# Amicus Curiarum

VOLUME 39
ISSUE 1 JANUARY 2022

**A Publication of the Office of the State Reporter**

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# COURT OF APPEALS

*Karen Webb v. Giant of Maryland, LLC*, No. 12, September Term 2021, filed December 21, 2021. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/coa/2021/12a21.pdf

APPEAL AND ERROR – REVIEW – SCOPE AND EXTENT OF REVIEW – JUDGMENT IN GENERAL – IN GENERAL

LABOR AND EMPLOYMENT – VICARIOUS LIABILITY FOR NEGLIGENT ACTS – RIGHTS AND LIABILITIES AS TO THIRD PARTIES – WORK OF INDEPENDENT CONTRACTOR – IN GENERAL

TRIAL – INSTRUCTIONS TO JURY – SPOLIATION – NECESSITY AND SUBJECT MATTER – FAILURE OF A PARTY TO TESTIFY OR TO CALL WITNESS OR PRODUCE EVIDENCE

APPEAL AND ERROR – HARMLESS AND REVERSIBLE ERROR – PARTICULAR ERRORS – INSTRUCTIONS – IN GENERAL

**Facts**:

Karen Webb, while shopping at a Giant food store, was injured when a non-motorized pallet jack of Pepsi products came in contact with her. The jack was being operated at the time by a delivery person employed by Pepsi who was re-stocking displays of Pepsi products. The jack was the property of Giant.

Webb sued Giant in the Circuit Court for Anne Arundel County, alleging, among other things, that Giant was liable vicariously for the actions of the Pepsi delivery person because of the degree of control Giant possessed assertedly regarding the use of its pallet jack by non-Giant personnel. Giant moved for summary judgment as to the vicarious liability claim. The circuit court denied the motion, without a hearing.

At trial, Giant's corporate representative testified that he had been informed by Giant's third party security vendor that, although there were cameras located throughout the store, no camera had captured the incident of Webb's injury.

At the close of Webb's case-in-chief and at the close of evidence, Giant moved for judgment on the vicarious liability claim because there was no evidence that the Pepsi delivery person was under Giant's control or direction sufficiently. The trial judge denied both motions.

As to Giant's failure to produce camera images of the incident, Webb requested a spoliation instruction. Over Giant's objection, the judge gave a pattern-based spoliation instruction to the jury. The jury awarded a substantial monetary amount to Webb.

On appeal to the Court of Special Appeals, Giant argued that the circuit court erred in denying its motion for summary judgment, denying its motion for judgment at the close of Webb's case-in-chief, and giving a spoliation instruction. The intermediate appellate court, in a reported opinion (249 Md. App. 545 (2021)), reversed the circuit court judgment. Although finding no error in the denial of summary judgment, the court concluded that there was error in the denial of the motion for judgment. The distinction explained for treating the actions on the two motions differently was that the standards for appellate review of the actions were different. As additional grounds for reversal, the appellate court found error in giving the spoliation instruction because there was no direct evidence that a relevant video of the incident in the Giant store ever existed or was destroyed by Giant or its security vendor.

The Court of Appeals granted Webb's petition for certiorari to consider what the standards for appellate review were as between the two relevant motions and whether the spoliation instruction was given appropriately.

**Held**: Affirmed.

The Court of Special Appeals applied correctly a *de novo* standard when reviewing the circuit court's denial of a motion for judgment filed by Giant at the close of the evidence. In reviewing the circuit court's decision, the Court conducted the same analysis as the circuit court and reviewed the evidence in a light most favorable to Webb (the non-moving party). Based on that review, which the appellate court conducted without deference to the circuit court, the Court held that the evidence was insufficient to submit Webb's negligence claim to the jury and that, as a result, Giant was entitled to judgment as a matter of law. The intermediate appellate court's analysis was sound and consistent with established Court of Appeals's precedent.

The Court of Special Appeals did not err in reversing the circuit court's denial of Giant's motion for judgment. The evidence, even when viewed in a light most favorable to Webb, did not permit an inference that Giant retained sufficient control over the work of the independent

contractor who caused her injuries. The evidence established that Giant had only a general control over the contractor's work, which was insufficient to establish Giant's liability. Moreover, any control Giant may have had over the contractor's work did not extend to the very thing from which Webb's injuries arose.

The Court of Special Appeals did not err in holding that the circuit court's spoliation instruction was improper and prejudicial. The appellate court reviewed properly the circuit court's decision to give the instruction for abuse of discretion. It then determined correctly that the instruction was not applicable under the facts of the case, given that there was no indication that the supposed evidence at issue – a video recording of the incident that caused Webb's injuries – had ever existed. The appellate court likewise did not err in holding that the instruction was prejudicial. Not only was the instruction misleading, but it required the jury to speculate about the applicability of a legal principle, *i.e.*, the inference to be drawn from the destruction or concealment of evidence, regarding evidence that was never shown to exist in the first place.

