appeals dated October 23, 2012, the following attorney has been disbarred by consent, effective November 23, 2012:

SHARON LOUISE GUIDA

*

RULES ORDERS AND REPORTS

A Rules Order pertaining to Categories 1, 4, 5, 9, and 12 of the One Hundred Seventy Fourth Report of the Standing Committee on Rules of Practice and Procedure was filed on November 1, 2012:

http://mdcourts.gov/rules/rodocs/ro174categories145912.pdf

Return to ToC

JUDICIAL APPOINTMENTS

On October 25, 2012, the Governor announced the appointment of **JEROME RICHARD SPENCER** to the Circuit Court for Charles County. Judge Spencer was sworn in on November 14, 2012 and fills the vacancy created by the retirement of the Honorable Steven G. Chappelle.

*

On October 25, 2012, the Governor announced the elevation of the **HON. EDWARD GREGORY WELLS** to the Circuit Court for Calvert County. Judge Wells was sworn in on November 15, 2012 and fills the vacancy created by the retirement of the Honorable Warren J. Krug.

*