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Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Larry D. Hunt, Misc. Docket AG No. 90, September Term 2014, filed April 22, 2016. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2016/90a14ag.pdf

ATTORNEY DISCIPLINE – ATTORNEY MISCONDUCT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Larry D. Hunt. Bar Counsel alleged that Respondent, a non-Maryland attorney, represented a criminal defendant on a *pro bono* basis in Maryland District Court, and made a false statement to Bar Counsel about his *pro hac vice* admission to the Maryland Bar. The Court of Appeals transmitted the action to the Circuit Court for Prince George's County, and designated the Honorable Albert W. Northrop ("the hearing judge") to enter findings of fact and conclusions of law.

The hearing judge found that Jaimel Fatin Peace ("Mr. Peace") was arrested for possession of controlled dangerous substances ("CDS") – not marijuana, and Respondent agreed to represent Mr. Peace on a *pro bono* basis. Respondent thereafter appeared on Mr. Peace's behalf on multiple occasions in Maryland District Court, sitting in Prince George's County, and filed a motion to suppress the CDS evidence.

During Bar Counsel's investigation, Respondent was asked whether he had applied for *pro hac vice* admission to the Maryland Bar, and falsely replied that he was "not an attorney licensed in Maryland, but was being admitted *pro hac vice* …" before Mr. Peace informed him that he no longer wanted his representation.

Held:

Based on the Court of Appeals' *de novo* review of Respondent's misconduct, the Court concluded that Respondent violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 5.5 (Unauthorized

Practice of Law, Multijurisdictional Practice of Law), 8.1 (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct).

The Court of Appeals decided that a 60 day suspension from the practice of law was the appropriate sanction. The Court noted that Respondent had acted dishonestly while engaging in the unauthorized practice of law, and observed that other attorneys had been disbarred for violating MLRPC 5.5, 8.1 and 8.4, as Respondent had. However, the Court distinguished Respondent's misconduct on the grounds that Respondent had only represented one client on a *pro bono* basis, and had not attempted to establish a regular practice of law in Maryland. Thus, the Court held that a lesser sanction was warranted.

Attorney Grievance Commission of Maryland v. Bruce August Kent, Misc. Docket AG No. 13, September Term 2015, filed April 25, 2016. Opinion by Hotten, J.

Adkins, J., dissents.

http://www.mdcourts.gov/opinions/coa/2016/13a15ag.pdf

ATTORNEY DISCIPLINE – ATTORNEY MISCONDUCT – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Bruce August Kent. Bar Counsel alleged that Respondent engaged in professional misconduct by misappropriating trust funds while acting in the fiduciary role of trustee. The Court of Appeals thereafter transmitted the action to the Circuit Court for Baltimore County, and designated the Honorable Colleen A. Cavanaugh ("the hearing judge") to render findings of fact and conclusions of law.

On May 20, 2015, Counsel for Respondent ("Mr. Balint") accepted service of process from Petitioner, including the Petition for Disciplinary or Remedial Action. On July 10, 2015, Mr. Balint and Deputy Bar Counsel ("Bar Counsel") appeared for a scheduling conference, and Bar Counsel hand delivered interrogatories and a request for production of documents to Mr. Balint. Mr. Balint and Bar Counsel agreed to several deadlines that were incorporated into a scheduling order. The order established a deadline for the completion of written discovery by August 17, 2015, and completion of all discovery by September 4, 2015.

On September 2, 2015, Petitioner filed a Motion for Sanctions for Failure of Discovery, and an accompanying Motion to Shorten Time for Respondent to Respond. According to Petitioner's Motion for Sanctions, Respondent had thirty (30) days to respond to the interrogatories and request for production of documents. Furthermore, despite an understanding between Bar Counsel and Mr. Balint that the discovery responses would be received by August 28, 2015, no responses were received as of September 1, 2015.

The hearing judge granted the Motion to Shorten Time to Respond, and ordered a response by 11 a.m. on September 4, 2015. When no response was received by the deadline, the hearing judge imposed the following sanctions: the averments in the Petition for Disciplinary or Remedial Action were deemed admitted; Respondent's Response to the Petition for Disciplinary or Remedial Action was stricken; Respondent was precluded from calling any witnesses or presenting any documents at trial; and Respondent was prohibited from asserting any affirmative defenses, mitigation, or extenuation. On September 21, 2015, the parties appeared for a hearing on the merits of Respondent's violations, and approximately one month later, the hearing judge issued written Findings of Fact and Conclusions of Law.

The hearing judge found that, in 2005, John and Sally McClelland (husband and wife) signed a Trust Agreement drafted by Respondent as their attorney. This agreement established "The McClelland Family Revocable Living Trust" (hereinafter "the McClelland Trust") with John and Sally McClelland designated as Trustees. In 2010, after the passing of John McClelland, Sally McClelland signed a Trustee Renunciation by which she relinquished her positon as the surviving trustee of the McClelland Trust to Respondent.

After being appointed trustee, Respondent opened a checking account in the name of the McClelland Trust, yet regularly deposited funds he received on behalf of the McClelland Trust into his attorney escrow account. Respondent thereafter regularly maintained an escrow account deficiency with regard to the McClelland Trust matter, and neglected to maintain the accrued balance of McClelland Trust funds in the escrow account. At one point in time, the account deficiency of McClelland Trust funds reached $75,392.83, and was largely created by Respondent's misappropriation of funds for his own personal benefit. The hearing judge also found that Respondent made three improper loans of McClelland trust funds from his escrow account: one to the business entity of another client, one to his son-in-law's business entity, and one to his son-in-law individually. Additionally, when asked by Bar Counsel about a check drawn on the McClelland Trust's checking account, made payable to a business entity owned by Respondent and his wife, Respondent falsely stated that the check was drawn on the wrong account in error.

Held:

The Court of Appeals overruled Respondent's argument that the hearing judge abused her discretion in imposing discovery sanctions. In light of the *Taliaferro* factors, which guide the court's discretion in imposing sanctions for discovery violations, the Court held that the hearing judge's discovery sanctions were proper.

Based on the Court of Appeals' *de novo* review of Respondent's misconduct, the Court concluded that Respondent violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.7 (Conflict of Interest: General Rule), 1.8(a) (Conflict of Interest: Current Clients: Specific Rules), 1.15(a) and (d) (Safekeeping of Property), 8.1(a) (Bar Admission and Disciplinary Matters), 8.4(a)-(d) (Misconduct), Maryland Rules 16-606.1 (Attorney Trust Account Record-Keeping) and 16-609 (Prohibited Transactions), and Md. Code (1989 Repl. Vol. 2010), § 10-306 of the Business Occupations and Professions Article ("Bus. Occ. & Prof.") (Trust Money Restrictions). The Court of Appeals determined that the appropriate sanction for Respondent's misappropriation of funds entrusted to him as a fiduciary was disbarment. The Court reasoned that Respondent's misappropriation of funds was dishonest, fraudulent, and criminal, and also reflected adversely on his fitness as an attorney.

Attorney Grievance Commission v. Richard W. Moore, Jr., Misc. Docket AG No. 7, September Term 2015, filed April 22, 2016. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2016/7a15ag.pdf

ATTORNEY DISCIPLINE – NEGLECT OF CLIENTS – FAILURE TO RESPOND TO BAR COUNSEL – INDEFINITE SUSPENSION

Facts:

This attorney disciplinary matter concerns a lawyer with 25 years' experience who was reprimanded by this Court in 2009 for his admitted violations of the MLRPC relating to neglect of clients and a failure to respond to requests for information from Bar Counsel. Shortly after receiving that reprimand, Respondent Richard W. Moore, Jr. undertook representation of clients in two immigration matters that took him down the same path of nonperformance of his professional obligations. With regard to two immigration matters, he failed to perform virtually any work on behalf of, or properly communicate with, his clients. When Bar Counsel inquired about these matters, he failed to provide a timely response to Bar Counsel's inquiries.

Held:

There was clear and convincing evidence that Mr. Moore violated MLPRC 1.1, 1.3, 1.4, 1.16, 8.1(b), and 8.4(d). The proper discipline is indefinite suspension.

To his credit, Mr. Moore has, as before, largely admitted his violations. He has also expressed his sincere remorse and the relationship of these violations to his difficulty in coping with long-standing personal issues. The hearing judge aptly characterized the source of Mr. Moore's misconduct as "representational paralysis in the face of a difficult case rather than … dishonesty." Nevertheless, as the regulator of the legal profession in Maryland, the Court is obligated to protect the public as best it can from attorneys who fail, for whatever reason, to conform to professional norms. Accordingly, Mr. Moore must be suspended from the practice of law indefinitely until such time as he can satisfy the Court that the misconduct will not recur.

Wayne Garrity, Sr. v. Maryland State Board of Plumbing, No. 35, September Term 2015, filed April 26, 2016. Opinion by Barbera, C.J.