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*Eric Antonio Alarcon-Ozoria v. State of Maryland*, No. 4, September Term 2021, filed December 21, 2021. Opinion by Hotten, J.

Watts,J., dissents.
Adkins, J., concurs.

https://www.courts.state.md.us/data/opinions/coa/2021/4a21.pdf

CRIMINAL LAW – DISCOVERY – MANDATORY DISCLOSURE

CRIMINAL LAW – DISCOVERY – DUE DILIGENCE

CRIMINAL LAW – DISCOVERY – HARMLESS ERROR

**Facts**:

On June 9, 2018, a shooting occurred outside Abyssinia, an Ethiopian restaurant in downtown Silver Spring, Maryland. The shots occurred in a nearby alleyway by the outdoor side patio bar. No one was injured. The restaurant had an outdoor surveillance camera facing the alleyway, but the view of the shooting was blocked by restaurant awnings. After interviewing witnesses and reviewing surveillance video from nearby establishments, law enforcement identified two suspects involved in the shooting. An anonymous tip helped identify one of the men as Ruben Gilbert. Law enforcement obtained a search warrant for Mr. Gilbert's cell phone and found a text exchange implicating Eric Alarcon-Ozoria ("Petitioner") as the other man involved in the shooting.

Thereafter, Petitioner was charged with assault in the first-degree, use of a firearm in the commission of a crime of violence, and illegal possession of a firearm after a felony conviction. Mr. Gilbert was charged as a co-conspirator, but the State entered a *nolle prosequi* disposition in June 2019. Petitioner's jury trial was scheduled for Monday, August 5 through Thursday, August 8, 2019 in the Circuit Court for Montgomery County.

On the morning of August 5 before trial, the State shared with defense counsel for the first time approximately 200 jail call recordings of conversations between Petitioner and Mr. Gilbert. The State had requested recordings of calls made by Petitioner from a state correctional facility on Wednesday, July 31, and received the calls on Friday, August 2. The State reviewed the recordings over the weekend, and on Sunday, August 4, requested additional recordings of any outgoing calls from the jail to Mr. Gilbert's phone. At 6:00 a.m. on Monday, August 5, the correctional facility provided one additional recording of a jail call between Mr. Gilbert and a person originally identified as another inmate but later identified as Petitioner. During an on-the-record chambers conference, the State identified twelve recordings received on Friday, August 2 that it might use for impeachment purposes and the one recording received Monday, August 5 that the State said it planned to use in its case-in-chief.

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Over objection of defense counsel, the circuit court admitted the jail call recordings with the State's assurance that it would not use the recordings in its case-in-chief or as impeachment evidence until the second day of trial, to give defense counsel time to review the recordings. The jury convicted Petitioner of illegal possession of a firearm. The circuit court sentenced Petitioner to fifteen years' imprisonment, with all but twelve years suspended and upon release five years of supervised probation. Petitioner timely appealed to the Court of Special Appeals, which affirmed. The Court of Special Appeals concluded that the State did not have an underlying obligation, pursuant to Md. Rule 4-263, to seek or obtain the jail call recordings.

**Held**: Affirmed.

The Court held that the scope of the mandatory obligation of the State to disclose materials to the defense without request, pursuant to Md. Rule 4-263, does not extend to materials held by a state correctional facility, which is not within the ambit of control by the State, does not regularly report to the State's Attorney, and did not report to the State's Attorney in the instant case.

The Court also held that the State did not violate its obligation of due diligence by providing jail call recordings of statements made by Petitioner on the morning of trial. Maryland Rule 4-263(c)(1) obligates the State to exercise due diligence in identifying "all of the material and information that *must* be disclosed under this Rule." (Emphasis added). The obligation for due diligence was not triggered until the State received approximately 200 jail call recordings three days before trial. The State did not violate its due diligence obligations by reviewing the recordings over the weekend and providing Petitioner with a select group of twelve recordings that it may have used as impeachment evidence and one recording used in its case-in-chief.

Finally, assuming *arguendo* that the State violated its discovery obligations by providing jail call recordings to Petitioner on the morning of trial, the Court held that the error was harmless beyond a reasonable doubt. The Court held in *Thanos v. State*, 330 Md. 77, 622 A.2d 727 (1993), that assuming the State violated Md. Rule 4-263 by surprising the defendant with three witnesses before trial, "any error in the State's discovery violations was harmless" given the existence of corroborating evidence. *Id*. at 97, 622 A.2d at 736. Similar to the corroborating evidence in *Thanos*, the State provided additional evidence to establish consciousness of guilt independent of the jail call recordings, including a text message exchange, witness testimony, forensic evidence, a 911 call recording, pictures, and video footage of the incident. Therefore, the Court concluded any error was harmless.

