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http://mdcourts.gov/opinions/coa/2017/14a16ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland ("AGC"), acting through Bar Counsel, filed in the Court of Appeals a Petition for Disciplinary or Remedial Action ("Petition") against Respondent, Lance Butler, III. The Petition alleged violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 3.3 (Candor Toward the Tribunal) and 8.4 (Misconduct). Those violations stemmed from Respondent's course of dishonest behavior, including making a series of material misrepresentations to the Inspector General of the federal agency at which he worked; testifying falsely at a prior attorney discipline proceeding; and either failing to file or making misrepresentations on certain tax returns for multiple years.

This Court assigned the matter to the Honorable Beverly J. Woodard (the "hearing judge") to conduct an evidentiary hearing and make findings of fact and conclusions of law. Respondent did not respond to Bar Counsel's inquiries, nor did he appear at the hearing. The hearing judge made the following findings of fact by clear and convincing evidence.

From 1984 to 2015, Respondent held various non-legal positions at the United States Agency for International Development ("USAID"). In 2007, while continuing to work for USAID, Respondent was admitted to the Bar of Maryland. In addition to his employment at USAID, Respondent represented clients in legal matters until roughly 2014.

In April 2012, the USAID Office of the Inspector General received an anonymous complaint about Respondent. The complaint alleged, among other things, that Respondent falsified his USAID timesheets; improperly provided legal advice to coworkers for pay; made material misrepresentations to his federal loan servicer to obtain a deferral; and failed to pay back income taxes. The Inspector General referred the matter to the AGC, which sought to contact Respondent. After repeated attempts, the AGC finally made contact. In January 2015, the Court

of Appeals reprimanded Respondent for violating MLRPC 8.1 for knowingly failing to respond to a disciplinary authority.

In April 2014, the USAID Inspector General investigated the allegations in the anonymous complaint. After reviewing various documents and records and conducting interviews of relevant witnesses, the Inspector General interviewed Respondent. At first, Respondent made multiple misrepresentations. When the interviewer revealed that she had been investigating Respondent for over a year, Respondent admitted that he had answered untruthfully. The Inspector General's investigation revealed the following details about Respondent's misconduct.

In February 2012, Respondent falsely stated on an annual ethics disclosure form that he had no reportable assets or sources of income, liabilities, outside positions, agreements, or arrangements for himself outside of USAID. He also failed to file this report for the years 2010, 2011, 2013, and 2014. In addition, after becoming delinquent on his student loan payments, Respondent materially misrepresented his employment status to his federal loan servicer to obtain a deferral.

Respondent also intentionally failed to file federal income tax returns for tax years 2008, 2009, and 2010; he failed to inform USAID that he had not filed state income tax returns for tax years 2008, 2009, and 2010; and he failed to pay the entirety of his income taxes for tax years 2009, 2010, and 2013. Respondent then falsely stated to USAID that he had remedied his late filings and payments. In 2012, he intentionally misrepresented to USAID the amount of his outstanding debt. Further, Respondent falsified multiple USAID timesheets, claiming that he worked roughly 200 hours at USAID when, in fact, he was working as an attorney. Finally, Respondent admitted to the Inspector General that during his prior disciplinary proceeding with the AGC, he provided false testimony in both a deposition and hearing.

Based upon these findings, the hearing judge concluded, by clear and convincing evidence, that Respondent violated MLRPC 3.3 and 8.4(a), (b), (c), and (d). Neither party filed exceptions.

On September 7, 2017, after oral argument, at which only Bar Counsel appeared, the Court of Appeals issued a per curiam order immediately disbarring Respondent.

Held:

The Court of Appeals concluded that Respondent violated Rules 3.3 and 8.4(a), (b), (c), and (d). The Court held that Respondent violated Rule 3.3(a)(1) by falsely testifying at his prior attorney discipline hearing in January 2014. Respondent violated Rule 8.4(b) by committing criminal acts that reflected unfavorably on his character for truthfulness. The Court agreed with the hearing judge that Respondent violated 18 U.S.C. § 1001; 26 U.S.C. § 7203; 20 U.S.C. § 1097; and Maryland Code Annotated, Criminal Law § 9-101. In addition, each of these violations of Rule 8.4(b) constituted a violation of Rule 8.4(c) because each act involved dishonesty, fraud, deceit, or misrepresentation.

The Court further held that Respondent's conduct was also prejudicial to the administration of justice, in violation of Rule 8.4(d). Finally, Respondent's violations of the Rules constituted multiple violations of Rule 8.4(a). The proper sanction for Respondent's prolonged course of intentionally dishonest behavior was disbarment.

Attorney Grievance Commission of Maryland v. Louisa Content McLaughlin, Misc. Docket AG No. 47, September Term 2016, filed October 20, 2017. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2017/47a16ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Petitioner, Attorney Grievance Commission ("AGC"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Louisa Content McLaughlin based upon her representation of Doris Leedom, an elderly and vulnerable adult. Bar Counsel charged McLaughlin with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.5(a) (Fees), 1.15(a) and (e) (Safekeeping Property), 8.1(a) and (b) (Bar Admission and Disciplinary Matters), 8.4(a), (c), and (d) (Misconduct), and Maryland Code (1957, 2010 Repl. Vol.) § 10-306 of the Business Occupations and Professions Article ("BP") (Misuse of Trust Money). The charges stemmed from a complaint lodged by Paula McCabe, the daughter of, and power of attorney for Ms. Leedom. The Court of Appeals designated the Honorable Judge Kevin Mahoney of the Circuit Court for Harford County to hear the matter and make findings of fact and conclusions of law.

McLaughlin undertook representation of Ms. Leedom, then a resident of New York, in 2011 and prepared estate planning documents for her. In 2013, Ms. Leedom moved to Maryland. McLaughlin drafted a Maryland power of attorney that named George Leedom as Ms. Leedom's power of attorney, and Mrs. McCabe as her successor. In June 2014, Mr. Leedom entered a rehabilitation facility for substance abuse treatment. McLaughlin learned of this development from Mrs. McCabe, but did not discuss the matter with Ms. Leedom or apprise her of the risks of retaining Mr. Leedom as her power of attorney. Mr. Leedom continued to hold his mother's power of attorney for approximately six months. In August 2014, McLaughlin assisted Ms. Leedom with the sale of two properties in Aberdeen, Maryland. McLaughlin agreed to hold the proceeds in escrow until Mr. Leedom and Mrs. McCabe could agree on their use for Ms. Leedom's benefit. Despite this agreement, McLaughlin disbursed $10,000 to Mr. Leedom in October 2014 without notifying Mrs. McCabe or obtaining her consent.

McLaughlin became Ms. Leedom's power of attorney in December 2014. The next month, without notifying Ms. Leedom, Mr. Leedom, or Mrs. McCabe, she paid herself $5,175 from the escrow account. She indicated that she earned this fee for work completed through August 2014, but did not pay herself for nearly five months. She never issued an invoice or billing statement to anyone. In April 2015, Mrs. McCabe became Ms. Leedom's power of attorney. She immediately demanded an accounting of, and the return of her mother's funds. After some delay, McLaughlin provided the accounting, but would not release the funds until Mrs. McCabe signed a release waiving McLaughlin's liability for any events during the representation. The

hearing judge found that Mrs. McCabe signed this release under duress. She subsequently filed a complaint with the AGC.

The AGC sent McLaughlin Mrs. McCabe's complaint. McLaughlin sent a written response. In that response, she made five intentional misrepresentations to Bar Counsel regarding her representation of Ms. Leedom. The AGC subsequently sent three letters to McLaughlin notifying her that the matter had been docketed for investigation and requesting a response. These letters also included additional correspondence from Mrs. McCabe. McLaughlin received all three letters, did not respond. McLaughlin met with an AGC investigator and told him she would like to respond, but never did. She also claimed that she was unaware that she was required to respond to Bar Counsel's letter.