Adkins, J., concurs.

http://www.mdcourts.gov/opinions/coa/2016/35a15.pdf

CIVIL PROCEDURE – OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL

FIFTH AMENDMENT – DOUBLE JEOPARDY

Facts:

On February 23, 2012, the Consumer Protection Division of Maryland's Office of the Attorney General ("CPD") issued a Statement of Charges and Petition for Hearing against Petitioner, Wayne Garrity, Sr., and his companies, All State Plumbing, Inc. and All State Plumbing, Heating & Cooling, Inc. ("All State"). The CPD alleged that Petitioner and All State engaged in unfair and deceptive trade practices in violation of the Maryland Consumer Protection Act ("CPA"). After an administrative contested case hearing, before an administrative law judge, the CPD, in its quasi-judicial capacity, thereafter issued findings of fact and conclusions of law, concluding that Petitioner committed at least 7,079 violations of the CPA. For that misconduct, Petitioner was fined $707,900 in civil penalties and was assessed $250,000 in restitution and $65,129.54 in costs.

Thereafter, Respondent, the Maryland State Board of Plumbing ("the Board"), upon review of the decision of the CPD, opened a complaint ("the Charge Letter") against Petitioner. The Charge Letter, which incorporated the CPD's final decision, alleged that Petitioner had violated the Maryland Plumbing Act ("MPA") through the same course of conduct that violated the CPA. At a hearing before the Board, Petitioner's counsel objected to the introduction of the CPD's Final Order, arguing that the Board must conduct its own evidentiary hearing and prove independently the violations of which Petitioner was charged. Counsel for the Board responded that Petitioner was collaterally estopped from relitigating the same facts as were litigated before the CPD and determined finally in the CPD's Final Order. The Board admitted the CPD's Final Order but did not state specifically that the Board would give that Final Order preclusive effect. The Board issued a Final Decision and Order on July 9, 2013. The Board, by application of the doctrine of collateral estoppel, adopted the findings of fact made by the CPD and, based upon those findings, concluded that Petitioner had committed "pervasive, numerous and egregious" violations of the MPA as alleged in the Charge Letter. The Board revoked Petitioner's master plumber license and imposed a $75,000 civil penalty.

Petitioner petitioned for judicial review of the Board's decision in the Circuit Court for Baltimore City, alleging that the Board improperly invoked collateral estoppel and that the

Board's monetary penalty violated principles of double jeopardy. The Circuit Court affirmed the Board's decision, as did the Court of Special Appeals.

Held:

The Court held that the Board's application of offensive non-mutual collateral estoppel was proper. Although the Supreme Court has instructed that this particular permutation of collateral estoppel may not promote judicial economy and fairness, those concerns were not present in this case. The Court reasoned that, because the Board could not have joined the CPD's administrative proceeding, principles of judicial economy, or, in this case, quasi-judicial economy, were served, rather than compromised, by precluding Petitioner from relitigating facts in the Board proceeding that were already established by the CPD. The Court also reasoned that application of collateral estoppel was fair to Petitioner. Given the significant fine to which Petitioner was susceptible as a result of the violations alleged by the CPD, and the fact that it was foreseeable the Board would initiate a proceeding to revoke his license upon an adverse ruling from the CPD, Petitioner had a sufficient incentive to defend himself vigorously in the CPD proceeding. Moreover, the two proceedings were procedurally the same, thereby removing any concern that one forum presented a procedural opportunity that would have rendered a different result. Consequently, the concerns often attendant to offensive non-mutual collateral estoppel did not preclude its application in this case.

The Court then held that the CPD's Final Order constituted a final judgment for purposes of satisfying that element of collateral estoppel. An agency decision can have preclusive effect when that agency is acting in a judicial capacity; the issue presented to the fact finder in the second proceeding was fully litigated before the agency; and resolution of the issue was necessary to the agency's decision. In this case, the CPD acted in a judicial capacity by holding a contested case hearing, in which both parties had the opportunity to present evidence, call witnesses, and make opening statements and closing arguments. The issues of Petitioner's violations of the CPA were fully litigated before the agency, and resolution of those issues was necessary to the CPD's final decision. The CPD's Final Order therefore constituted a final judgment and could be given preclusive effect.

The Court also held that the penalty imposed by the CPD did not put Petitioner in "jeopardy," and, as a result, the Board's subsequent penalty did not violate the Double Jeopardy Clause. The Court reasoned that the CPD's monetary penalty was civil, rather than criminal, because the statute according to which Petitioner was sanctioned was clearly intended to constitute a civil penalty, and it served a remedial purpose of protecting the public from dishonest merchants. Moreover, a monetary penalty is not the typical affirmative disability or restraint required to constitute criminal punishment, and the statute—authorizing a penalty of $1,000 for each violation—was not unreasonable on its face. That Petitioner committed an extensive number of violations, and the summation of each violation resulted in a large monetary penalty, cannot be used in his favor to transform what is unquestionably a civil remedial sanction into a criminal punishment.

Justin Davis v. Wicomico County Bureau, No. 46, September Term 2015, filed April 25, 2016, Opinion by Battaglia, J.

Adkins, J., concurs.

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

http://www.mdcourts.gov/opinions/coa/2016/46a15.pdf

CIVIL PROCEDURE – RES JUDICATA

Facts:

Justin Davis, Petitioner, sought to secure a paternity test years after he had executed an Affidavit of Parentage, in which he attested, shortly following the birth of twin boys in 2009, that he was their father. He first sought a paternity test when the Wicomico County Bureau of Support Enforcement ("Bureau"), Respondent had filed a Complaint for Child Support against Mr. Davis in 2011. Mr. Davis requested a paternity test and denied parentage of the children, alleging that his signature on the affidavit had been obtained through fraud or misrepresentation. The Circuit Court ordered Mr. Davis to pay child support and denied the request for a paternity test. Mr. Davis did not note an appeal.

Two years later, Mr. Davis filed a "Complaint for Blood Test, to Challenge Finding of Paternity (By Affidavit of Parentage), and to Set Aside Child Support Order." The Circuit Court denied the request for a paternity test, concluding that Mr. Davis did not have an absolute right to a blood or genetic test, and that even if he did, he had waived his right by failing to appeal the trial judge's decision in 2011.

Mr. Davis appealed to the Court of Special Appeals, which affirmed in a reported opinion, 222 Md. App. 230, 112 A.3d 1024 (2015). The Court of Special Appeals concluded that Mr. Davis's claims were barred by *res judicata*, and, in reaching the merits, the intermediate appellate court concluded that the plain language and legislative history of Sections 5-1028 of the Family Law Article and 5-1038 of the Family Law Article do not entitle Mr. Davis to a blood or genetic test.

Held: Affirmed.

The Court of Appeals affirmed. The Court held that Mr. Davis's claims were barred by *res judicata*. The circuit court order that was entered in 2011, which denied Mr. Davis a paternity test and ordered him to pay child support, was a final judgment that Mr. Davis did not appeal. *Res judicata* precluded Mr. Davis from raising the same issue in 2013 in a separate action.

Prince George's County Police Civilian Employees Association v. Prince George's County, Maryland on behalf of Prince George's County Police Department, No. 1, September Term 2015, filed April 22, 2016. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2016/1a15.pdf

ARBITRATION – MD. CODE ANN., CTS. & JUD. PROC. (1973, 2013 REPL. VOL.) § 3-224(b)(3) – EXCEEDING ARBITRATOR'S POWERS – AUTHORITY TO CONTRACT

Facts:

Prince George's County ("the County"), Respondent/Cross-Petitioner, terminated the employment of Marlon Ford ("Ford"), who had been working in a motor pool of the Prince George's County Police Department and who was a member of the Prince George's County Police Civilian Employees Association ("the Association"), Petitioner/Cross-Respondent. The Association filed a grievance on Ford's behalf, and the parties participated in arbitration.

The arbitrator found the following facts. Article 8.C. of the collective bargaining agreement between the parties stated in pertinent part that an employee was entitled to a *Weingarten* advisement—i.e., an advisement of the right to have an Association representative present—before an interview that could result in discipline. After advising Ford of his *Miranda* rights (which Ford waived in writing), but without advising Ford of his *Weingarten* right, officers of the Prince George's County Police Department's Criminal Investigations Division began interviewing Ford about a missing handgun. After a brief exchange about the missing handgun, the interview focused on whether Ford had impersonated a law enforcement officer. The officers of the Criminal Investigations Division also interviewed Khari Grooms ("Grooms"), an acquaintance of Ford's. Grooms told the officers of the Criminal Investigations Division that Ford had told Grooms that he was a law enforcement officer. Ford denied many of Grooms's allegations, but the officers of the Criminal Investigations Division believed Grooms's version of events. Afterward, the Prince George's County Police Department's Internal Affairs Division notified Ford of an investigation regarding whether Ford had used law enforcement vehicles without authorization; in the notice, the Internal Affairs Division advised Ford of his *Weingarten* right. On two occasions, a member of the Internal Affairs Division interviewed Ford with a representative from the Association present. The County terminated Ford's employment for nine alleged violations of State and local law, including impersonating a law enforcement officer and taking law enforcement vehicles without authorization.

The arbitrator found that Ford had not intentionally engaged in criminal behavior, but had used bad judgment by acting in ways that caused others to assume that he was a law enforcement officer. The arbitrator sustained Ford's grievance, vacated the County's termination of his employment, imposed a thirty-day suspension instead, and granted back pay to Ford. The arbitrator based the arbitration award on the multiple grounds, including the arbitrator's

determination that the County violated the collective bargaining agreement because the officers of the Criminal Investigations Division failed to advise Ford of his *Weingarten* right.