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*Michael O'Sullivan v. State of Maryland*, No. 3, September Term, 2021, filed December 17, 2021. Opinion by Biran, J.

McDonald and Raker, JJ., concur and dissent.

https://mdcourts.gov/data/opinions/coa/2021/3a21.pdf

PERJURY – PROSECUTION'S BURDEN OF PRODUCTION – COMMON LAW "TWO-WITNESS" RULE

APPELLATE REVIEW – SUFFICIENCY OF THE EVIDENCE – PERJURY

**Facts**:

On May 28, 2019, Officer Michael O'Sullivan was indicted by a grand jury in Baltimore City for perjury in violation of Md. Code, Crim. Law (CR) § 9-101 and for the common law offense of misconduct in office. O'Sullivan, a veteran officer in the Baltimore Police Department, was charged with allegedly providing false testimony at the criminal trial of Yusuf Smith, when he claimed to have seen Smith remove a handgun from his waistband and throw it to the ground. Based on O'Sullivan's testimony, the District Court of Maryland found Smith guilty of a handgun charge and related offenses. Smith appealed his convictions to the Circuit Court for Baltimore City. Before the case was heard, the State dismissed the case against Smith and began investigating O'Sullivan.

O'Sullivan elected a nonjury trial in the Circuit Court for Baltimore City, which took place over two days in October 2019. The State called Smith as a witness and asked him to specify what O'Sullivan testified to at Smith's District Court trial that was "inconsistent with the truth." Smith replied: "He said that he saw me with a silver handgun and I removed it from my waistband and threw it on the ground and that was not true." The State also introduced video footage from body cameras worn by O'Sullivan and his supervisor, Sergeant Amy Streett, which showed them approaching the area where O'Sullivan claimed he saw Smith discard an object. The footage from O'Sullivan's camera showed him recover a revolver. The State argued that the video footage showed it was impossible for O'Sullivan to have seen Smith discard the revolver, and therefore, that O'Sullivan had testified falsely at Smith's trial.

On December 3, 2019, the circuit court found O'Sullivan guilty of perjury and misconduct in office and sentenced him to concurrent 15-month terms of incarceration on the two counts.

In an unreported opinion, the Court of Special Appeals affirmed O'Sullivan's convictions, holding that Maryland's common-law two-witness rule did not apply "because a reasonable factfinder could conclude that O'Sullivan testified falsely at Smith's criminal trial based solely on the body camera footage[.]" *O'Sullivan v. State*, No. 2275, slip op. at 17, Sept. Term, 2019, 2020 WL 7419686, at *8 (Md. Ct. Spec. App. Dec. 18, 2020). The court also held that, even if it

were to apply the two-witness rule, the rule would be satisfied because Streett's body camera footage was independent corroborative evidence of Smith's testimony, and because "the direct and circumstantial evidence was legally sufficient to foreclose any reasonable hypothesis other than O'Sullivan's guilt." *Id*.

O'Sullivan filed a petition for *certiorari* in the Court of Appeals, contending that both of the intermediate appellate court's bases for affirmance were erroneous. The State filed a conditional cross-petition for *certiorari*, asking the Court to abrogate the two-witness rule prospectively. On April 9, 2021, the Court of Appeals granted both petitions. *O'Sullivan v. State*, 474 Md. 221 (2021).

**Held**: Affirmed.

Maryland's common-law "two-witness rule" is a burden of production that applies if the State elects to present the testimony of a witness as direct and positive evidence of the element of falsity. If the State opts to introduce such witness testimony, the two-witness rule requires that the State do more: the State must also produce evidence from at least one additional witness that directly and positively contradicts the allegedly false testimony, or the State must introduce other evidence that tends to corroborate a sole witness's direct evidence, i.e., that tends to establish the falsity of the defendant's prior testimony. The State is not required to prove falsity in a perjury case by calling at least one witness who testifies that the defendant's prior testimony was false. The State can prove falsity by introducing only circumstantial evidence, by introducing direct evidence from multiple witnesses, or by introducing circumstantial evidence along with direct evidence from one or more witnesses. Any such combination of forms of proof will satisfy the State's burden of production as to the element of falsity.