McLaughlin never answered the Petition for Disciplinary or Remedial Action. Bar Counsel filed a motion for an Order of Default, which the Circuit Court granted. McLaughlin did not move to vacate the default, and did not respond to Bar Counsel's discovery requests. She failed to appear at the hearing on March 20, 2017. The hearing judge deemed Bar Counsel's discovery requests admitted. He determined that these admitted facts provided clear and convincing evidence that McLaughlin violated MLRPC 1.3, 1.4(a) and (b), 1.5(a), 1.15(a) and (e), 8.1(a) and (b), 8.4(a), (c), and (d), and BP § 10-306. He found multiple aggravating factors, and no mitigating factors.

On September 11, 2017, Bar Counsel and McLaughlin appeared before the Court of Appeals for oral argument to address the appropriate sanction. McLaughlin told the Court that she had never received notice of the hearing, nor the proceedings before this Court. She also insisted that she had done nothing wrong during her representation of Ms. Leedom. The Court of Appeals disbarred McLaughlin in a per curiam order the same day.

Held:

The Court of Appeals concluded that the hearing judge properly entered a default and that clear and convincing evidence supported the hearing judge's conclusions of law that McLaughlin violated MLRPC 1.3, 1.4(a) and (b), 1.5(a), 8.1(a) and (b), 8.4(a), (c), and (d), and BP § 10-306. McLaughlin neglected to communicate with her client about essential matters, failed to act diligently in the representation, failed to explain the basis for her fees, mishandled client funds, did not participate in the disciplinary investigation, and engaged in conduct that was prejudicial to the administration of justice. She made multiple misrepresentations to Bar Counsel. The Court of Appeals concluded that the hearing judge appropriately found multiple aggravating factors. The Court agreed that McLaughlin had no mitigation available to her because she had not participated in the proceedings. McLaughlin's numerous violations of the MLCPC and BP § 10-306, and particularly her intentional dishonest conduct and the presence of numerous aggravating factors warranted disbarment.

John W. Green, III v. State of Maryland, No. 4, September Term 2017, filed October 20, 2017. Opinion by Watts, J.

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

http://www.mdcourts.gov/opinions/coa/2017/4a17.pdf

MANDATORY DISCLOSURES DURING DISCOVERY – PRETRIAL IDENTIFICATION OF A CO-DEFENDANT – MARYLAND RULE 4-263(d)(7)(B)

Facts:

In the Circuit Court for Cecil County ("the circuit court"), the State, Respondent, charged John W. Green, III ("Green"), Petitioner, with first-degree murder of Jeffrey Myers ("Myers") and other crimes. At trial, the State offered evidence of the following theory of the case. Green was friends with Jonathan Copeland ("Copeland"), a drug dealer. One of Copeland's customers was Myers, the person who was killed. One day, Myers burglarized Copeland's residence and stole cash and drugs. Later that day, Copeland and Green went to Myers's residence and confronted him about the burglary. The next day, Copeland obtained a handgun. The following day, Copeland and Green returned to Myers's residence in Copeland's Ford Mustang and confronted Myers about the burglary again. During the confrontation, Myers was fatally shot while he was in his truck. Copeland, Myers, and Green were the only people who were present at the time of the shooting.

Green was the only defendant when the case proceeded to trial. Copeland had been charged with the same offenses with respect to Myers. Copeland, however, pled guilty to first-degree murder and conspiracy to commit first-degree murder.

The State's sole eyewitness to the shooting testified that, while she was driving, she saw two parked vehicles facing each other. One vehicle was a truck, and the other was a Mustang. Two men were nearby. One man was standing off to the side of the road. That man was shorter and stouter than the other one, and was wearing a hoodie. The other man was standing near the Mustang's driver's seat, with one foot in the Mustang and the other foot on the ground. That man was tall and thin, and was wearing a hat.

The eyewitness testified that she heard a gunshot. The eyewitness looked into her driver's side-view mirror and saw the shorter, stouter man shoot into the truck three times. The witness could not see the face of the shorter, stouter man—*i.e.*, the shooter—because his hood was up. The witness, however, got a look at the face of the tall, thin man—*i.e.*, the person who was not the shooter.

During the witness's direct-examination, the prosecutor proffered that the witness would identify Copeland as the person who was not the shooter. Green's counsel objected on the ground that

the State had not disclosed the witness's identification of Copeland during discovery. Green's counsel stated that he was surprised to learn that the witness could identify Copeland.

The prosecutor did not contend that he, too, had just learned that the witness could identify Copeland. The prosecutor neither disputed that there had been a pretrial identification of Copeland by the witness, nor denied that Copeland had informed law enforcement officers pretrial of her ability to identify Copeland as the person who was not the shooter. Instead, the prosecutor contended that Maryland Rule 4-263(d)(7)(B) obligated the State to disclose during discovery pretrial identifications of a defendant, not a co-defendant. Maryland Rule 4-263(d)(7)(B) requires the State to disclose to the defense, without the necessity of a request, "[a]ll relevant material or information regarding . . . pretrial identification of the defendant by a State's witness[.]"

The circuit court permitted the witness to identify Copeland. Copeland was briefly brought into the courtroom. The witness identified Copeland as the tall, thin man who had been wearing a hat and standing near the Mustang's driver's side. In other words, the witness identified Copeland as the person who did not perform the shooting.

As the only witness on his own behalf, Green acknowledged that only he, Copeland, and Myers were present at the scene of the shooting. According to Green, Copeland shot Myers.

The jury found Green guilty of first-degree murder and other crimes. Green appealed, and the Court of Special Appeals affirmed the convictions. Green filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Reversed and remanded for a new trial.

The Court of Appeals held that, as a general matter, Maryland Rule 4-263(d)(7)(B) does not, by its plain language and history, require the State to disclose during discovery a State's witness's pretrial identification of a co-defendant.

The Court rejected the State's contention that, even if Maryland Rule 4-263(d)(7)(B) can be construed to apply to co-defendants, Maryland Rule 4-263(d)(7)(B) did not apply in this case because it was not clear that Copeland and Green were co-defendants. Despite the State's contention on appeal, the record was replete with references by the prosecutor identifying Copeland as a co-defendant in the circuit court. Additionally, both the Court of Appeals and the Court of Special Appeals have treated the term "co-defendant" in a manner that indicates that a co-defendant is an individual who is charged with the same crime as the defendant. The Court of Appeals has never determined, or, indeed, even indicated, that a co-defendant must be charged in the same charging document as the defendant. In this case, it was undisputed that Copeland pled guilty to first-degree murder of Myers and conspiracy to commit first-degree murder of Myers—i.e., that he was charged with, and convicted of, the same crimes with which Green was charged. The Court concluded that Green and Copeland were co-defendants.

As to the plain language of Maryland Rule 4-263(d)(7)(B) and whether, as a general matter, it requires disclosure of the pretrial identification of a co-defendant, Maryland Rule 4-263(d)(7)(B) provides: "Without the necessity of a request, the State's Attorney shall provide to the defense . . . [a]ll relevant material or information regarding . . . pretrial identification of the defendant by a State's witness[.]" The word "co-defendant" is conspicuously absent from Maryland Rule 4-263(d)(7)(B). The Court determined that the language of Maryland Rule 4-263(d)(7)(B) is plain and unambiguous—Maryland Rule 4-263(d)(7)(B) applies only to pretrial identifications of "the defendant," and not to pretrial identifications of a co-defendant. Significantly, where Maryland Rule 4-263(d) applies to co-defendants, the language of the Rule says as much; the word "co-defendant" is found in three of Maryland Rule 4-263(d)'s other provisions. Those three provisions demonstrate that, where a provision of Maryland Rule 4-263 applies to co-defendants, the provision explicitly states that it applies to co-defendants. The plain language of Maryland Rule 4-263(d)(7)(B) supports the conclusion that Maryland Rule 4-263(d)(7)(B) applies only to the defendant, and not to co-defendants.

The Court's interpretation of Maryland Rule 4-263(d)(7)(B) was supported by the circumstance that Maryland Rule 4-263(d)(7)(B) is not the only provision of Maryland Rule 4-263(d) that expressly refers to the defendant, but does not apply to a co-defendant. This leads to the conclusion that Maryland Rule 4-263(d) expressly delineates when provisions apply to the defendant, but not a co-defendant. In addition to Maryland Rule 4-263(d)(7)(B), three other provisions of Maryland Rule 4-263(d) apply only to the defendant. As such, Maryland Rule 4-263(d)(7)(B) is not an anomaly. Just as the Court would not read into other provisions of Maryland Rule 4-263(d) a requirement that the State's discovery obligations include a co-defendant as well as the defendant, the Court would not alter the plain language of Maryland Rule 4-263(d)(7)(B).