The County filed a petition to vacate the arbitration award, which the Circuit Court for Prince George's County ("the circuit court") denied. The County appealed, and the Court of Special Appeals vacated both the circuit court's judgment and the arbitration award and remanded for a rehearing before a new arbitrator, holding in pertinent part that the arbitration award was contrary to an explicit, dominant, and well-defined public policy of effective law enforcement. The Association petitioned for a writ of *certiorari*, raising one issue: "[Did] the Court of Special Appeals err[] when it declared a public policy that was contrary to well established rules . . . ?" The County cross-petitioned for a writ of *certiorari*, raising only an issue concerning reinstatement and back pay. The Court of Appeals granted the petition and the cross-petition; and, after hearing oral argument as to these two issues, the Court ordered supplemental briefing and reargument as to the following two issues: "1. Did the negotiators of the collective bargaining agreement between [the] County and the [] Association have the authority to enter into a contractual provision that extends a Weingarten right to criminal investigations? 2. As a matter of contract interpretation, does Article 8.C. of the collective bargaining agreement apply to criminal investigations?" The parties filed supplemental briefs, and the Court heard reargument.

Held: Affirmed in part and reversed in part.

The Court of Appeals held that the County lacked the authority to enter into a collective bargaining agreement that required a *Weingarten* advisement before a criminal investigative interview of one of the County's police civilian employees, and, as such, the arbitrator exceeded his authority by basing the arbitration award, in part, on the determination that the County violated the collective bargaining agreement because officers of the Criminal Investigations Division failed to advise Ford of his *Weingarten* right. To conclude otherwise would encroach upon the Prince George's County Police Department's statutorily mandated duty to conduct criminal investigations.

No provision of the Prince George's County Code gave the County the authority to enter into a collective bargaining agreement that requires a *Weingarten* advisement before a criminal investigative interview of one of the County's police civilian employees. Contrary to the Association's contention, Prince George's County Code ("PGCC") § 13A-109(a) did not confer on the County the authority to enter into a collective bargaining agreement that requires a *Weingarten* advisement before a criminal investigative interview of one of the County's police civilian employees. PGCC § 13A-109(a) states in pertinent part: "The employer and the exclusive [collective bargaining] representative . . . shall negotiate in good faith with respect to wages, hours and other terms and conditions of employment [that] are subject to negotiation under this law[.]" Nothing in PGCC § 13A-109(a) even remotely contemplates that the County may require *Weingarten* advisements in criminal investigations. In other words, as the County asserted, nothing in PGCC § 13A-109(a) enables the County to by contract give its employees

procedural rights and benefits regarding criminal investigations. Where an employee is under investigation for having potentially committed a crime, by definition, the suspected criminal conduct, even if committed at the workplace, does not fall within the ambit of the employee's terms and conditions of employment. Stated otherwise, suspected criminal activity is not conduct that is related to an employee's "wages, hours and other terms and conditions of employment[.]" PGCC § 13A-109(a). Indeed, in some instances, an employee may be the subject of a criminal investigative interview regarding criminal activity that is completely unrelated to his or her job. The Court agreed with the County's assertion that, for the County to have the authority to enter into a collective bargaining agreement that requires a Weingarten advisement before a criminal investigative interview of one of the its police civilian employees, there would need to be authority for the County to do so—e.g., a provision of the Prince George's County Code—that would grant the County such authority or, in other words, permit the County to engage in collective bargaining as to the County's duty to enforce the law.

The Court remanded the case for consideration of an appropriate award by the same arbitrator based on the existing grounds supporting the award, absent the alleged *Weingarten* violation.

O'Brien & Gere Engineers, Inc. v. City of Salisbury, No. 53, September Term 2015, filed April 26, 2016. Opinion by Adkins, J.

Harrell, J., concurs and dissents.

http://www.mdcourts.gov/opinions/coa/2016/53a15.pdf

BREACH OF CONTRACT – LITIGATION PRIVILEGE – WAIVER OF PRIVILEGE IN SETTLEMENT AGREEMENT

Facts:

To upgrade a wastewater sewage treatment plant ("WWTP"), the City of Salisbury hired O'Brien & Gere Engineers ("OBG") as its design engineer and Construction Dynamics Group ("CDG") as its construction manager. The project failed.

The City and OBG settled a legal dispute arising out of the failed upgrade by signing an agreement ("the Settlement Agreement"). Importantly, the parties signed a non-disparagement clause in the Settlement Agreement, which states:

> The City and OBG mutually agree that they will not make, or cause or encourage other persons or entities to make, any disparaging remarks or comments about each other relating to any matter having occurred prior to the effective date of this Settlement Agreement or in the future relating directly or indirectly to the Salisbury wastewater treatment plant through any means, including without limitation, oral, written or electronic communications, or induce or encourage others to publicly disparage the other settling party. For purposes of this paragraph, the term "disparaging" means any statement made or issued to the media, or other entities or persons that adversely reflects on the other settling party's personal or professional reputation and/or business interests and/or that portrays the other settling party in a negative light.

The City then continued to pursue its claim for breach of contract against CDG. During trial, the City described CDG's obligations under contract: "[CDG was] to advise [the City] of deficiencies which are discovered or suspected by the construction manager [CDG] which involve the design of the project." The City also said: "[M]ost of the problems were design problems created by the design engineer, [OBG]." The City used its witnesses to elaborate on these points.

Believing the City to have violated the non-disparagement clause in the Settlement Agreement, OBG filed a complaint against the City for injunctive and monetary relief. The City filed a motion to dismiss, which was granted. The Court of Special Appeals affirmed.

Held: Affirmed.

The City first argues that, even if it breached the non-disparagement clause, we cannot grant OBG the injunctive relief it sought because "the acts sought to be enjoined [] ceased" when the City's suit against CDG ended. (Quoting *State v. Ficker*, 266 Md. 500, 507 (1972)). Without a doubt, injunctive relief is unavailable. As the City is no longer making negative statements about OBG that we could enjoin, injunctive relief is off the table. OBG responds by arguing that it may nevertheless pursue monetary relief. The City avers that "money damages may not be awarded," however, because the Settlement Agreement states that "an adequate remedy at law will not exist." In reviewing the pertinent provision in the Settlement Agreement, we note that the language focuses precisely on the adequacy of a legal remedy, not on its availability. We cannot agree with the City that this contract language shows the parties' intention to limit available relief. Rather, our research and the relevant language indicate an attempt by the parties merely to ensure the availability of injunctive relief. We conclude that the dispute over the meaning of the non-disparagement clause is not moot.

The principal dispute on the merits concerns the litigation privilege. The litigation privilege protects attorneys and witnesses from civil liability for statements made in judicial proceedings. *Norman v. Borison*, 418 Md. 630, 650 (2011). The privilege rests on the vital public policy of the "free and unfettered administration of justice." *Adams v. Peck*, 288 Md. 1, 5 (1980) (citation and internal quotation marks omitted).

Conceding that the litigation privilege is absolute with respect to "defamation and other torts arising from statements made in legal proceedings," OBG argues that we should adopt a different approach with respect to its breach of contract claim. The City first responds that OBG never argued to the circuit court its primary argument here—"that the City waived its right to rely on the absolute litigation privilege because it agreed to the non[-]disparagement provision contained in the Settlement Agreement." But the City's non-preservation argument fails based on its own presentation of the legal issue to the circuit court at the hearing on the motion to dismiss.

We are tasked with resolving the question, novel to Maryland, of whether the City can raise the litigation privilege as a defense to a claim not in tort, but for breach of contract. Many other jurisdictions have approved the use of the litigation privilege as a defense to claims sounding in breach of contract. *See, e.g., Rain v. Rolls-Royce Corp.*, 626 F.3d 372, 377–78 (7th Cir. 2010) (applying Indiana law). These courts have explained that the privilege would be "valueless" or "meaningless" if the opposing party could bar application of the privilege just by drafting the claim with a non-tort label. *See Kimmel & Silverman, P.C. v. Porro*, 53 F. Supp. 3d 325, 343 (D. Mass. 2014) (applying Massachusetts law). We agree with the reasoning of these jurisdictions and conclude that the litigation privilege can apply as a defense to claims sounding in contract.

We now examine whether the City may rely on the litigation privilege to defend itself against OBG's claim of breach in this case. The cases we have found have generally focused on whether the application of the privilege would further the privilege's public policy reasons. Drawing from these courts, we now inquire "whether applying the litigation privilege in this case would promote the due administration of justice and free expression by participants in judicial

proceedings." *Rain*, 626 F.3d at 378; see *Wentland v. Wass*, 25 Cal. Rptr. 3d 109, 114 (Cal. Ct. App. 2005).

The City pursued its already pending claim of breach of contract against CDG, a third party, as contemplated by the parties to the Settlement Agreement. In order to persuade the jury that CDG breached its contract with the City, the City *needed* to establish that OBG had defectively designed the WWTP, that CDG was obligated to advise the City of such issues, and that CDG failed to do so. Application of the litigation privilege allows the City to pursue its claims and protect its rights without fear of future legal liability.

We now turn to OBG's argument that the City waived its litigation privilege by the terms of the Settlement Agreement. Because we recognize the fundamental importance of the fact-finding process, which the litigation privilege fosters, we decide today that non-disparagement contracts should be construed with a rebuttable presumption *against* waiver of the litigation privilege.