The Court of Appeals declined the State's request to abrogate the two-witness rule prospectively, concluding that doing so would be inconsistent with the doctrine of *stare decisis*. The Court reaffirmed that the logical underpinnings of the rule remain sound. The Court disagreed with the State's argument that, by affording extra protection to those who have been charged with giving false testimony, the two-witness rule potentially licenses the very harm it seeks to avoid. The Court concluded that this concern is overblown, given the relatively modest burden that the two-witness rule imposes on the State. In addition, the Court observed that the rule encourages a reasonable, truthful witness – who otherwise might be reluctant to testify out of fear that she may not be believed – to provide testimony. It does so by requiring the State to have more than just one person's uncorroborated contrary account to successfully prosecute the witness for perjury. This gives the truthful witness confidence that, if the factfinder does not accept the witness' testimony, the State will not proceed against the witness on a perjury charge based solely on a "he said/she said" dispute.

In addition, the Court disagreed with the State's contention that the rule is unnecessary because, in addition to proving falsity, the State must also prove willfulness. The Court observed that the trier of fact in a perjury case may infer willfulness from the proof of falsity itself. Because proof

of falsity and proof of willfulness often are coextensive, or at least intertwined, the existence of the willfulness element does not warrant abrogation of the two-witness rule.

Contrary to the Court of Special Appeals, the Court of Appeals held that the two-witness rule does apply to O'Sullivan's prosecution. Whether or not the State could have proved the element of falsity without calling Smith as a witness, the State did not proceed that way. Because the State chose to introduce Smith's direct and positive testimony to establish the element of falsity, the two-witness rule was applicable, and the State was required to produce additional evidence that tended to prove the falsity of O'Sullivan's prior testimony. The State met its burden of production under the two-witness rule in this case.

The Court disagreed with O'Sullivan's contention that a different standard of review should apply with respect to the sufficiency of the evidence of falsity in an "oath-against-oath" perjury case, versus a perjury case in which the two-witness rule is inapplicable. The Court observed that prior cases discussing the two-witness rule have conflated the rule's burden of production with the State's burden of persuasion in proving falsity beyond a reasonable doubt, resulting in confusion. Most notably, in *Brown v. State*, 225 Md. 610, 616-17 (1961), the Court stated that, if the State attempts to prove falsity in a perjury case through the use of direct testimony from a single witness and corroborating circumstantial evidence, the latter must be "of such a nature so as to be of equal weight to that of at least a second witness, thus foreclosing any reasonable hypothesis other than the defendant's guilt." In this case, the Court described *Brown*'s formulation as "unhelpful." The State always has the burden to prove all elements of a criminal charge beyond a reasonable doubt. How the State chooses to attempt to meet its burden of persuasion as to falsity in any particular case does not affect the standard of review that a court applies in determining whether the State has met that burden. Thus, circumstantial evidence in an oath-against-oath perjury case need not be equal to the conceptual "weight" of a second witness. Rather, where the State introduces direct and positive testimony from a single witness as well as circumstantial evidence to prove falsity, a reviewing court should examine the totality of the evidence, as it does in every other case. Under that standard of review, the court asks whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. The evidence at O'Sullivan's trial was sufficient to prove his guilt of all the elements of the perjury charge and the misconduct in office charge.

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# COURT OF SPECIAL APPEALS

*Robert A. Podles v. Consumer Protection Division, Office of the Attorney General of Maryland*, No. 184, September Term 2021, filed December 15, 2021. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/cosa/2021/0184s21.pdf

ANTITRUST AND TRADE REGULATION – STATUTORY UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION – ENFORCEMENT AND REMEDIES – STATE AND LOCAL ADMINISTRATIVE AGENCIES – SUBPOENAS; WITNESSES

ANTITRUST AND TRADE REGULATION – STATUTORY UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION – PARTICULAR RELATIONSHIPS – PROFESSIONALS

**Facts**:

The Consumer Protection Division of the Office of the Attorney General of Maryland ("CPD") was conducting an administrative investigation of certain activities of Robert A. Podles, a licensed Maryland real estate salesperson. The CPD was examining specifically Podles's role in lease-to-own and land installment contracts that may violate the Maryland Consumer Protection Act ("MCPA").

In furtherance of its investigation, the CPD issued a subpoena to Podles to produce documents "related to his trade practices concerning consumer realty" and "any Maryland real estate-related transaction" in which he was involved. Podles refused to comply, relying on a provision of the MCPA that states, in Md. Code, Commercial Law Art., § 13-401(1), that the MCPA "does not apply to . . . [t]he professional services of a . . . real estate salesperson[.]" He maintained this exception was a blanket one on its face and applied to any attempt by the CPD to investigate, charge or prosecute him for an alleged violation of the MCPA.

The CPD filed in the Circuit Court for Harford County a petition to enforce the administrative investigatory subpoena issued to Podles. It sought summary judgment, which Podles opposed. The court granted CPD's petition. Podles filed this timely appeal to the Court of Special Appeals.

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**Held**: Affirmed.