The Court acknowledged that there may be cases, such as this one, where a defendant alleges that a pretrial identification of a co-defendant is relevant and, thus, should be disclosed under Maryland Rule 4-263(d)(7)(B). In such instances, however, the correct resolution is not to read into Maryland Rule 4-263(d)(7)(B) the requirement that the State disclose pretrial identifications of a co-defendant. Instead, the proper inquiry is whether the pretrial identification of the co-defendant constitutes "relevant material or information regarding . . . pretrial identification of the defendant" under Maryland Rule 4-263(d)(7)(B). Stated otherwise, a defendant's allegation of prejudice based on the nondisclosure of a pretrial identification of a co-defendant does not require departing from the plain meaning of Maryland Rule 4-263(d)(7)(B)'s language.

Given that Maryland Rule 4-263(d)(7)(B) is unambiguous, the Court was not required to examine its history, but the Court elected to do so as a confirmatory process. Maryland Rule 4-263(d)(7)(B)'s history reinforced the Court's conclusion that the absence of a reference to a co-defendant in proposed Maryland Rule 4-263(d)(7)(B) was intentional. In a Supplement to a Rules Report, the Rules Committee stated that it "saw no need to expand" Maryland Rule 4-263 with respect to pretrial identifications or otherwise. The Court determined that it was reasonable to infer from this statement that the Rules Committee considered, but intentionally refrained from, adding a reference to co-defendants to proposed Maryland Rule 4-263(d)(7)(B).

The Court held that, under this this case's circumstances, the witness's pretrial identification of Copeland as the person who was not the shooter was relevant information regarding the pretrial identification of Green as the person who was the shooter, and was required to be disclosed under Maryland Rule 4-263(d)(7)(B). The pretrial identification of Copeland as the person who was not the shooter was the equivalent of the pretrial identification of Green as the shooter, where the State's theory of the case was, and its evidence showed, that Green, Copeland, and Myers were the only people at the scene of the shooting, and that Copeland was not the shooter.

The Court concluded that its precedent mandated the conclusion that the witness's informing detectives before trial of her ability to identify Copeland as the person who was not the shooter constituted a pretrial identification of Copeland. For purposes of Maryland Rule 4-263(d)(7)(B), the phrase "pretrial identification" is not limited to State-orchestrated identification procedures, such as a photographic array, a showup, or a lineup. Here, a pretrial identification of Copeland occurred when the witness informed detectives before trial that she could identify Copeland as being present with the victim but not being the shooter. Just as it is unnecessary for an identification to occur during a lineup, showup, or other formal identification procedure, it is also unnecessary for an witness's recognition of a person who was at the scene of a crime to occur in front of law enforcement officers. What matters is that the witness advises officers of his or her ability to identify the person. At that point, the State is charged with knowledge of the witness's ability to identify the person.

Having determined that the witness made a pretrial identification of Copeland and that law enforcement officers were aware of the identification, the Court turned to the issue of whether that identification was subject to mandatory disclosure under Maryland Rule 4-263(d)(7)(B). The Court observed that Maryland Rule 4-263(d)(7)(B) does not simply require disclosure of pretrial identifications of defendants. Rather, Maryland Rule 4-263(d)(7)(B) requires disclosure of "**[a]ll relevant material or information regarding** . . . pretrial identification of the defendant by a State's witness[.]" (Emphasis added).

In *Collins v. State*, 373 Md. 130, 146, 816 A.2d 919, 928 (2003), the Court underscored the importance of the phrase "*relevant* material or information *regarding*" in Maryland Rule 4-263(d)(7)(B). Specifically, the Court stated its holding as follows: "[The witness]'s prior inconsistent statement [about not seeing anyone at the scene of the crime], under the circumstances of this case, falls within the scope of 'relevant material or information regarding pretrial identification of the defendant by a witness for the State.'" *Id*. at 146, 816 A.2d at 928 (emphasis in original) (footnote omitted). The phrase "relevant material or information regarding" is plainly not limited to the mere occurrence of a pretrial identification of a defendant. Instead, the phrase "relevant material or information regarding" renders Maryland Rule 4-263(d)(7)(B) applicable to more than just a pretrial identification procedure identifying the defendant.

In addition to considering Maryland Rule 4-263's language, the Court took into account its purposes—to assist defendants in preparing their defense and to protect them from unfair surprise. The duty to disclose pretrial identifications is properly determined by interpreting the plain meaning of Maryland Rule 4-263 with proper deference to these policies. Guided by

Maryland Rule 4-263(d)(7)(B)'s language and purposes, as well as the Court's precedent, the Court concluded that a pretrial identification of a co-defendant is relevant information regarding pretrial identification of the defendant where the pretrial identification of the co-defendant is effectively the equivalent of a pretrial identification of the defendant. Stated otherwise, under the circumstances of this case, information regarding the pretrial identification of Copeland was relevant information regarding the pretrial identification of Green.

The Court explained that the facts of this case served as a prime example of a pretrial identification of a co-defendant being effectively the equivalent of a pretrial identification of the defendant. It was undisputed that, at the time of the shooting, Myers, the victim, was in his truck, which was facing Copeland's Mustang. The witness testified that, as she was driving by the scene of the shooting, she saw two men. One man was shorter and stouter, wearing a hoodie, and standing off to the side of the road. The other man was taller and skinnier, wearing a hat with snowflakes, and standing near the Mustang's driver's seat. The witness heard a gunshot, looked into her driver's side-view mirror, and saw the shorter, stouter man shoot into the truck three times. The witness had not gotten a look at the face of the shorter, stouter man—*i.e.*, the shooter—because his hood was up. The witness had, however, gotten a look at the face of the tall, thin man—*i.e.*, the person who was not the shooter. The record establishes that prior to trial the witness informed law enforcement officers of her ability to identify Copeland as the person who was not the shooter. And, at trial, the witness unequivocally identified Copeland as the person who was not the shooter. The State's theory of the case was that Green was the person with Copeland and was the shooter.

Given the State's theory of the case, the witness's identification of Copeland as the person who was not responsible for the shooting established that Green was the shooter. The witness's pretrial identification of Copeland was in essence the equivalent of a pretrial identification of Green as the shooter. As such, the witness's pretrial identification of Copeland was relevant information regarding the pretrial identification of Green, and was subject to mandatory disclosure under Maryland Rule 4-263(d)(7)(B).

The Court observed that its holding would not require prosecutors to predict the future. As a prosecutor prepares for trial, he or she becomes aware of evidence that identifies the defendant. A prosecutor is in a position to determine whether a witness's pretrial identification of a co-defendant is the equivalent of a pretrial identification of the defendant as the person responsible for the crime. For example, here, the prosecutor was certainly aware in advance of trial of the State's theory that Green, Copeland, and Myers were the only people at the scene of the shooting and that Copeland was not the shooter. The prosecutor knew in advance that, if the witness identified Copeland as the person who was not the shooter, her identification of Copeland would essentially identify Green as the shooter. It was incumbent upon the prosecutor under Maryland Rule 4-263(d)(7)(B) to disclose the witness's pretrial identification of Copeland, as the witness's pretrial identification of Copeland was relevant information as to the pretrial identification of Green as the shooter.

Having established that the State violated Maryland Rule 4-263(d)(7)(B) by failing to disclose the witness's pretrial identification of Copeland, the Court addressed the issue of whether the

error was harmless. The Court was far from convinced beyond a reasonable doubt that the State's violation of Maryland Rule 4-263(d)(7)(B) did not influence the verdict to Green's detriment. The witness's identification of Copeland as the person who was not the shooter was critical to the State's case. The witness was the State's only witness to the shooting. The witness's testimony that Copeland was not the shooter was the only evidence that directly identified Green as the shooter. The other State's witnesses, at best, gave testimony demonstrating that Green and Copeland confronted Myers and testimony that placed Green at the scene of the shooting.