In light of our rebuttable presumption, the non-disparagement clause here does not prohibit the statements that OBG challenges. The term "disparaging" does not expressly reach the lawsuit against CDG. The term, as defined in the Settlement Agreement, focuses instead on statements "made or issued to the media, or other entities or persons." Identifying this audience does not suggest that the City knew the Settlement Agreement would circumscribe the statements it could make in court. And importantly, OBG knew of the City's pending case against CDG and that its design work would be discussed in that case. As part of the Settlement Agreement, OBG promised to provide that certain persons, likely OBG employees, would complete depositions for that case. The Settlement Agreement includes no language restricting the legal issues that the City could raise or the legal strategy that the City could take. Finally, based upon our review of the CDG lawsuit transcripts, we agree with the Court of Special Appeals that "the facts material to whether CDG breached its contract with the City were interrelated with the facts material to whether OBG's design was flawed." The reasonable interpretation of the Settlement Agreement, then, is that the parties contemplated that OBG's design work would come into play during the lawsuit against CDG.

Applying a rebuttable presumption against waiver of the litigation privilege, we conclude that the City did not waive the litigation privilege in the non-disparagement clause, and the circuit court correctly granted the City's motion to dismiss.

David Glenn Seal v. State of Maryland, No. 51, September Term 2015, filed March 28, 2016. Opinion by Adkins, J.

McDonald, J., concurs.

http://www.mdcourts.gov/opinions/coa/2016/51a15.pdf

CRIMINAL LAW – MARYLAND WIRETAPPING AND ELECTRONIC SURVEILLANCE ACT – ACTING UNDER THE SUPERVISION OF AN INVESTIGATIVE OR LAW ENFORCEMENT OFFICER – SUPPRESSION OF EVIDENCE

Facts:

Donald is man currently living in West Virginia. As a child, Donald lived with his mother Shanda Seal, and his stepfather, Mack Henry Seal, Jr. in Montgomery County, Maryland. The Petitioner in this case, David Seal, is the brother of Mack Seal and the step-uncle of Donald. David Seal lived with his mother, Donald's step-grandmother, in Montgomery County.

During the summer of 1982, when he was ten years old, Donald spent multiple nights at his step-grandmother's house. He testified that he awoke one morning to "someone touching" his penis. When Donald woke fully, he saw David Seal leaving the room. Seal returned about five minutes later and began to fondle Donald beneath his underwear. Donald testified that the sexual abuse continued throughout the summer. In addition, Donald testified that the abuse continued for several years thereafter, but ended "[c]lose to the end of sixth grade and the beginning of seventh grade."

Donald did not tell anyone about the abuse while it was occurring because he was "scared" and "afraid." The first time Donald told anyone about the abuse was when he was 21 years old. Donald told his mother and stepfather. They were upset, but did not do anything about it.

On January 22, 2013, Donald went to the police station in Rockville, Maryland and met with Detective Tracey Copeland of the Montgomery County Police. After telling Copeland about the abuse, Donald and Copeland tried to call Seal together "a couple of times that day" in an effort to engage Seal in a discussion of the abuse and elicit an admission or confession. These phone calls were unsuccessful. Donald and Copeland then decided that they would wait a couple of days before calling Seal again. At a hearing where the trial court considered Seal's motion to suppress, when asked what she told Donald, Copeland testified as follows:

> I showed him the equipment that I would be using, sort of gave him the process with respect to what we normally did in that type of monitored phone call and then proceeded to attempt to make the phone call.

Copeland met with Donald in Frederick, Maryland after the January 22 meeting and twice attempted a phone sting, but they were never able to reach Seal. As a result, Copeland provided

Donald with equipment that would enable him to record a telephone conversation with Seal. Copeland testified at trial that she "showed [Donald] the equipment that [she] utilize[d] in order to do the phone sting," and "made sure he understood how to work it" and "how to operate it." After Donald returned to his home in West Virginia, he used the equipment to record a telephone call with Seal on February 5, 2013. During this recorded call, Seal made multiple incriminating statements. Copeland testified at the motions hearing that she did not monitor the conversation in live time. After this phone call took place, Copeland met Donald in Frederick to retrieve the recording equipment.

At trial in the Circuit Court for Montgomery County, the February 5 recorded telephone conversation was played for the jury over defense counsel's objection. The jury returned a guilty verdict on all counts: one count of child sexual abuse, four counts of third-degree sex offense, and six counts of second-degree sex offense.

Seal appealed to the Court of Special Appeals and maintained that the Circuit Court erred in denying his motion to suppress the February 5 telephone conversation that was played for the jury at trial. The intermediate appellate court, in a split decision, affirmed the Circuit Court's denial of Seal's motion to suppress and upheld the conviction. The Court of Special Appeals ruled that Copeland sufficiently supervised Donald so as to make the recording a permissible interception under an exception in CJP § 10-402(c)(2) of the Maryland Wiretapping and Electronic Surveillance Act. Seal timely appealed and the Court of Appeals granted his Petition for Writ of Certiorari.

Held: Reversed.

The Court provided a brief overview of the Maryland Wiretapping and Electronic Surveillance Act and noted that the exception found in CJP § 10-402(c)(2) was the only one that was pertinent to the appeal. This exception provides that "it is lawful . . . for an investigative or law enforcement officer acting in a criminal investigation or any other person acting at the prior direction and under the supervision of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication in order to provide evidence" of an enumerated offense. The Court referred to this as the "supervision exception."

The Court clarified that the central point of contention between the parties was whether Donald was acting "under the supervision of an investigative or law enforcement officer" as required by the exception. Seal argued that the call was not recorded under the supervision of Copeland because all she did was give Donald the recording equipment with limited instructions about how to operate it. The State, however, relied on case law interpreting the federal wiretap statute as support for a broad reading of the word "supervision" in the Maryland Wiretap Act.

The Court juxtaposed the federal wiretap statute with the Maryland Wiretap Act. It considered the federal wiretap statute to be less restrictive because it allows "a person acting under color of law to intercept a wire, oral, or electronic communication" whereas the Maryland Wiretap Act

requires one to act "at the prior direction and under the supervision of an investigative or law enforcement officer." The Court stated that although it do not see it as necessary that the State monitor each recorded call, it did not share the State's view that the difference in this language was not meaningful.

The Court stated that in the absence of case law interpreting "acting under supervision of" as that phrase is used in the Maryland Wiretap Act, it would analyze federal decisional law interpreting the term "under color of law" in the federal wiretap statute. After examining several cases in which federal courts interpreted "color of law," the Court found that each of the cases framed the inquiry into whether one is "acting under color of law" as whether an individual is acting at the "direction" of the government. Because the Maryland Wiretap Act mandates direction and supervision, these cases were not helpful to the State's position. Moreover, the Court agreed with Seal that the government in these federal cases was monitoring the progress of the surveillance, in some form or another. The Court considered the supervision in those cases to be much more than occurred when Donald recorded his conversation with Seal. The Court stated that neither rules nor guidelines were established by Detective Copeland and there was no evidence that the officer made any effort to contact Donald after he left the police station.

The Court faulted the trial court for treating the hand-over of the equipment as equivalent to supervision. The Court highlighted that Copeland set no limit, restriction or requirement on the:

- Number or frequency of calls;
- Time of day or duration of calls;
- How or when to report back to police;
- Remote monitoring of calls by police;
- How long Donald could retain the equipment;
- Inquiry about other criminal matters; or
- Maintaining a log of calls made.

The Court clarified that it was not holding that law enforcement must be present or listening remotely at the time of the recordings nor that there could never be a two-week gap between communications when the police are supervising a person who is taping conversations. Rather the court rested its holding on the complete absence of supervision.

Finally, the Court rejected the State's contention that it rely on a Florida case because that state's wiretap statute is strikingly different than Maryland's Wiretap Act. Although Florida's wiretap statute, like Maryland's, uses the word "direction," the word "supervision" is conspicuously absent. The Court thus rejected an examination of a Florida case interpreting the meaning of "under the direction of an investigative or law enforcement officer" as that phrase is used in Florida's wiretap act.

Donald R. Twigg v. State of Maryland, No. 3, September Term 2015, filed March 28, 2016. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2016/3a15.pdf

CRIMINAL LAW – MERGER

CRIMINAL LAW – APPELLATE COURT'S DISCRETION TO REMAND

CRIMINAL LAW – STATUTORY CONSTRUCTION – AGGREGATE APPROACH TO VIEWING INCREASE

Facts:

In 2011, Petitioner, Donald R. Twigg, was tried before a jury in the Circuit Court for Charles County on charges of child sexual abuse, second degree rape, third degree sexual offense, and incest during a period spanning March 25, 1974, to January 1, 1979. Petitioner's daughter testified that he committed various sexual offenses against her during that time frame when she was nine to fourteen years of age.

The court instructed the jury that in order to convict Petitioner of child abuse, it was required to find, among other elements, that Petitioner sexually molested or exploited his daughter. The State argued in closing that Petitioner committed the "sexual molestation or sexual exploitation element" of child abuse by engaging in any of the charged sexual offenses. The State did not argue that the sexual molestation/exploitation element of the child abuse conviction should be based upon evidence other than that supporting the other charged sexual offenses.