The Court of Special Appeals found that the circuit court did not err in granting summary judgment in favor of the CPD against Podles, after he failed to produce documents in accordance with an administrative investigatory subpoena issued by the Division regarding allegations that Podles had violated the MCPA. Although the MCPA exempts expressly the "professional services" of a real estate salesperson from the Act's purview, that exemption did not preclude the Division from issuing and enforcing an investigatory subpoena against Podles simply because he was a real estate salesperson or because the information being sought may turn-out to have been related to his "professional services" as a real estate salesperson. Whether the exemption applies to any charges against and/or prosecution of Podles that may be brought by the CPD following its investigation is left for another day.

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*Norino Properties, LLC, et al. v. Joseph J. Balsamo*, No. 1343, September Term 2020, filed December 15, 2021. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2021/1343s20.pdf

MARYLAND CONSTITUTIONAL LAW – IN BANC REVIEW – SCOPE OF REVIEW

**Facts**:

In 2019, appellee, Joseph J. Balsamo, filed suit in the Circuit Court for Baltimore County against appellants, John Zorzit and Norino Properties, LLC, seeking, among other things, to dissolve Balsamo and Norino Properties, LLC, a real estate investment company in which Mr. Balsamo and Mr. Zorzit each have a 50% membership interest. The circuit court granted appellants' motion to dismiss the complaint with prejudice on the ground that the claims were barred by the doctrine of *res judicata* and the complaint failed to state a claim upon which relief could be granted. The court subsequently denied Mr. Balsamo's motion to alter or amend the judgment of dismissal and his accompanying request for leave to amend the complaint.

In April 2020, Mr. Balsamo filed a notice for in banc review of the circuit court's decision, and the circuit administrative judge designated three judges to review the decision as a panel in banc. Appellants moved to dismiss the in banc review, challenging the jurisdiction of the in banc panel to review the court's decision, on the ground that in banc review, as authorized by Article IV, § 22 of the Maryland Constitution, was unavailable in this case "because no trial was conducted." The panel found that that the court's decision was a final judgment that was reviewable in banc, and therefore, it denied appellants' motion to dismiss the in banc review. After a merits hearing, the panel reversed the circuit court's denial of leave to amend the complaint, and without addressing the propriety of the court's dismissal based on *res judicata*, it granted Mr. Balsamo 30 days to file another complaint.

**Held**: Affirmed.

Pursuant to Article IV, § 22 of the Maryland Constitution, in banc review by a circuit court panel is permitted "[w]here any trial is conducted by less than three Circuit Judges." The plain language of Article IV, § 22 provides that in banc review is available only after a trial.

A "trial" for purposes of Article IV, § 22 is "'that step in an action by which issues or questions of fact are decided.'" *Berg v. Berg*, 228 Md. App. 266, 281 (2016) (quoting *Miller v. Tobin*, 18 F. 609, 616 (C.C.D. Or. 1883), *overruled on other grounds by Alley v. Nott*, 111 U.S. 472 (1884)). The term "trial" in the context of in banc review should be read broadly to include an action that determines issues (of law or fact) or questions of fact, as long as the action results in a

final judgment. The ruling of the circuit court granting a motion to dismiss with prejudice, thereby resolving the action between the parties, was a "trial" pursuant to Article IV, § 22.

Accordingly, the in banc panel had jurisdiction to review the decision of the circuit court dismissing Mr. Balsamo's complaint. The in banc panel properly found that the circuit court abused its discretion in denying Mr. Balsamo leave to amend the complaint.

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*MCB Woodberry Developer, LLC v. The Council of Unit Owners of the Millrace Condominium, Inc.*, No. 1187, September Term 2020, filed December 16, 2021. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/cosa/2021/1187s20.pdf

CIVIL IMMUNITY – ANTI-SLAPP STATUTE

**Facts**:

The developer of a mixed use project, known as the Clipper Mill Planned Unit in Baltimore, submitted to local government authorities a proposal to revise a previously approved plan for the project. Some residents and community associations within the existing development of the project opposed the proposal. While a lawsuit initiated by the opponents challenging the proposal was pending, the developer filed its own civil action in the Circuit Court for Baltimore City against the opponents seeking monetary damages and declaratory relief for opponents' assertedly unjustified and improper opposition to the project revision, causing delay and excessive costs to the developer. The causes of action advanced included counts for breach of contract (violation of project covenants), tortious interference with economic relations, and civil conspiracy to interfere tortiously. In conjunction with the suit, the developer filed extensive discovery demands to opponents.