Undeniably, the State's failure to disclose the witness's pretrial identification of Copeland prejudiced Green. Green's counsel stated that he was surprised to learn at trial that the witness was expected to identify Copeland. The State's failure to disclose the witness's pretrial identification of Copeland prevented Green's counsel from attempting to interview the witness about her identification of Copeland, and potentially performing research to determine if, or when, the witness had seen Copeland's photograph in a newspaper. Green's counsel lacked the ability to prepare to cross-examine the witness regarding the timing or remoteness of her pretrial identification of Copeland. Green's counsel was unable to prepare to question the witness as to whether anything in the newspaper article or other circumstances may have influenced the witness's testimony. Although Green's counsel theoretically could have formulated such questions without being told of the witness's pretrial identification of Copeland before trial, being aware of the pretrial identification would undoubtedly have aided Green's counsel's trial preparation.

In addition to providing Green's counsel the opportunity to interview the witness about her identification of Copeland and perform pretrial research, disclosure of the witness's pretrial identification of Copeland may have influenced Green's decision to accept a plea bargain. In any event, it was not for the Court to determine what, if any, response the defense could have prepared had it known of the prior inconsistent statement. It was enough to find that the defense was denied an adequate opportunity to do so, to its prejudice.

Finally, the Court determined that the appropriate remedy was to order a new trial and refrain from ordering that the witness's identification of Copeland be excluded on remand.

In re C.E., No. 2, September Term 2017, filed October 20, 2017. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2017/2a17.pdf

INFANTS – DEPENDENT AND NEGLECTED CHILDREN – REVIEW – RIGHT OF REVIEW, PARTIES, AND DECISION REVIEWABLE

Facts:

C.D., mother of C.E., suffers from several mental illnesses that prevent her from properly caring for her children. Between 1998 and 2015, each of C.D.'s six children had been adjudged a child in need of assistance ("CINA"). Juvenile courts also involuntarily terminated C.D.'s parental rights to four of her six children. Shortly after C.E.'s birth in 2014, The Circuit Court for Baltimore City committed C.E. to the custody of the Baltimore City Department of Social Services ("Department"). The Department placed C.E. in the care and custody of relatives. C.E. remained in the care and custody of relatives throughout this CINA case.

At an adjudicatory hearing in 2016, the juvenile court found C.E. was a CINA. After a CINA finding, Md. Code, Family Law § 5-525(f)(1) requires the Department to make reasonable efforts to reunify the family. This obligation can be waived, however, if a court orders that reasonable efforts are not required under Md. Code, Courts and Judicial Proceedings ("CJP") § 3-812. After the adjudicatory hearing, the Department filed a Motion to Waive Reasonable Efforts to Reunify pursuant to CJP § 3-812. According to CJP § 3-812 (c), the Department may request a waiver if a parent has involuntarily lost parental custody to a sibling of a CINA.

Because C.D. had already involuntarily lost parental rights to four of C.E.'s siblings, the Department requested a waiver of the obligation to provide reunification efforts. Furthermore, C.D had continually rejected the Department's reunification services. C.D. repeatedly refused the Department's referrals for mental health treatment, exhibited a complete unwillingness to work with the Department, and failed to make any improvement in her abilities to parent during supervised visits with her children.

C.D. contested the Department's waiver request. She argued that CJP 3-812 violated her fundamental right to parent by unconstitutionally depriving her access to reunification services. She further claimed that the waiver would unconstitutionally punish her for the previous contested terminations of her parental rights. The juvenile court rejected these arguments and granted the Department's waiver request.

Before the final resolution of C.E.'s CINA case, C.D. immediately appealed the juvenile court's waiver to the Court of Special Appeals, arguing that CJP 3-812 violated her constitutional rights. In an unreported opinion, the intermediate appellate court did not address C.D.'s constitutional claims and instead held that she could not immediately appeal the juvenile court's waiver.

C.D. filed a Petition for Writ of Certiorari which the Court of Appeals granted.

Held: Affirmed.

First the Court of Appeals explained the nature of CINA proceedings and the immediate appealability of various orders in the CINA process. Appeals must be authorized by statute. The General Assembly has outlined permitted appeals in CJP Title 12. While CJP § 12-301 permits appeals of final judgments, the Court of Appeals has held that the definition of "final judgment" is left to case law.

One exception to this finality requirement can be found in CJP § 12-303(3)(x), which permits immediate appeal of an order depriving a parent of the care or custody of a child. In CINA cases, the Court has issued several decisions analyzing various orders by the juvenile courts and whether such orders fall within the finality exception of CJP § 12-303(3)(x). Generally, the Court has held that only those orders changing custody of a child or materially affecting a parent's ability to care for a child can be immediately appealed.

Turning to the facts of C.D.'s appeal, the Court noted that C.D.'s custody of C.E. has not changed. Before and after the juvenile court's order waiving reasonable reunification services, C.E. remained in the care and custody of relatives. Additionally, the order did not deprive C.D. of her ability to care for C.E. Before the order, C.D. refused to utilize reunification services. After the order, these services will remain unused. The juvenile court merely relieved the Department of the obligation to foist such services on an unwilling recipient. The Court also noted that the CINA statutes aim to provide a just yet expedient resolution for children in need of assistance. Allowing immediate appeals of an order that did not impact a parent's care or custody of a child, would result in further delays to CINA cases and postpone a final resolution for children in such cases.

COURT OF SPECIAL APPEALS

In the Matter of the Donald Edwin Williams Revocable Trust and the Individual Beneficiary Trust of Linda L. Slacum, No. 1499, September Term 2016, filed November 1, 2017. Opinion by Eyler, D.S., J.

http://mdcourts.gov/opinions/cosa/2017/1499s16.pdf

APPELLATE PROCEDURE – DISMISSAL OF APPEAL FOR LACK OF FINAL JUDGMENT – CONSOLIDATION OF RELATED CASES IN CIRCUIT COURT

Facts:

Donald Williams died leaving an Estate having $3.5 million dollars in assets and a Trust having $35 million dollars in assets. Pursuant to his Estate plan, money in his Estate would fund an individual beneficiary trust ("IBT") for his long-time girlfriend; most of the rest of the Estate assets would pour over into the Trust; and the Trust assets would be paid over to a charitable foundation he had created ("Foundation").

Disputes arose among the Trustees of the Trust and the Personal Representative of the Estate over the funding of the IBT and other issues, resulting in five lawsuits, some in the orphans' court and some in the circuit court. The Foundation was not a party to these cases but participated in a mediation with the parties that resulted in an agreement and mutual release that the parties and the Foundation signed. After certain aspects of the agreement were performed, the Foundation was dissatisfied and filed two lawsuits (on the same day) in the Circuit Court for Wicomico County: 1) the "Removal Case," in which it sought relief primarily in the form of removal of the Trustees of the Trust, and 2) the "Damages Case," in which it primarily sought damages against the Trustees of the Trust. The circuit court granted a motion to consolidate the cases. Its order provided that the cases would share one case number and set of docket entries and would be handled together, except that the show cause hearing the Foundation was entitled to receive with respect to its petition to remove the Trustees would be held before the merits trials.

The Trustees filed motions to dismiss or for summary judgment in both cases. The court granted partial summary judgment against the Foundation in the Damages Case with respect to all claims it could have asserted as of the date of the mutual release. The show cause hearing went forward and thereafter the court dismissed the Removal Case with prejudice on the ground that there was

no legal basis on which to remove the Trustees. The Foundation noted an appeal from that order. The Trustees filed a motion to dismiss the appeal for lack of a final judgment.

Held:

The order dismissing the Removal Case is not a final judgment. The Foundation is the plaintiff in the Removal Case and in the Damages Case, and the defendants in the two cases overlap. The cases are based on the same allegations of fact and assertions of wrongdoing on the part of the Trustees, differing only in the forms of relief sought. The court consolidated the two cases for that reason, except that it permitted the required show cause hearing to proceed in the Removal Case. Only partial summary judgment was granted in the Damages Case, and the parties were awaiting trial on the remaining claims in that case. Unlike *Coppage v. Resolute Ins. Co.*, 264 Md. 261 (1972), and *Yarema v. Exxon Corp.*, 305 Md. 219 (1986), the cases here are not separate and distinct and were not consolidated merely for the convenience of holding a single trial. In granting the motion to consolidate, the court commented that the claims all could have been included in one action instead of two. It is clear that the court intended for the cases to be jointly disposed of. In both cases, the central issue is the effect of the mutual release on the Foundation's claims. As in *Waterkeeper Alliance, Inc. v. Maryland Department of Agriculture*, 439 Md. 262 (2014), the consolidated cases involve interrelated issues and disposing of them separately would be contrary to principles of judicial economy and the policy against piecemeal appeals.