The jury found Petitioner guilty of child sexual abuse, second degree rape, third degree sexual offense, and incest. Neither the court nor the verdict sheet directed the jury to specify which of the charged sexual offense(s) satisfied the sexual molestation/exploitation element of the child abuse conviction. The court sentenced Petitioner to consecutive terms of twenty years for second degree rape, ten years for third degree sexual offense, ten years for incest, and fifteen years for child abuse, but suspended all fifteen years in favor of five years' probation. Petitioner was sentenced to a total of forty years' incarceration.

Before the Court of Special Appeals, Petitioner argued that his sentences for second degree rape, third degree sexual offense, and incest must merge with the child abuse offense under the required evidence test of *Blockburger v. United States*, 284 U.S. 299 (1932). In support of merging all of the sexual offenses, Petitioner relied upon *Nightingale v. State*, 312 Md. 699 (1988), which held that merger is required when the jury's verdict for child sexual abuse is unclear as to whether the sexual molestation/exploitation element of that offense was based upon the sexual offense as a lesser included offense or some other conduct. Although *Nightingale* was

overruled by the General Assembly's amendment to the child abuse statute in 1990, which allowed for separate sentences, Petitioner was subject to the pre-1990 version of the statute.

The Court of Special Appeals agreed with Petitioner and merged all three sexual offenses—second degree rape, third degree sexual offense, and incest—with the sentence for child abuse. *Twigg v. State*, 219 Md. App. 259 (2014). The Court of Special Appeals also remanded the case to the trial court for resentencing on the child abuse conviction and concluded that resentencing on the child abuse conviction would not result in an unlawful increase even if the court imposed the maximum fifteen years' incarceration because Petitioner's new sentence would not exceed his original total forty-year sentence.

Petitioner filed a petition for writ of certiorari to the Court of Appeals, seeking review of the Court of Special Appeals's decision to remand for resentencing and the court's holding that Petitioner's sentence would not be unlawfully increased if he was resentenced to active incarceration on the originally suspended sentence for child abuse. The State filed a conditional cross-petition, seeking review of whether all of the sexual offenses, or only one, must merge into the child abuse offense. The Court of Appeals granted the petition and the cross-petition.

Held: Affirmed in part and reversed in part.

The Court of Appeals held that only one sexual offense must merge into the sentence for child sexual abuse under the pre-1990 amendment. Any one of the sexual offenses—second degree rape, third degree sexual offense, or incest—satisfies the sexual molestation/exploitation element to support Petitioner's conviction child abuse. The Court reasoned that once the State proves a predicate sexual offense and abuse of a child as a result of that predicate offense, the crime of child sexual abuse is complete, and the sexual molestation/exploitation element of child sexual abuse is satisfied under the required evidence test, thereby rendering redundant the merger of additional predicate sexual offenses under *Blockburger*. The Court rejected Petitioner's argument that *Nightingale* guided the disposition of the case because the *Nightingale* Court did not explain why it merged more than one sexual offense with the child abuse conviction. Instead, the Court relied upon its more recent decision in *State v. Johnson*, 442 Md. 211 (2015), which held that only one underlying predicate felony merges into a greater offense under the *Blockburger* required evidence test.

Applying *Johnson* to the present case, the Court of Appeals concluded that Petitioner was entitled to have the crime with the greatest maximum sentence merge with the sentence for child abuse because the jury's verdict was ambiguous as to which sexual offense supported conviction for child abuse. Accordingly, the Court ordered the circuit court to vacate the sentence carrying the greatest maximum sentence, second degree rape, and affirmed the sentences imposed for third degree sexual offense and incest.

The Court of Appeals also held that the Court of Special Appeals had discretion to remand for resentencing Petitioner's unchallenged child abuse conviction, pursuant to Maryland Rule 8-

604(d). The Court concluded that an appellate court may remand for resentencing on a conviction not challenged by the defendant without violating double jeopardy principles because a defendant lacks an expectation of finality in his sentence when he appeals part of his sentence.

The Court further concluded that resentencing on the unchallenged conviction would not violate due process. The Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969), held that due process requires that judicial vindictiveness must play no role in resentencing a defendant and a presumption of vindictiveness arises when a more severe sentence is imposed. The Court explained, however, that the Supreme Court has retreated from its analysis in *Pearce* and has clarified that a more severe sentence will not offend due process unless the record reveals a reasonable likelihood that the increased sentence was a result of actual vindictiveness or the defendant shows actual vindictiveness.

Finally, the Court of Appeals explained the General Assembly codified the *Pearce* doctrine under Md. Code Ann., Cts. & Jud. Proc. § 12-702(b) (1988, 2013 Repl. Vol.), which provides that, on remand, "[the court] may not impose a sentence more severe than the sentence previously imposed for the offense[.]" The Court, rejecting Petitioner's interpretation that "offense" and "sentence" are singular nouns, concluded that "offense" and "sentence" may refer to the aggregate sentencing package when a defendant is convicted on a multi-count charging document. The Court reasoned that viewing all of the convictions in a multi-count case as an entire sentencing package comports with the realities of trial judges' approach to sentencing and aligns with the federal courts of appeal and majority of state appellate courts that have held likewise. Moreover, the Court held that this interpretation of § 12-702(b) in no way runs afoul of the General Assembly's intent to codify the due process principles articulated in *Pearce*, and this interpretation is indeed consonant with the federal and state appellate court's application of the *Pearce* doctrine to resentencing after vacation of one or more counts in a multi-count conviction.

By viewing the sentences in a multi-count conviction as a package, a sentence has increased upon resentencing only when the new sentence in the aggregate is greater than the total sentence imposed originally. In adopting the aggregate approach, the Court concluded that if the Circuit Court imposed any period of active incarceration for child abuse, including the maximum fifteen-year incarceration, Petitioner's sentence would not be unlawfully increased under § 12-702(b). The Court reasoned that Petitioner's sentence would not be increased because, when adding even the maximum period of incarceration to his remaining twenty-year incarceration for third degree sexual offense and incest, Petitioner's total sentence would not be greater than his originally imposed forty-year sentence.

State of Maryland v. Jeriko Graves, No. 57, September Term 2015, filed April 22, 2016. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2016/57a15.pdf

CRIMINAL LAW – MD. RULE 4-215(E) – RIGHT OF DEFENDANT TO COUNSEL OF HIS/HER CHOICE – REASONS FOR THE REQUEST TO DISCHARGE COUNSEL

Facts:

This case concerns Md. Rule 4-215(e)'s requirement that, "[i]f a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request." Respondent, Jeriko Graves, was charged in the Circuit Court of Anne Arundel County ("circuit court") with various controlled dangerous substance ("CDS") offenses, and second-degree assault. Moments before a motions hearing, Respondent informed the circuit court, through his assigned public defender ("defense counsel"), that he wished to obtain a continuance to discharge defense counsel and hire a private attorney whose services he had been pleased with in the past.

Upon receiving this information from defense counsel, the court addressed Respondent personally, asking him whether he understood the charges against him, informing him of the potential sentences he would face upon conviction, and asking him about the steps he had taken to hire the private attorney. When Respondent revealed that he had not yet hired the private attorney, the circuit court denied the continuance motion. The circuit court nonetheless asked Respondent if he would like to discharge defense counsel, to which Respondent replied that he would "keep him on."

Respondent was subsequently convicted by a jury of possession with intent to distribute cocaine, possession of marijuana, and possession of cocaine. Respondent appealed to the Court of Special Appeals, arguing that the circuit court had not complied the Md. Rule 4-215(e)'s mandate that "the court shall permit the defendant to explain the reasons for the request." The Court of Special Appeals agreed, and reversed the judgment of the circuit court.

Held: Affirmed

The Court of Appeals affirmed the decision of the Court of Special Appeals, and held that the circuit court's colloquy with Respondent did not provide an opportunity for Respondent to explain the reasons for his request, because the court never explored why Respondent wanted to discharge his attorney. The Court of Appeals reasoned that, under Md. Rule 4-215(e), the court must either obtain the explanation for the request to discharge counsel from the defendant, or ask the defendant if the reasons proffered by defense counsel are accurate.

Injured Workers' Insurance Fund v. Subsequent Injury Fund, et al.; *Baltimore County, Maryland v. Subsequent Injury Fund, et al.*, Nos. 39 & 40, September Term 2015, filed April 22, 2016. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2016/39a15.pdf

WORKERS' COMPENSATION ACT – SUBSEQUENT INJURY FUND ASSESSMENT – § 9-806

Facts:

These two cases arise out of decisions from the Workers' Compensation Commission ("the Commission"). Md. Code (1991, 2008 Repl. Vol., 2015 Cum. Supp.), § 9-806 of the Labor and Employment Article ("LE"), provides in pertinent part that:

> The Commission shall impose an assessment of 6.5%, payable to the Subsequent Injury Fund, on: (i) each award against an employer or its insurer for permanent disability or death, including awards for disfigurement and mutilation; (ii) except as provided in paragraph (2) of this subsection, each amount payable by an employer or its insurer under a settlement agreement approved by the Commission; and (iii) each amount payable under item (i) or (ii) of this paragraph by the Property and Casualty Guaranty Corporation on behalf of an insolvent insurer.