The opponents, in response to the developer's suit, filed a motion to dismiss, claiming that the suit was barred by operation of Maryland's Strategic Litigation Against Public Participation (Anti-SLAPP) statute. Md. Code, Courts & Judicial Proceedings Art. ("Cts. & Jud. Proc."), § 5-807. The purpose of the statute is to prohibit litigation maintained to deter, punish, or intimidate critical public comment and participation in governmental proceedings. A party seeking to have the targeted litigation nullified must persuade a court to find four things: (1) the suit was brought in bad faith; (2) the defendants made protected communications to a government body or the public; (3) the lawsuit is materially related to the protected communications; and, (4) the suit was brought with the intent to inhibit protected communications.

After a hearing, the circuit court granted the opponents' motion to dismiss. The developer appealed to the Court of Special Appeals. It posed a single question – did the circuit court err by dismissing the developer's suit under the Anti-SLAPP statute?

**Held**: Affirmed.

The Court of Special Appeals concluded the following:

(1) Developer did not state a plausible claim that the residents of a condominium and townhouse development and their homeowners' associations violated the community declaration of covenants by opposing actions by the developer to modify the planned unit development. Md. Code Ann., Cts. & Jud. Proc. § 5-807(b)(2) & (3);

(2) Communications by residents of condominium and townhouse developments and their homeowners' associations made to the public, elected representatives, the Baltimore City Planning Commission, and the Circuit Court for Baltimore City relative to assertedly minor amendments to a planned unit development were on a matter within the authority of a government body and on an issue of public concern. Md. Code Ann., Cts. & Jud. Proc. § 5-807(b)(1);

(3) Bad faith under the Anti-SLAPP statute has the same meaning as under Md. Rule 1-341, the pursuit of litigation vexatiously for the purpose of harassment or unreasonable delay, or for other improper reasons. Md. Code Ann., Cts. & Jud. Proc. § 5-807(b)(1); Md. Rule 1-341;

(4) The structure of the Anti-SLAPP statute envisions that, in the appropriate case, bad faith may be decided upon a preliminary motion to dismiss. The facts as alleged in developer's complaint, coupled with facts that were appropriate for judicial notice, established that the developer filed the complaint for the improper purpose of deterring the residents and their homeowners' associations from engaging in protected communications in opposition to development, which constitutes bad faith. Md. Code Ann., Cts. & Jud. Proc. § 5-807(b)(1) & (d); and,

(5) The developer did not allege any facts showing that the residents acted with constitutional malice in making any communications. Md. Code Ann., Cts. & Jud. Proc. § 5-807(c).

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*Anthony Fludd v. Donielle Kirkwood*, No. 1297, September Term 2020, filed December 16, 2021. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2021/1297s20.pdf

FAMILY LAW – CHILD SUPPORT – EQUITABLE DEFENSES – LACHES

FAMILY LAW – CHILD SUPPORT – CONTINUING JURISDICTION OVER NON-RESIDENTS

**Facts**:

Anthony Fludd and Donielle Kirkwood are the natural parents of two minor children. In January 2012, Ms. Kirkwood filed a bill of complaint for custody of the parties' then-only child in the Circuit Court for Montgomery County. At the time, Ms. Kirkwood was fleeing her relationship with Mr. Fludd, which, she claimed, had turned abusive.

The parties initially entered into a consent order on June 19, 2012 in the circuit court under which they shared legal custody and Ms. Kirkwood had primary physical custody. Just three days later, however, Mr. Fludd filed a motion to modify, the first in a long series of filings that the circuit court characterized as "abusive." The parties proceeded to contest custody and visitation for three years. In the interim, the parties' second child was born. Finally, in December 2015, the court entered a final custody order awarding Ms. Kirkwood sole legal and physical custody of the parties' two children.

In September 2016, Ms. Kirkwood filed a motion for child support and other financial relief. Mr. Fludd responded. For unknown reasons, the circuit court did not rule on Ms. Kirkwood's motion for child support for several years.

On September 26, 2019, Mr. Fludd filed a motion to modify custody and visitation. At a hearing on the motion to modify, the circuit court appointed a child privilege attorney and counseled Mr. Fludd to resume therapy in the hopes of furthering the reunification process outlined in the 2015 child custody order.

After this hearing, Ms. Kirkwood filed a motion requesting a hearing on the still- pending motion for child support. However, the circuit court was informed that Ms. Kirkwood and the children fled to Texas some months earlier. Mr. Fludd had already notified the court, several years earlier, that he moved to Washington, D.C. Accordingly, on September 1, 2020, the court held a hearing on the issue of the court's continuing jurisdiction over the case.

Although the parties and the court agreed that the circuit court no longer had jurisdiction over the child custody issues, Ms. Kirkwood argued that the court retained jurisdiction over child support. On November 17, 2020, the court issued an order in which it found that Ms. Kirkwood had

presented grounds establishing personal jurisdiction over Mr. Fludd on the matter of child support and related attorney's fees and costs under the long-arm provisions of Maryland's Uniform Interstate Family Support Act ("UIFSA"), codified at Maryland Code (1984, 2019 Repl. Vol.), Family Law Article ("FL"), §§ 10-301-71.