Tania Renee Wallace-Bey v. State of Maryland, No. 476, September Term 2016, filed November 2, 2017. Opinion by Arthur, J.

http://mdcourts.gov/opinions/cosa/2017/0476s16.pdf

CRIMINAL LAW – BATTERED SPOUSE SYNDROME – EVIDENCE OF PSYCHOLOGICAL ABUSE AND EXPERT TESTIMONY ON BATTERED SPOUSE SYNDROME

Facts:

On October 24, 2007, Tania Wallace-Bey fatally shot her boyfriend, Julius Whaley. She claimed that she shot him just after he had raped her that morning. Wallace-Bey was charged with first-degree premeditated murder and use of a handgun in the commission of a crime of violence. In 2009, she was convicted on both counts. The Circuit Court for Prince George's County sentenced her to life plus 20 years.

Years later, Wallace-Bey petitioned for post-conviction relief. In support, an expert forensic psychologist opined that Wallace-Bey was suffering from battered spouse syndrome at the time of the shooting. In 2014, the post-conviction court determined that Wallace-Bey's trial counsel had rendered ineffective assistance by failing to investigate the issue of battered spouse syndrome. The court granted her a new trial.

The retrial occurred in March 2016. At trial, the State established that Wallace-Bey called 911 on the evening of October 24, 2007, and reported that her boyfriend had raped her and that she had shot him. Officers and paramedics responded to an apartment complex in Greenbelt. They found Whaley's body on the floor of a bedroom of his apartment, with a single gunshot to the chest. Near the body, officers found a revolver belonging to Wallace-Bey and an empty container of sleeping pills, which she had purchased from a nearby drugstore that morning. Outside the building, an officer recovered a grain alcohol bottle and a bag containing Wallace-Bey's personal items. One item was a handwritten note in which she asked for forgiveness from her family and Whaley's family and wrote that Whaley had abused her during the previous year.

Paramedics took Wallace-Bey to a hospital to treat her reported overdose. At the hospital, she gave oral and written statements to a detective. According to the detective, Wallace-Bey stated that she had traveled from Pennsylvania to spend three days with Whaley; that Whaley forcibly raped her during the early morning hours; and that, once he fell asleep, she retrieved her gun from her bag and shot him. Later that night, Wallace-Bey underwent a sexual assault forensic examination. The forensic nurse transcribed another statement in which Wallace-Bey reported the rape and shooting.

The detective later learned that, three days before the shooting, when Wallace-Bey had traveled to Maryland from her mother's residence in Philadelphia, she left behind several items including

a document expressing her last wishes. On the day before the shooting, Wallace-Bey had mailed additional items (personal papers, personal effects, and a suicide note) to her mother's residence from a post office in Hyattsville.

Before Wallace-Bey presented her defense case, the State made two motions *in limine*. The State moved to preclude any evidence that Wallace-Bey had been abused by persons other than Whaley as irrelevant. The State moved to exclude evidence of "any statements" made by Whaley to Wallace-Bey during their relationship, on the ground that those "statements" were hearsay. The court granted both motions.

Wallace-Bey testified in her own defense about the shooting and about abuse that she suffered during her relationship with Whaley. She testified that she and Whaley first became romantic partners and cohabitants in the mid-1990s. She claimed that she ended the relationship after a few years because of Whaley's controlling behavior. A decade later, they reconnected and resumed their relationship.

In February 2006, Whaley rented an apartment in Greenbelt so that Wallace-Bey could move in with him. According to Wallace-Bey, Whaley soon began to abuse her. She testified that he first raped her in their apartment and then at a hotel. In another incident, Whaley kicked her while she was on the ground, and she fled the apartment afterwards. A few days after he persuaded her to return, Whaley physically restrained Wallace-Bey and threatened to harm her. In another incident at the apartment, Whaley attempted to rape Wallace-Bey, but she managed to escape.

After moving out, Wallace-Bey got a new job that required her to spend a few months on the road. Whaley contacted her while she was away, and at his insistence, they reconciled. Soon after, Wallace-Bey became pregnant with Whaley's child. She told him about the pregnancy and returned to the apartment. On the first night after her return, she submitted to his demands for sex. A week later, she miscarried. According to Wallace-Bey, Whaley raped her twice on the night she was recovering from the miscarriage. After another reconciliation, Wallace-Bey became pregnant again, but she terminated the pregnancy without telling Whaley. Around the same time, she made preparations to commit suicide. Wallace-Bey testified that she did not want her mother to find her body, so she traveled to Maryland to visit Whaley on October 21, 2007.

Wallace-Bey testified that, on the morning of October 24, 2007, Whaley woke her up, demanded sex, dragged her by the hair, and forcibly raped her. She testified that, a few minutes after he finished raping her, he started to press his body against hers. In response, she grabbed her gun from her bag and shot him once. She testified that she felt that she had to shoot him because she saw him stroking his penis to become erect so that he could rape her again. After he was dead, she bought sleeping pills and ingested them with alcohol. Eventually, she woke up from her failed suicide attempt and called 911.

Throughout her testimony, the court sustained objections and granted motions to strike whenever Wallace-Bey testified about things that Whaley said during their relationship and during incidents of abuse. The court struck her testimony that, on the night she returned to the

apartment while pregnant, Whaley had ordered her to "get naked" and instructed her, "you are not leaving." The court also sustained the State's objection to her testimony that, just before being raped on the morning of the shooting, Whaley told her, "you need to learn to take the dick."

Dr. Patricia McGraw testified for the defense as an expert in forensic psychology. Dr. McGraw opined that Wallace-Bey was suffering from battered spouse syndrome at the time of the shooting, as a result of repeated physical and psychological abuse by Whaley. The court struck Dr. McGraw's testimony that Wallace-Bey reported that Whaley had called her "tainted and flawed" and "not a suitable mate." The court sustained objections to Dr. McGraw's testimony that Wallace-Bey reported that Whaley had "insisted" that she do things and by "claimed" that he was "divinely ordained" or "the police of God."

In rebuttal, the State called its own expert forensic psychiatrist, who opined that Wallace-Bey did not meet criteria for battered spouse syndrome.

The jury ultimately found Wallace-Bey guilty of first-degree premeditated murder and the use of a handgun in the commission of a crime of violence. The court sentenced Wallace-Bey to life imprisonment for the murder conviction and a consecutive term of 20 years for the handgun offense. Wallace-Bey then noted a timely appeal.

Held: Reversed and remanded.

The Court of Special Appeals held that the trial court committed prejudicial error by requiring Wallace-Bey to present any evidence that Whaley repeatedly abused her without mentioning any words that he said to her. The Court reversed the judgments on that ground, and the Court addressed other evidentiary issues for guidance on remand.

The Court held that the trial court erred when it granted the motion *in limine* to preclude Wallace-Bey from introducing "any statements" made to her by Whaley, on the ground that those "statements" were hearsay. The court had no basis to conclude that any of the unspecified declarations by Whaley were "assertion[s]" within the meaning of Md. Rule 5-801(a), or whether the evidence would be "offered in evidence to prove the truth of the matter asserted," within the meaning of Md. Rule 5-801(c).

The trial court further erred by precluding Wallace-Bey from testifying about specific declarations made by Whaley for the purpose of showing how those words affected her. Wallace-Bey had testified that Whaley once ordered her to "get naked" and commanded not to leave by saying, "you are not leaving." Wallace-Bey had also testified that she understood that Whaley was about to rape her on the morning of the shooting because he said, "you need to learn to take the dick." To the extent that those declarations were commands, they were not assertions. To the extent that those declarations included any assertions, the defense did not offer them to prove the truth of what Whaley was saying.