In *Injured Workers' Insurance Fund v. Subsequent Injury Fund, et al.*, claimant, Salvatore Glorioso, Jr. ("Glorioso"), suffered a work-related injury in the course of his employment with the Motor Vehicle Administration ("MTA"). He subsequently filed a claim with the Commission. The Commission awarded Glorioso weekly payments of $307.00 for a period of 150 weeks, for a total award of $46,050.00. The MTA was, however, entitled to an offset under LE § 9-610 because Glorioso also received disability retirement benefits from the MTA. The offset of $118.27 per week lowered the final amount of compensation to $28,390.50.

In *Baltimore County, Maryland v. Subsequent Injury Fund, et al.*, a separate case, consolidated with *Injured Workers' Insurance Fund* for the purposes of the Court's opinion, claimant, a Baltimore County ("County") firefighter, Gary Shipp ("Shipp"), became disabled as a result of hypertension and coronary artery disease. He filed a claim with the Commission. The Commission awarded Shipp weekly payments of $525.00 for a period of 333 weeks, for a total award of $174,825.00. The County filed a request for rehearing pointing out that it had been paying Shipp service retirement benefits and was thus entitled to an offset under LE § 9-503(e). The Commission issued a new Award of Compensation to account for the offset under LE § 9-503 which lowered the County's weekly rate of compensation to $194.45 per week for a period of 333 weeks, for a final amount of compensation of $64,751.85.

The MTA and the County paid the Subsequent Injury Fund ("SIF") the 6.5% assessment on the amount of the award after the statutory offsets provided for under LE §§ 9-610 and 9-503(e), respectively. In each case, the SIF filed issues with the Commission claiming that the MTA and the County failed to pay 6.5% assessment on the amount of the award prior to the offset, which is the amount the SIF is entitled to under LE § 9-806. In both cases, the Commission concluded that under LE § 9-806, the amount owed to the SIF by the employers, the MTA and Baltimore County, is 6.5% of the Commission's award of compensation prior to the deduction of any statutory offset.

Both the MTA and the County filed petitions for judicial review in the Circuit Court for Baltimore City and the Circuit Court for Baltimore County, respectively. The Circuit Courts for Baltimore City and Baltimore County agreed with the Commission's interpretation of LE § 9-806. The MTA and the County appealed to the Court of Special Appeals where the cases were consolidated for consideration. In a reported opinion, the Court of Special Appeals affirmed the judgments of the Circuit Court for Baltimore City and the Circuit Court for Baltimore County.

Held: Affirmed

The judgment of the Court of Special Appeals is affirmed. The assessment payable to the SIF pursuant to LE § 9-806 is calculated based on the amount of an award prior to the statutory offsets for retirement benefits provided by LE §§ 9-610 and 9-503(e).

The language of LE § 9-806 is clear and unambiguous and consistent with the broad statutory scheme of the Workers' Compensation Act. The offsets fulfill the General Assembly's goal of preventing an employee from obtaining double recovery for one injury while ensuring the survival of the SIF. The purpose of the SIF is to encourage employers to hire individuals with prior disabilities or injuries by limiting an employer's liability in the event such an individual suffers a subsequent injury in the course of their employment. The SIF is funded solely by the 6.5% statutory assessment provided under LE § 9-806. Meanwhile, the offsets prescribed by LE §§ 9-610 and 9-503(e) provide governmental employees with a single recovery when they are entitled to payments under both a pension plan and workers' compensation.

A Guy Named Moe, LLC, t/a Moe's Southwest Grill v. Chipotle Mexican Grill of Colorado, LLC et al., No. 56, September Term 2015, filed April 26, 2016. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2016/56a15.pdf

CORPORATIONS AND ASSOCIATIONS – POWER TO SUE – STATUTE OF LIMITATIONS

REAL PROPERTY LAW – ZONING – JUDICIAL REVIEW – STANDING – SPECIAL AGGRIEVEMENT – PROTESTANT LACKS PROXIMITY

Facts:

A Guy named Moe, LLC, ("Moe") filed a petition for judicial review in Circuit Court challenging the decision of the Board of Appeals of the City of Annapolis to approve Chipotle Mexican Grill of Colorado, LLC's, ("Chipotle") application for a special exception. Chipotle moved to dismiss the case because Moe's right to do business had been "forfeited" and it could not "maintain" suit under Section 4A-1007(a) of the Corporations and Associations Article of the Maryland Code (1975, 2007 Repl. Vol.). Chipotle also argued that Moe did not have standing to pursue a petition for judicial review of the Board's decision because it was not a "taxpayer" and was not "a person aggrieved" under Section 4–401(a) of the Land Use Article, Maryland Code (2012). Moe, in response, filed an Amended Petition for Judicial Review and attached a "Certificate of Good Standing" issued by the State Department of Assessments and Taxation. Moe argued that, while it was not registered to do business in Maryland when it had filed its petition, it could still "maintain" the action under Section 4A-1007 of the Corporations and Associations Article because it had subsequently successfully registered and paid the associated penalty. Moe also argued that it did have standing, both as a taxpayer and as a person aggrieved.

The Circuit Court, after a hearing, dismissed Moe's petition, reasoning that a foreign limited liability company could maintain an action as long as it "c[a]me back and renew[ed]" its right to do business, but found that Moe lacked standing to petition for judicial review because it was not a taxpayer and the petition was brought "simply [as] a matter of competition."

The Court of Special Appeals affirmed the Circuit Court on the issue of standing but disagreed with the lower court on the seminal issue of whether Moe could maintain its suit.

Held: Affirmed.

The Court of Appeals disagreed with the Court of Special Appeals and held that a foreign limited liability company could file a petition for judicial review and subsequently "cure" a forfeiture of

its registration to do business in Maryland that occurred prior to the filing of its action; but affirmed the intermediate appellate court's decision, however, because Moe was not aggrieved for standing purposes. The Court reasoned that "maintain," as used in Section 4A-1007(a) of the Corporations and Associations Article, means "to continue" something already in existence, Black's Law Dictionary 1097 (10th ed. 2014), and coupled with "unless the limited liability company shows to the satisfaction of the court," indicates that the Legislature intended to permit a noncompliant foreign limited liability to "cure" its failure to comply with registration requirements, even though having failed to register before filing suit.

Although the Court held that Moe could file its petition for judicial review and then register in order to maintain its action, the Court also held that Moe was not a "person aggrieved" and thus did not have standing under Section 4-401 of the Land Use Article, Maryland Code (2012), to file a request for judicial review of the decision of the board of appeals. The Court reasoned that Moe lacked the sufficient proximity and "plus factors" identified in *Ray v. Mayor & City Council of Baltimore*, 430 Md. 74, 85, 59 A.3d 545, 551-52 (2013) needed to demonstrate aggrievement.

COURT OF SPECIAL APPEALS

Laurence S. Kaye v. Linda Wilson-Gaskins, No. 525, September Term 2015, filed April 28, 2016. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2016/0525s15.pdf

RELEASE – REQUISITES AND VALIDITY – COVENANT NOT TO SUE AS RELEASE

Facts:

Laurence Kaye ("Kaye") represented Linda Wilson-Gaskins ("Wilson-Gaskins") in a lawsuit for wrongful discharge in which Wilson-Gaskins was awarded a verdict in the amount of $1,415,991. Despite her significant recovery, Wilson-Gaskins was not satisfied with Kaye's handling of the litigation. After a series of communications between Kaye and Wilson-Gaskins, the two agreed that Kaye would discount his attorney's fees in exchange for a release signed by Wilson-Gaskins. The release provided that Wilson-Gaskins: "does release and forever discharge Kaye . . . of and from any and all actions claims and demands . . . which may hereafter arise . . . or which may develop, whether or not such consequences are known or anticipated."

Wilson-Gaskins subsequently filed a complaint against Kaye alleging professional negligence arising from his representation in the wrongful discharge action. The circuit court granted Kaye's motion for summary judgment, and the Court of Special Appeals affirmed the circuit court's grant of summary judgment. Following the final judgment in Wilson-Gaskins's lawsuit, Kaye filed a claim against Wilson-Gaskins alleging that by filing her professional negligence claim she breached the parties' release agreement. Wilson-Gaskins filed a motion to dismiss Kay's complaint. The circuit court granted Wilson-Gaskins's motion to dismiss finding that the release did not contain an executory promise to refrain from litigating against Kaye. Kaye appealed.

Held: Affirmed.

The Court of Special Appeals held that the circuit court appropriately granted Wilson-Gaskins's motion to dismiss where the release agreement did not expressly indicate that the parties intended for Kaye to recover consequential damages as a result of Wilson-Gaskins's failure to honor the discharge in their agreement.

The Court of Special Appeals first observed that the validity of the settlement agreement between the parties was conclusively established in Wilson-Gaskins's professional negligence action and constituted the law of the case. The Court then noted that its interpretation of settlement agreements, similar to other contracts, is guided by the objective theory of contracts. *Spacesaver Sys., Inc. v. Adam*, 440 Md. 1, 7 (2014).

Thereafter, the Court distinguished between a release and a covenant not to sue. A release is a unit of consideration that is tendered—and the obligee's promise under the contract is discharged—immediately at the time of contracting. A covenant not to sue, on the other hand is "a contract under which the obligee of a duty promises never to sue the obligor or a third person to enforce the duty or not to do so for a limited time." Restatement (Second) of Contracts § 285. Because a release is tendered immediately when it is given, a purported release of claims that have yet to accrue must be construed as a covenant not to sue. Restatement (Second) of Contracts § 284 cmt. a. Where a party promises never to sue on a claim that has yet to accrue, however, the Court will generally construe that promise as a discharge unless the parties clearly express that they intend for the promisee to recover consequential damages as a result of the promisor's failure to honor that discharge in their agreement.