Following this determination, the court held a hearing over two days in early December on the merits of Ms. Kirkwood's 2016 motion for child support. Ms. Kirkwood testified to her financial burdens as well as the abuse that Mr. Fludd inflicted on her. The court issued a written order requiring that Mr. Fludd: (1) pay $2,101 per month in child support; (2) pay one calendar year of arrears, totaling $25,212.00; and (3) pay Ms. Kirkwood $8,000 in attorney's fees.

Mr. Fludd noted a timely appeal.

**Held**: Affirmed.

The Court of Special Appeals reached several holdings. First, the Court determined, in accordance with Maryland precedent and the law of a majority of other jurisdictions, that the defense of laches is generally not applicable to a child support claim but stopped short of holding that laches may never be applied. The propriety of applying laches to child support arrearage claims is narrow. Moreover, parents who raise the defense—regardless of how long the delay—to bar *prospective* child support obligations may liken their prospects to a camel passing through the eye of a needle. Child support is awarded by the court for the benefit of children, and children have an '"indefeasible right' to have their best interests fully considered." *Kaplan v. Kaplan*, 248 Md. App. 358, 387-88 (2020) (citations omitted). When determining the appropriateness of applying laches to a child support action, courts must consider the best interest of the child and the parents' *continuing* duty to "support" and "care" for the child. Maryland Code (1984, 2019 Repl. Vol.), Family Law Article, § 5-203(b)(1); Maryland Code (2014, 2019 Repl. Vol.), General Provisions Article, § 1-401.

Second, the Court held that the trial court was not barred by the defense of laches from awarding child support and attorney's fees. Any delay in bringing and adjudicating the underlying child support action could not have relieved Mr. Fludd of his continuing statutory duty to support his minor children until they reach the age of majority.

Third, the Court concluded that Mr. Fludd's "obligation to pay child support . . . arose under the laws of this State," Maryland Code (1973, 2020 Repl. Vol.), Courts and Judicial Proceedings Article, § 6-103.1(2), and that he was given "reasonable notice and opportunity to be heard." *Glading v. Furman*, 282 Md. 200, 209 (1978). Accordingly, the circuit court had continuing jurisdiction over Mr. Fludd in the child support case.

Fourth, the Court held that a trial court need only find one basis among the seven listed under the UIFSA long-arm statute, FL § 10-304, in order to exercise jurisdiction over a nonresident defendant.

Fifth, in addition to retaining jurisdiction under the continuing jurisdiction doctrine, the Court concluded that Mr. Fludd invoked the circuit court's jurisdiction under two prongs of the UIFSA long-arm statute. The Court held that FL § 10-304(a)(2) was satisfied when Mr. Fludd filed a responsive pleading, entered a general appearance, and affirmatively requested relief from the court. Once Mr. Fludd submitted to the court's jurisdiction under FL § 10-304(a)(2), he could not "un-ring [the jurisdictional] bell." *Friedetzky v. Hsia*, 223 Md. App. 723, 747 (2015). In addition, the Court held that another prong of the UIFSA's long-arm statute—FL § 10-304(a)(6)—was satisfied when the circuit court credited Ms. Kirkwood's testimony that the children were conceived in Montgomery County, Maryland and that exercise of jurisdiction under this prong would not offend due process. Accordingly, the circuit court correctly determined that it was able to exercise jurisdiction over Mr. Fludd under the UIFSA long-arm statute.

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*Baltimore Action Legal Team, et al., v. Office of the State's Attorney of Baltimore City, et al.*, No.1251, September Term 2020, filed December 17, 2021. Opinion by Wells, J.

https://mdcourts.gov/data/opinions/cosa/2021/1251s20.pdf

GENERAL PROVISIONS – MARYLAND PUBLIC INFORMATION ACT – PERSONNEL RECORDS – ATTORNEY WORK PRODUCT – FEE WAIVER

**Facts**:

Between December 2019 and January 2020, appellant Baltimore Action Legal Team ("BALT") made three requests under the Maryland Public Information Act ("MPIA") to appellee, the Office of the State's Attorney for Baltimore City ("SAO"). BALT specifically requested that the SAO provide, first, a list of 305 Baltimore City police officers with "questionable integrity," (the "do not call" list or "the list") as well as supporting documentation; second, any information relating to investigations of police officers that the SAO conducted during 2019; and third, charges filed against a specific police officer in 2020. These requests came amid the State's Attorney disclosure of the existence of such a list during a public hearing into institution-wide corruption of City police officers. The SAO denied each MPIA request and denied two fee waiver requests. BALT sued. The Circuit Court for Baltimore City granted summary judgment in the SAO's favor, finding that the list was exempt as a personnel record and as attorney work-product. The court sustained the SAO's denial of the fee waiver, finding, among other things, that BALT had failed to show that the requested information was in the public interest and that they could not have paid the fee.