The battered spouse syndrome statute (Md. Code (1974, 2013 Repl. Vol.), § 10-916 of the Courts and Judicial Proceedings Article ("CJP")) specifically allows a defendant to introduce evidence of "psychological abuse of the defendant" by the abuser. Evidence of verbal conduct may be evidence of psychological abuse. The trial court erred by barring the defense expert from mentioning Wallace-Bey's reports of any words spoken by Whaley for the purpose of illuminating the expert opinion about psychological abuse. The excluded testimony did not contain hearsay from Whaley. An utterance from Whaley "insist[ing]" that Wallace-Bey do something is not an assertion. Wallace-Bey was not attempting to prove the truth of Whaley's comments that she was "tainted and flawed" and an "[un]suitable mate" or of his claims that he was "divinely ordained" and "the police of God."

The Court held that the erroneous hearsay rulings were not harmless. Through the combined effect of the *in limine* ruling and subsequent rulings on individual objections, the trial court substantially impaired the presentation of the entire defense case. To provide guidance for another trial, the Court discussed the remaining evidentiary issues.

First, Wallace-Bey contended that the court erred by granting the motion in limine to preclude her from presenting any evidence that she had been abused by anyone other than Whaley. Where a defendant generates the issue of battered spouse syndrome, CJP § 10-916(b) permits the admission of "[e]vidence of repeated physical and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged[.]" This provision does not prohibit the admission of evidence that the defendant had suffered prior abuse by persons other than the victim.

Although Wallace-Bey failed to articulate her theory of relevance at trial, her appellate brief explained that the defense expert based an opinion about battered spouse syndrome in part on Wallace-Bey's history of physical and sexual abuse as a child. On remand, if Wallace-Bey offers evidence that she was abused by persons other than Whaley as the foundation for an expert opinion about how that abuse affected her psychological condition and mental state, then the trial court should admit the evidence for that purpose over the State's relevancy objection. Wallace-Bey's testimony should then be followed by the expert testimony, which the court should also admit over any relevancy objection. Testimony about Wallace-Bey's history of abuse by others should be admitted to the extent necessary to allow the jury to meaningfully evaluate the expert opinion.

The Court also addressed Wallace-Bey's contentions that the trial court should have permitted the defense expert to testify about various other matters relevant to battered spouse syndrome. First, it was appropriate for defense counsel to elicit limited testimony from the defense expert about "the history of battered spouse syndrome" as a brief introduction that would help the jury understand the syndrome.

Next, the defense expert should have been permitted to testify about the relationship between battered spouse syndrome and post-traumatic stress disorder. Similarly, the defense expert should have been permitted to testify about the connection (if any) between battered spouse syndrome and depression, because there was evidence that Wallace-Bey experienced depression.

Where a witness has been properly qualified to give expert testimony about battered spouse syndrome, the trial court generally should permit counsel to inquire about any connections between battered spouse syndrome and any other related psychological conditions. The expert testimony may address those connections in general and then in relation to conditions observed in a specific defendant.

Finally, the court trial court erred by permitting the State to cross-examine Wallace-Bey about whether she believed that the detective had been "lying" in his testimony about a statement she gave to him at the hospital. Although the question was objectionable for many reasons, the trial court should have sustained the objection where defense counsel objected specifically on the ground that the question was "argumentative."

Ricardo Dillon v. Lynita Miller, et al., No. 901, September Term 2016, filed September 29, 2017. Opinion by Friedman, J.

http://www.mdcourts.gov/opinions/cosa/2017/0901s16.pdf

DIVORCE – EARNINGS – EARNING CAPACITY

Facts:

Lynita Miller filed a complaint against Ricardo Dillon seeking child support for their 6-year-old daughter. After an evidentiary hearing, a Magistrate in the Circuit Court for Anne Arundel County recommended that Dillon pay support. Dillon filed timely exceptions, which were granted by the Circuit Court. The case was remanded back to the Magistrate for further factual findings.

After a second evidentiary hearing, the Magistrate made findings of fact that Dillon is a citizen of Jamaica "who has been in and out of the United States," and that Dillon claimed he was not permitted to work in the United States because he does not have a green card, a social security number, or work authorization. The Magistrate further noted that Dillon is married to a United States citizen with whom he has another young child, and Dillon's wife has filed an application "for him to remain in [the United States] and be able to work." Additionally, the magistrate found that Dillon was currently supported by his wife and other family members, and that he already paid child support to the mother of another child under a court order in Montgomery County. Finally, the Magistrate specifically found that Dillon's testimony that "he had no income at all from income earning sources" was not credible, and recommended a finding that Dillon was voluntarily impoverished and that income be imputed to him commensurate with earning the federal minimum wage.

In conjunction with his findings, the Magistrate determined that extraordinary circumstances existed to justify entry of an immediate order for child support. The circuit court agreed and entered its Order on the same day that the Magistrate released his Report and Recommendations. The Order ratified and affirmed the facts found by the Magistrate, and granted Miller's Complaint for Support. Dillon did not file exceptions to the Magistrate's second Report and Recommendations. He did, however, note an appeal.

Held: Affirmed

Parents have an obligation to support their children, regardless of the source of income.

The Court of Special Appeals held that, although the circuit court Order was entered before the time for filing exceptions had passed, Dillon was still required to file exceptions under Rule 9-208(h)(2) to challenge the Magistrate's findings. Because Dillon failed to file any exceptions to

the Magistrate's second Report and Recommendations, Dillon could only challenge the circuit court's conclusions of law based on the facts found by the Magistrate, not the facts themselves. Therefore, Dillon waived any complaints that the circuit court erred in accepting the Magistrate's factual findings.

The Court rejected Dillon's argument that his circumstances require him to remain underemployed so that he does not risk his immigration status, and therefore he should not be considered voluntarily impoverished. The Court held that, based on the facts found by the Magistrate, there was no error in the circuit court's characterization of Dillon's employment prospects, or its evaluation of the factors for finding voluntary impoverishment and calculating imputed income. Dillon had options available to him to secure the funds necessary to support his daughter, including gifts from his wife and family members, salary and wages from work in the United States, or salary and wages if he returned to Jamaica to work. The Court noted that ordering Dillon to pay child support was not an instruction to work illegally; the Court was acknowledging the reality that he had salary and wages, and taking that reality into consideration to determine his obligations. Public policy supports the result that, as an adult who has fathered a child in the United States and has no physical or mental limitations that prevent employment, Dillon must support his child in whatever way he can.

Washington Gas Light Company v. Maryland Public Service Commission, No. 117, September Term 2016, filed November 1, 2017. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2017/0117s16.pdf

PUBLIC UTILITIES – REGULATION OF CHARGES

Facts:

The Public Service Commission is responsible for reviewing, and when appropriate, approving, plans filed pursuant to Maryland's Strategic Infrastructure Development and Enhancement ("STRIDE") law, Public Utilities Article ("PUA") § 4-210. The statute allows gas companies to accelerate their cost recovery for certain infrastructure improvement projects. In 2015, Washington Gas Light Company ("WGL") filed an amendment to its previously-approved STRIDE plan seeking to add additional projects. WGL serves customers in Maryland, Virginia, and the District of Columbia. Some of the projects for which the utility sought accelerated cost recovery are located in part or entirely outside of Maryland.

The public utility law judge recommended denial of STRIDE cost recovery for the out-of-state portions of WGL's proposal on the basis that the law was intended to incentivize improvements made within the State of Maryland. WGL appealed, but the Commission agreed with the public utility law judge. WGL petitioned for judicial review in the Circuit Court for Montgomery County, which affirmed the Commission's determination.

Held: Affirmed.

The Court of Special Appeals held that accelerated cost recovery under the STRIDE law is not available for work done by public service natural gas companies outside the State of Maryland.

The General Assembly passed the STRIDE law in 2013 to incentivize gas companies to make safety and reliability-related improvements to their systems. The law authorizes the Public Service Commission to allow gas companies to charge customers a fixed annual surcharge to recover costs for system improvements as the work is being done. PUA § 4-210. This process is in contrast to typical ratemaking procedures, which require any improvement be "used and useful in providing service to the public"—or in other words, completed—before the company can begin to recover its costs. *Columbia Gas of Maryland, Inc., v. Pub. Serv. Comm'n of Maryland*, 224 Md. App. 575, 587, *cert. denied*, 445 Md. 488 (2015) (quoting PUA § 4-101(3)).