In the present case, the Court of Special Appeals held that nowhere in the agreement does Wilson-Gaskins purport to undertake the affirmative obligation to refrain from suing Kaye. Additionally, the Court observed that Kaye made a reciprocal promise never to sue, and that to entertain a claim on the breach of that promise would give rise to a circuity of action. The Court of Special Appeals, therefore, held that the circuit court did not err in granting Wilson-Gaskins's motion to dismiss Kaye's breach of contract claim.

Old Republic Insurance Company v. Nancy Gordon, No. 1020, September Term 2014, filed April 27, 2016. Opinion by Graeff, J.

Nazarian, J., dissents.

http://www.mdcourts.gov/opinions/cosa/2016/1020s14.pdf

MARYLAND COLLECTION AGENCY LICENSING ACT ("MCALA") – DEFINITION OF "IN THE BUSINESS OF" – DEFINITION OF "COLLECTION AGENCY"

Facts:

In October 2006, Countrywide Home Loans ("Countrywide") extended a loan to Nancy Gordon in the amount of $95,000. Countrywide subsequently purchased a credit insurance policy from Old Republic Insurance Company ("Old Republic") to secure the loan.

In February 2011, Ms. Gordon defaulted on her loan, and Countrywide submitted a claim to Old Republic. Old Republic paid the claim and began to pursue repayment from Ms. Gordon. Ms. Gordon repaid a portion of the debt, but then she stopped making payments. Old Republic filed a complaint against her, seeking a judgment for the remaining balance of the debt plus costs and interest.

Ms. Gordon filed a motion for summary judgment, claiming that Old Republic's collection attempt was illegal because Old Republic acquired the alleged debt when it was in default, and therefore, Old Republic was acting as a "collection agency" under Md. Code (2010 Repl. Vol.) § 7-101(c) of the Business Regulation Article ("BR"), but Old Republic was not licensed as a collection agency. Relying on recent case law providing that "a judgment entered in favor of an unlicensed debt collector constitutes a void judgment as a matter of law," Ms. Gordon argued that the circuit court should enter judgment against Old Republic because it was not entitled to the relief it sought. The circuit court agreed and granted summary judgment in Ms. Gordon's favor.

Held: Reversed.

Pursuant to the Maryland Collection Agency Licensing Act ("MCALA"), persons doing business as a collection agency generally must have a license. See BR § 7 301(a). A party that lacks a required license may not file an action in a Maryland court to enforce rights related to its unlicensed activities.

Old Republic Insurance Company pursued a subrogation claim against Ms. Gordon after it paid her defaulted debt to a mortgage loan company pursuant to a credit insurance policy.

The legislative history of MCALA does not support the conclusion that the General Assembly intended to include an insurance company pursuing subrogation rights under the definition of "collection agency" in BR § 7 101. Accordingly, the circuit court erred in granting the debtor's motion for summary judgment on the ground that Old Republic was a collection agency and did not have the right to sue the debtor because it did not have a license.

Phillip Martin v. TWP Enterprises, Inc., No. 1855, September Term 2014, filed February 24, 2016. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2016/1855s14.pdf

CORPORATIONS & ASSOCIATIONS – SUCCESSOR LIABILITY

Facts:

Best & Brady Components, LLC ("Best & Brady"), a lumber manufacturing company, opened for business in March of 2010. Phillip Martin ("Martin" or "Appellant") was a minority owner and assumed management of Best & Brady's daily operations under a two-year employment contract. After its formation, however, Best & Brady encountered numerous problems and by May 2011, ran out of cash. Shortly thereafter, TWP Enterprises, Inc. ("TWP" or "Appellee"), bought Best & Brady's assets.

On October 7, 2013, Martin filed a complaint in the Circuit Court for Montgomery County, Maryland, against Best & Brady and TWP, seeking unpaid wages and compensation under his employment contract. Martin obtained a default judgment against Best & Brady and pursued TWP for satisfaction of the judgment. On August 5 and 6, 2014, the circuit court held a bench trial on the sole issue of TWP's successor liability. Martin claimed that TWP was a mere continuation of Best & Brady and, therefore, liable under the "mere continuation" exception to the general rule that successor corporations do not assume the liabilities of selling corporations. The circuit court disagreed, finding that TWP was not a mere continuation of Best & Brady and, therefore, was not liable for the default judgment against Best & Brady.

Held: Affirmed.

The Court of Special Appeals first observed that application of the "mere continuation" exception to the general rule against successor liability requires an examination of the corporate entities involved, including a factual comparison of the selling corporation to the purchasing corporation. The Court recognized that the appellate courts in *Academy of IRM v. LVI Environmental Services, Inc.*, 344 Md. 434 (1997), *Nissen Corporation v. Miller*, 323 Md. 613 (1991), and *Baltimore Luggage Co. v. Holtzman*, 80 Md. App. 282 (1989) looked beyond the traditional indications of continuation—whether the purchasing corporation maintained the same or similar management and ownership as the selling corporation—to other factors. Thus, the Court determined that, even where a court has found that the ownership and management of a corporation has continued, it may also examine whether the policy reasons underlying the "mere continuation" exception are served by finding successor liability.

The Court of Special Appeals noted that "other factors" considered by the Court of Appeals in *Academy of IRM* included an analysis of whether applying the "mere continuation" exception would, in the transaction at issue, serve to prevent corporations from purposefully placing assets out of the reach of the predecessor's creditors. The Court stated that "Maryland law establishes that the function of the 'mere continuation' exception is to prevent corporations from purchasing assets solely for the purpose of placing those assets out of the reach of the predecessor's creditors." Accordingly, the Court held that a court may consider the purpose of an asset sale and the adequacy of consideration as additional factors in its analysis of whether the "mere continuation" exception should apply. Therefore, the Court affirmed the circuit court's determination in this case that TWP is not a mere continuation of Best & Brady.

Joshua Paul Bowling v. State of Maryland, No. 1121, September Term 2015, filed March 31, 2016. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2016/1121s15.pdf

FOURTH AMENDMENT – DOG SNIFFS – MARIJUANA DECRIMINALIZATION

Facts:

On January 2, 2015, Officer Brian Barr initiated a traffic stop after witnessing Joshua Paul Bowling, appellant, make two illegal turns. Officer Barr called for a K-9 unit. As Officer Barr was returning to his vehicle to complete the traffic stop, appellant got out of his vehicle and closed the door, locking the keys inside. For safety reasons Officer Barr waited with appellant until backup arrived.

In the meantime, the K-9 unit arrived and conducted a sniff of appellant's vehicle. The dog was trained to detect the odors of marijuana, cocaine, heroin, methamphetamines, and MDMA (ecstasy). The dog alerted when passing the rear driver's side door.

Officer Barr subsequently arrested appellant for driving with a suspended license. After a tow truck driver opened appellant's vehicle, Officer Barr searched the vehicle. The search revealed 198.2 grams of marijuana, paraphernalia, and an OxyContin tablet. The circuit court denied appellant's motion to suppress the evidence found in the vehicle.

Held: Affirmed.

The Maryland appellate courts consistently have held that the detection of the odor of marijuana by a trained drug dog establishes probable cause to conduct a warrantless *Carroll* doctrine search of a vehicle. The recent Maryland law, which decriminalized the possession of less than 10 grams of marijuana and made it a civil offense, does not change this conclusion.

The statutory language of Maryland Code (2015 Supp.) § 5 601 of the Criminal Law Article ("CR") makes clear that, although the legislation enacted in 2014 decriminalized the possession of less than 10 grams of marijuana, it remains a civil offense, and therefore, it still is illegal.

Neither the Supreme Court nor the Maryland appellate courts have limited the automobile exception to situations where there is probable cause to believe there is evidence of a crime in the vehicle. Rather, a search is permitted when there is probable cause to believe that the car contains evidence of a crime ***or*** contraband. The legislative history of what is now CR § 5-601(c)(2)(ii) makes clear that the Maryland General Assembly intended that, although possession of a small amount of marijuana would no longer be a criminal offense, it would continue to be considered contraband, regardless of the quantity. Accordingly, this legislation does not change

the established precedent that a drug dog's alert to the odor of marijuana, without more, provides the police with probable cause to authorize a search of a vehicle pursuant to the *Carroll* doctrine.

State of Maryland v. Kerron Andrews, No. 1496, September Term 2015, filed March 30, 2016. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2016/1496s15.pdf

CRIMINAL LAW – USE OF CELL SITE SIMULATORS

CONSTITUTIONAL LAW – FOURTH AMENDMENT – WARRANTLESS SEARCHES

Facts:

Appellee Kerron Andrews was positively identified via photographic array as the gunman in a drug-related shooting in Baltimore City on April 27, 2014, and a warrant for his arrest was issued on May 2, 2014. Unable to locate Andrews, the Baltimore City Police Department ("BPD") submitted an application in the Circuit Court for Baltimore City for a pen register/trap & trace order for Andrews's cell phone. On the evening of May 5, 2014, the same day they obtained the pen/trap order, the BPD deployed a cell site simulator known under the brand name Hailstorm to locate Andrews. The Hailstorm device forced Andrews's cell phone to transmit identifying signals that allowed the police to track it to a precise location inside a residence located at 5032 Clifton Avenue in Baltimore City. The officers found Andrews with the cell phone in his pants pocket inside the residence and arrested him. The BPD then obtained a search warrant and found a gun in the cushions of the couch where Andrews had been seated. In the circuit court, Andrews successfully argued that the warrantless use of the Hailstorm device was an unreasonable search, and the circuit court suppressed all evidence obtained by the police from the residence as fruit of the poisoned tree.