**Held**: Reversed.

In undertaking its analysis, the Court of Special Appeals first recognized that BALT raised two narrow issues: 1) Whether the do not call list qualified as a personnel record and 2) whether the list qualified as attorney work-product. Either classification would exempt the list from production under the MPIA. The Court held that the list was not a personnel record because the SAO could not claim that it had supervisory authority over the records and the person who was the subject of the records. To qualify under the personnel record exemption, the list would have to pertain to personnel issues, such as a performance rating or the ability of an employee to perform their job, generally. Maryland Code Annotated, General Provisions ("GP"), § 4-311(a). Instead, the list contains the names of the officers that the SAO, not the City's police department, has designated as having "questionable integrity." Consequently, the list is not a personnel record as defined in GP § 4-311(a), although the Court recognized that the list might have been created utilizing personnel records from the City police department. But even if the list was

compiled using personnel records from the police department, that information could have been redacted or severed while complying with the MPIA request for disclosure of the list.

As far as the SAO's claim that the do not call list was attorney work-product, the Court concluded that such a designation was inappropriate. In sustaining the SAO's conclusion that the list constituted attorney work-product, the circuit court relied on a broad reading of the holding in *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc*., 351 Md. 396, 401 (1998). The Court of Special Appeals declined to adopt the circuit court's expansive reading of that opinion. "[T]he touchstone of the work product doctrine [is] that the materials must have been created in preparation for trial." *Id*. at 407. It is not enough that litigation may eventually occur, but rather, "there must have been a particular, identifiable claim or impending litigation" to invoke the protections of the work product doctrine. *Id*. at 411. While SAO-generated work is protected when prepared in anticipation of trial, the mere fact that the SAO is in the business of routinely engaging in litigation, and a document generated by their office might be litigated in a prosecution, alone, "does not render all documents prepared with regard to those circumstances protected work product." *E.I. du Pont de Nemours*, 351 Md. at 411. Our holding in this regard is limited to the "do not call" list, and not the related materials, because in responding to a discovery request, such materials may be attorney work product and exempt from production under the MPIA.

Finally, with regard to BALT's two requests for fee waivers under the MPIA, specifically, GP §4-206(e), the circuit court reasoned that because the record before it lacked evidence from BALT regarding its inability to pay, as well as any indication of how BALT would disseminate the requested information, the SAO properly denied the fee waiver requests. After reviewing each waiver request, the Court of Special Appeals, however, concluded that both of BALT's requests touched on the operations of the SAO, a relevant factor to be considered when deciding whether a fee waiver was appropriate. Further, the record developed below revealed that the SAO considered only BALT's supposed ability to pay the fees associated with copying the information in denying the requests. Although BALT's ability to pay is one factor that the SAO could assess, relevant case law makes clear a denial is arbitrary and capricious when it is made solely based on expense to the agency and the ability of the requester to pay. Consideration of other "relevant factors" must also be made. In the absence of consideration of any other relevant factors, including, for example, the heightened controversy surrounding City officers' use of force, the SAO's denial could not withstand scrutiny. The Court, therefore, held that the SAO's denial of both of BALT's waiver requests was arbitrary and capricious.

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# ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated December 8, 2021, the following attorney has been placed on disability inactive status by consent:

MARGOT ELIZABETH ROBERTS

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# JUDICIAL APPOINTMENTS

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On November 2, 2021, the Governor announced the appointment of **HON. KATHLEEN MARIE DUMAIS** to the Circuit Court for Montgomery County. Judge Dumais was sworn in on December 2, 2021 and fills the vacancy created by the retirement of the Hon. Gary E. Bair.

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On November 4, 2021, the Governor announced the appointment of **KATHLEEN DIANE ENGLISH** to the Circuit Court for Frederick County. Judge English was sworn in on December 10, 2021 and fills the vacancy created by the retirement of the Hon. William R. Nicklas, Jr.

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On November 2, 2021, the Governor announced the appointment of **THERESA MICHELLE CHERNOSKY** to the Circuit Court for Montgomery County. Judge Chernosky was sworn in on December 17, 2021 and fills the vacancy created by the retirement of the Hon. Cynthia Callahan.

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# RULES ORDERS AND REPORTS

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A Rules Order pertaining to the Supplement to the 208th Report of the Standing Committee on Rules of Practice and Procedure was filed on December 22, 2021.

http://mdcourts.gov/sites/default/files/rules/order/ro208supplement.pdf

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# UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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