WGL contended that the Commission should not have denied STRIDE cost recovery for the out-of-state work because none of the eligibility requirements set out in PUA § 4-210(a)(3) refer to a project's geographical location. WGL is correct but PUA § 4-210(b) contains an explicit statement of legislative intent:

> It is the intent of the General Assembly that the purpose of this section is to accelerate gas infrastructure improvements in the State by establishing a mechanism for gas companies to promptly recover reasonable and prudent costs of investments in eligible infrastructure replacement projects separate from base rate proceedings.

The Court of Special Appeals reiterated its long-standing approach to statutory interpretation, the purpose of which is to "discern and carry out the intent of the Legislature." *Blue v. Prince George's County*, 434 Md. 681, 689 (2013). Any analysis must begin with "the normal, plain meaning of the language of the statute, reading the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *Spaw, LLC, v. City of Annapolis*, 452 Md. 314, 341 (2017) (quoting *Douglas v. State*, 423 Md. 156, 178 (2011)). Reading the statute as a whole, the Court held that subsection (b) acts as a substantive restriction on the Commission's authority to approve a gas company's request for accelerated cost recovery through the STRIDE law. The plain language of PUA § 4-210 prohibits cost recovery under the STRIDE law for work done outside of Maryland.

The Court also reviewed the statute's legislative history, which it may do "merely as a check of our reading of the statute's plain language." *Phillips v. State*, 451 Md. 180, 197 (2017). Earlier versions of the STRIDE law introduced in the General Assembly contained similar or identical statements of intent in the body of the text. The remainder of the legislative history was silent on the issue of accelerated cost recovery for out-of-state improvements. The Court noted that the legislative history's silence on an issue is insufficient to warrant an interpretation of statutory language that is contrary to the plain text. Therefore, it concluded that there was nothing to indicate that the statement of intent in subsection (b), that improvements are to be in the State, should not apply in this case.

C & B Construction, Inc. v. Jeffrey Dashiell et al., No. 1307, September Term 2016, filed November 1, 2017. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2017/1307s16.pdf

STATUTES – MARYLAND CONSTRUCTION TRUST LAW – APPLICABILITY OF SUBTITLE

Facts:

C & B Construction, Inc. ("C & B") sought to employ the Maryland Construction Trust Statute, Md. Code (1974, 2015 Repl. Vol.), Real Property Article (RP) § 9-201 et seq., to hold officers of Temco Builders, Inc. ("Temco"), appellees Vice President Jeffrey Dashiell ("Dashiell") and President Edward J. Maguire ("Maguire"), personally liable for money owed to C & B by Temco.

On six construction projects, C & B performed various construction work as part of its subcontracts with Temco. According to C & B, Temco was paid by project owners for the majority of the work that C & B performed. However, Temco failed to pay C & B for that work. C & B alleged that Dashiell and Maguire spent the money received from the project owners by paying other subcontractors, or by repaying officers for loans they made to the business. Neither party disputes that Temco failed to pay C & B its performance of the subcontracts. Temco signed a consent judgment for the money owed on all six contracts prior to the C & B's action against Dashiell and Maguire.

C & B filed a complaint in the Circuit Court for Wicomico County against Dashiell and Maguire, seeking to hold Dashiell and Maguire individually liable under the Construction Trust Statute for a total of $218,349.90. At the conclusion of C & B's case, the Temco officers moved for judgment, asserting that the statute did not apply in this case, because the subcontracts were not subject to either the Little Miller Act or the mechanics' lien statute, as required by the statute's applicability clause. The circuit court agreed and, on July 19, 2016, entered judgment in favor of Dashiell and Maguire for C & B's Construction Trust statute claims.

Held: Affirmed.

The key issue is whether the applicability clause in § 9-204(a) required C & B to establish that its subcontracts were subject to either the Little Miller Act or the mechanics' lien statute. The Construction Trust statute requires money paid to a contractor for work performed by a subcontractor to be held in trust by the contractor. RP § 9-201(b). Under § 9-202, an officer of a contractor "who knowingly retains or uses the money held in trust . . . for any purpose other than

to pay those subcontractors for whom the money is held in trust, shall be held personally liable . . . .” RP § 9-202.

According to § 9-204: “This subtitle applies to contracts subject to Title 17, Subtitle 1 of the State Finance and Procurement Article, known as the ‘Maryland Little Miller Act,’ as well as property subject to § 9-102 of this title.” Subsection 9-204 references two statutes: (1) the Maryland Little Miller Act (“Little Miller Act”), and (2) RP § 9-102, which specifies the coverage of Maryland’s mechanics’ lien statute.

The legislation was amended to clarify that the bill provided for *the* application of the Subtitle, rather than merely *certain* applications. Further, the subtitle’s incorporation of the mechanics’ lien statute and its definitions of critical terms provide the outer limits of its applicability in private contracts. See RP § 9-204(c). The inclusion of the “Little Miller Act” makes the statute’s remedies available to subcontractors who perform work on State-owned properties. Yet, both the mechanics’ lien statute and the Little Miller Act limit, in different ways, the available remedies to subcontractors who perform a substantial work on the particular construction project.

Adopting C & B’s construction of § 9-204 would impose unprecedented liability upon corporate officers by making the statute’s remedies available in *all* construction subcontracts. To assume the Legislature intended such exposure, without expressly addressing that purpose, is unreasonable, given that the statute is in derogation of corporate law precedents regarding officer liability. In contrast, limiting the statute to public and private contracts of a particular caliber or where the subcontractor performs a substantial portion of the work is consistent with reason and common sense.

Finally, every court to address the applicability clause of Maryland’s Construction Trust statute has reached the same conclusion. Although no Maryland court has addressed in detail the scope of the applicability clause, we described the requirements of § 9-204 in *Walter v. Atl. Builders Group, Inc.* and strongly suggested that the subtitle applied only to contracts subject to the Little Miller Act or the mechanics’ lien statute. 180 Md. App. 347, 351 n. 3 (2008). Additionally, as many as five federal courts that have examined Maryland’s Construction Trust statute’s applicability have reached the same conclusion.

Stanley Sugarman, et al. v. Chauncey Liles, Jr., No. 1460, September Term 2016, filed November 1, 2017. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2017/1460s16.pdf

SUFFICIENCY OF EVIDENCE – EXPERT TESTIMONY – EPIDEMOLOGICAL STUDIES

Facts:

This appeal arises out of a complaint filed by Chauncey Liles, Jr., against Stanley Sugarman and Ivy Realty (collectively "Ivy Realty") alleging injury and damages caused by lead paint exposure at a residence managed, maintained, operated and controlled by Ivy Realty. To demonstrate causation between exposure and injury, Mr. Liles relied on expert testimony provided by Dr. Jacalyn Blackwell-White, MD, who opined that based on Mr. Liles' medical records and the Environmental Protection Agency's ("EPA") Integrated Science Assessment ("EPA-ISA") on lead, Mr. Liles suffered from lead poisoning as a child.

At the close of Mr. Liles' case, and again at the close of all evidence, Ivy Realty moved for judgment, arguing that the evidence before the court was insufficient to prove both injury and damages. In particular, Ivy Realty asserted that the expert testimony to support Mr. Liles' causation theory was speculative and lacked a factual basis as it was solely derived from epidemiological studies, and thus lacked any identifiable measurement to support an expert's opinion that Mr. Liles' cognitive loss was caused by lead exposure. Additionally, Ivy Realty asserted that there was insufficient evidence to establish that Mr. Liles' lead exposure resulted in a legally measurable compensable injury. The court denied each motion.

A jury returned a verdict in favor of Mr. Liles and awarded him $1,302,610 in damages, $600,000 in non-economic damages and $702,610 in economic damages. The jury verdict was reduced in accordance with Maryland's statutory cap on non-economic damages, and a final judgment was entered against Ivy Realty in the amount of $1,277,610.

Held: Affirmed.

Epidemiological studies indicating a causal relationship between childhood lead exposure and problems with attention, in conjunction with Mr. Liles' medical and neurophysiological records, provided a sufficient factual basis for the circuit court to permit the jury to consider whether Mr. Liles' cognitive impairments in processing speed and auditory encoding, measures of attention, were caused by lead exposure. And, the expert's opinion, based on the Lanpher Study, that the plaintiff lost four IQ points as a result of lead exposure, had a sufficient factual basis.

Additionally, there was a sufficient basis for testimony indicating that Mr. Liles would suffer a loss of earning capacity in the amount of $1,698,808. Dr. Conte, an economics expert, explained

that this amount reflected the difference between the wages an individual could receive if he or she were able to attain an Associate's degree (plaintiff's earning potential absent injury), i.e., $3,456,127, and the wages of an individual with only high school education, plus some college (earning capacity with cognitive deficits), i.e., $1,757,320. This evidence was sufficient to present the issue of damages to the jury.

Greater Towson Council of Community Associations, et al. v. DMS Development, LLC, Nos. 853 &854, September Term 2016, filed November 1, 2017. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2017/0853s16.pdf

ZONING AND LAND USE – STANDING BEFORE THE CIRCUIT COURT – PROPERTY-OWNER STANDING – ASSOCIATION STANDING

Facts:

This consolidated case involves two petitions for judicial review in the Circuit Court for Baltimore County in which Greater Towson Council of Community Associations ("GTC") sought the reversal of two zoning decisions of the Board of Appeals ("Board"). The Board's decisions involved a Planned Unit Development ("101 York PUD" or "the PUD") designed to house, primarily, students attending Towson University. First, the appellant and cross-appellee, GTC -- an "umbrella group" representing more than 30 Towson neighborhood associations -- sought the circuit court's review of the Board's approval of the PUD itself (the "PUD approval case"). Second, GTC challenged the Board's decision to affirm the County Council's decision to grant of a waiver of certain local "open space" requirements and assess a waiver fee of only "zero" dollars (the "open space waiver case").

Pursuant to Baltimore County Code ("BCC") § 32-6-108(c), new developments must provide a certain amount of recreational "open space." The 101 York PUD did not meet the minimum amount of open space, and therefore, was required to obtain a waiver and pay a fee assessed by the Council. The Director of Permits Approvals and Inspections recommended that the Council approve the waiver based on certain exceptions, including that it is "located in a RAE zone" and to be used for "dormitories." Thereafter, the Council granted DMS's waiver and set the fee at "zero" dollars, and GTC appealed to the Board. The Board approved the waiver and imposed a zero-dollar fee.

In the separate PUD approval case, GTC and the American Legion, an adjacent property owner, opposed the approval of the 101 York PUD before an Administrative Law Judge ("ALJ"). The ALJ approved the PUD on May 12, 2015, subject to certain conditions. One such condition was that DMS pay a fee of $1,358,084.00 rather than the zero-dollar fee set by the Council. GTC appealed to the Board the ALJ's approval of the PUD. On October 5, 2015, the Board affirmed the ALJ's decision to approve the PUD, but reversed the ALJ's decision to make approval subject to a $1,358,084.00 waiver fee.

GTC petitioned the circuit court for review in both cases and the cases were consolidated. On January 21, 2016, the American Legion and all individual petitioners filed a Stipulation of Partial Dismissal in the PUD approval case, leaving GTC as the only remaining petitioner in both cases before the circuit court. DMS filed a motion to dismiss based on GTC's lack of standing. The

circuit court denied DMS's motion and granted certain untimely motions to intervene filed by individual property owners; ultimately, however, the court affirmed the decisions of the Board in both cases.

Held: Reversed.

On appeal, GTC presents several issues for our review regarding its appeals from the circuit court's decisions, many of which overlap and would affect the outcome of the other case. Specifically, GTC argues that the PUD was not a "dormitory" and was not located within a residential zoning district, and therefore, that the Board should not have granted the waiver. The standing issues presented by DMS in its cross-appeals, however, are determinative in both cases. Multiple parties have been involved at varying points during the cases' ascent to this Court. Only GTC, however, timely filed and continued to maintain its petitions for judicial review before the circuit court at the decisive moment.

Liberal standing requirements are afforded to those who seek to challenge an administrative decision before the Board. *Sugarloaf Citizens' Assoc. v. Dep't of Envt.*, 344 Md. 271, 286 (1996). Because this threshold is relatively low, "a concerned citizen or group of citizens may be allowed to argue against a zoning decision before the Board but not be sufficiently aggrieved to seek judicial review of the Board's decision" in the circuit court. *Comm. for Responsible Dev't on 25th St. v. Mayor & Cty. Council of Baltimore*, 137 Md. App. 60, 71 (2001) (citation omitted). To have standing to petition for judicial review, a party must meet "two conditions precedent": (1) The petitioner must have participated in the case before the Board, and (2) the party must be "aggrieved" by the Board's decision. B*ryniarski v. Montgomery Cnty. Bd. of Appeals*, 247 Md. 137, 143-44 (1967).

In zoning cases, the weight attributed to a petitioner's "aggrievement" is most often evaluated by "how close the affected property is to the re-zoned property." *Ray v. Mayor & Cty. Council of Baltimore*, 430 Md. 74, 83 (2013). A property owner is "aggrieved" when (1) his or her property adjoins, confronts or is "nearby" the subject property (i.e. "*prima facie* aggrieved"), or (2) "she is farther away . . . [but] offers 'plus factors' supporting injury" (i.e. "almost *prima facie* aggrieved"). *Ray*, *supra*, 430 Md. at 551-52. An association has no standing without a property interest of its own "separate and apart from that of its members." *Citizens Planning & Housing Ass'n v. Cnty. Exec. of Baltimore Cnty.*, 273 Md. 333, 345 (1974)). If not "*prima facie* aggrieved," the association must allege and prove "plus factors" demonstrating that the association will be harmed differently from the general public.

GTC is an "umbrella organization" of neighborhood associations, rather than a neighborhood association with individual resident members, and GTC owned no property within Maryland. The circuit court erred in its finding that GTC had standing due to its interest in the benefits of the payment of a waiver fee. There is no evidence in the record that GTC was "aggrieved" by the decision to permit the zero-dollar waiver fee any more than any property owner in all of Baltimore County. As a community association not "aggrieved" by the Board's decisions, GTC

did not have standing to petition the circuit court for judicial review. The same is true for GTC's standing in the PUD approval case.

The intervenors in this case were not parties to the proceedings before the Board and no viable petitioner existed for the intervenors to join. Even if the motions to intervene had been timely, neither GTC nor any of the intervenors met both requirements for standing to petition for judicial review before the circuit court. Accordingly, the circuit court erred when it denied DMS's motion to dismiss, granted the untimely motions to intervene, and reached the merits of the case.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated October 2, 2017, the following attorney has been disbarred by consent:

GARY STEWART PEKLO

*

By an Order of the Court of Appeals dated September 7, 2017, the following attorney has been indefinitely suspended by consent, effective October 10, 2017:

MARIANNE ELIZABETH MORRIS

*

By an Order of the Court of Appeals dated October 12, 2017, the following attorney has been disbarred by consent:

JOHN THOMAS BURCH, JR.

*

By an Order of the Court of Appeals dated October 25, 2017, the following attorney has been disbarred by consent:

WILLIAM GORDON McLAIN, IV

*

By an Order of the Court of Appeals dated October 31, 2017, the following attorney has been suspended:

JEFF A. GODFREY

*

By an Order of the Court of Appeals dated October 31, 2017, the following attorney has been suspended:

MATTHEW PETER GORMAN

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*

JUDICIAL APPOINTMENTS

*

On September 22, 2017, the Governor announced the appointment of **DONINE MARIE CARRINGTON** to the Circuit Court for Charles County. Judge Carrington was sworn in on October 6, 2017 and fills the vacancy created by the retirement of the Hon. Thomas R. Simpson, Jr.

*

On September 22, 2017, the Governor announced the appointment of **LAWRENCE FRANCIS KREIS, JR.** to the Circuit Court for Harford County. Judge Kreis was sworn in on October 19, 2017 and fills the vacancy created by the retirement of the Hon. William O. Carr.

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Ninety-Fourth Report of the Standing Committee on Rules of Practice and Procedure was filed on October 11, 2017.

http://mdcourts.gov/rules/rodocs/ro194.pdf

UNREPORTED OPINIONS

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

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

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