Held: Affirmed.

The Court of Special Appeals concluded, as a matter of first impression, that people have a reasonable expectation that their cell phones will not be used as real-time tracking devices by law enforcement, and—recognizing that the Fourth Amendment protects people and not simply areas—that people have an objectively reasonable expectation of privacy in real-time cell phone location information. The Court also observed that cell phone users do not actively submit their real-time location information to their service provider and that the pin-point location information provided by a cell site simulator is obtained directly by law enforcement officers and not through a third-party. Thus, the Third Party Doctrine from *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979) was inapplicable in this case. Accordingly, the Court held that the use of a cell site simulator requires a valid search warrant, or an order satisfying the constitutional requisites of a warrant, unless an established exception to the warrant requirement applies.

Regarding the pen/trap order obtained by the BPD pursuant to Maryland Code, Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP") § 10-4B-01 *et seq.*, the Court of Special Appeals determined that it does not, on its face, apply to the use of cell site simulators. The Court observed that nothing in the plain language of CJP § 10-4B-01 *et seq.* suggests that it was ever intended to authorize the use of surveillance technology that can exploit the manner in which a cell phone transmits data to convert it into a mobile tracking device. Further, the Court concluded that the limited showing required by CJP § 10-4B-01 *et seq*. falls short of the particularity required for the issuance of a search warrant. Accordingly, the Court of Special Appeals held that an order issued pursuant to CJP § 10-4B-04 cannot authorize the use of a cell site simulator, such as Hailstorm. The Court further explained that, unless a valid exception to the warrant requirement applies, the government may not use a cell phone simulator without a warrant or, alternatively, a specialized order that requires a particularized showing of probable cause, based on sufficient information about the technology involved to allow the court to contour reasonable limitations on the scope and manner of the search and that provides adequate protections in case any extraneous cell phone information might be unintentionally intercepted.

Turning to the search warrant obtained by the BPD following their constitutionally invasive Hailstorm search, the Court of Special Appeals observed that the only information linking Andrews and 5023 Clifton Avenue was the fruit of the antecedent Fourth Amendment violation. The Court noted that the State presented no credible argument that evidence obtained through any independent lawful means had revealed Andrews's presence in the home. The Court held that, under the facts of this case, once the constitutional taint is removed from the search warrant application, what remains is insufficient to establish probable cause for a search of 5032 Clifton Avenue, and the evidence seized in that search withers as the fruit of the poisoned tree.

Finally, the Court of Special Appeals stated that where, as here, the antecedent Fourth Amendment violation was the only basis for the search warrant, the fruit of the poisoned tree doctrine trumps BPD's alleged good faith reliance on the search warrant. Moreover, the Court found troubling the fact that the BPD had entered into a non-disclosure agreement by which the department was prohibited from disclosing cell site simulator technology to any court under any circumstances and, in accord with that agreement, failed to sufficiently apprise the circuit court of the intended purpose for the pen/trap order. Thus, the Court of Special Appeals could not reasonably conclude that the BPD officers in this case relied in good faith on the search warrant obtained through the pen/trap application and subsequent unconstitutionally intrusive warrantless search.

Albert Green v. Donald Nelson, et al., No. 950, September Term 2015, filed April 28, 2016. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2016/0950s15.pdf

ESTATES AND TRUSTS – WILL CAVEATS – TIME FOR FILING

ESTATES AND TRUSTS – WILL CAVEATS – TIME FOR FILING – PURPOSE

Facts:

In 2003, the late Kenneth Green executed a will in which he made his friend, Betty McClintock, the prime beneficiary. In 2009, he executed a second will—later determined to have been procured by fraud and undue influence—in which he revoked the earlier will and gave all of his assets to his brother, appellant Albert Green. Apparently unaware of the second will, Linda Malamis and Donald Nelson ("appellees" or the "Estate"), filed a petition to open Kenneth's estate and to probate the earlier will. The Orphans' Court of Allegany County issued an administrative probate order appointing Nelson and Malamis as personal representatives, and admitted the earlier will to probate. Almost two months later, Green petitioned the orphans' court for judicial probate, asserting that the second will was Kenneth's last will and testament. That will was also admitted to probate and a personal representative was appointed. After a five-day hearing in the Circuit Court for Allegany County, the second will was found to have been fraudulently procured, a determination affirmed by this Court. *See Green v. McClintock*, 218 Md. App. 336, *cert. denied*, 440 Md. 462 (2014).

While the circuit court's finding of fraud was on appeal in this Court, Green filed a petition to caveat the 2003 will on September 3, 2013—almost three and a half years after the appointment of Malamis and Nelson as personal representatives under the earlier will. The orphans' court denied the petition as untimely. Green appealed, and the Circuit Court for Allegany County upheld its decision.

On appeal, Green argued that his petition to caveat the 2003 will was timely filed under Maryland Code (1974, 2011 Repl. Vol.), Estates and Trusts Article ("E.T.") § 5-207(a), and, alternatively, that public policy considerations should allow the late-filing of a petition to caveat the will in this case. The Estate argued that because Nelson and Malamis were first appointed as personal representatives under the 2003 will in 2010, the plain language of the statute dictates that the time for filing a caveat to that will expired six months after their initial appointment. The Estate also contended that no public policy excused late-filing in the instant case.

Held: Affirmed.

E.T. § 5-207(a) provides that a "petition to caveat a will may be filed at any time prior to the expiration of six months following the first appointment of a personal representative under a will, even if there be a subsequent judicial probate or appointment of a personal representative." Under the same section, "[i]f a different will is offered subsequently for probate, a petition to caveat the later offered will may be filed at a time within the later to occur of: (1) Three months after the later probate; or (2) Six months after the first appointment of a personal representative of a probated will."

The Court held that, under the plain language of E.T. § 5-207, a petition to caveat a will must be filed within six months of the first appointment of a personal representative under a will. This furthered a key purpose of the statute, to ensure "prompt probate of wills and the speedy administration and settlement of estates" and "to simplify the administration of estates, to reduce the expenses of administration."

The Court held that even if a later judicial probate or a change in the personal representatives occurs, neither extend the time for filing a caveat to a will beyond six months after a personal representative is appointed under that will. Thus, in this case, the Court determined that the fact that the 2009 will was admitted to judicial probate did not excuse Green's duty to file a petition to caveat the 2003 will within six months of the appointment of personal representatives under that will. The Court also held that the subsequent readmission of the 2003 will into probate after the 2009 will was found to have been procured by fraud did not turn the 2003 will into a "later offered will" under the statute.

Lockheed Martin Corporation v. Vincent Balderrama, No. 379, September Term 2015, filed March 31, 2015. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2016/0379s15.pdf

EMPLOYMENT AND LABOR LAW – DISCRIMINATION BY RETALIATION – PERFORMANCE IMPROVEMENT PLAN AS AN ADVERSE ACTION – REDUCTION IN FORCE (RIF) AS A NON-RETALIATORY REASON FOR TERMINATION

Facts:

Vincent Balderrama, a 58-year-old Hispanic male at the time of the trial, was hired by Lockheed Martin in 2004. Beginning in 2009, Mr. Balderrama's annual performance ratings began to decline. Although he played a role in a lucrative helicopter sale, he was viewed as not a team player, and Mr. Balderrama's supervisor issued him a negative performance review for 2012.

In March 2013, Mr. Balderrama appealed his performance review to Lockheed Martin's human resources department, claiming that his supervisor was "prejudiced" and was "measuring [him] by a different yardstick." It was not until several months later, when he sought further review of his complaint, that he made an explicit allegation of age and race discrimination. Both Lockheed Martin's human resources department and its EEO department concluded that Mr. Balderrama's performance review was not a product of discrimination.

Following an interim performance review, Mr. Balderrama's supervisor concluded that Mr. Balderrama lacked commitment to work on his performance issues. On October 1, 2013, Mr. Balderrama was placed on a formal performance improvement plan (PIP).

On October 16, 2013, Lockheed Martin announced that it was going to lay off approximately 600 employees due to budget concerns. The company utilized a reduction in force (RIF) tool to assist in making the layoff decisions. The tool ranked employees by calculating a numerical score for each employee that consisted of an aggregate of the employee's last three annual performance scores, coupled with a score from a contemporaneous skill review. Pursuant to the tool, Mr. Balderrama was ranked as the worst performer in his group by a significant margin. In November 2013, Mr. Balderrama was notified that he was included in the RIF.

In July 2014, Mr. Balderrama filed a lawsuit against Lockheed Martin, alleging discrimination and retaliation. The circuit court subsequently granted Lockheed Martin's motion for summary judgment on the discrimination claim. The parties went to trial on the retaliation claim. The jury rendered a verdict in Mr. Balderrama's favor and awarded him $830,000.

Held: Reversed.

In resolving a claim of retaliation when the employee does not have direct evidence of an intent to discriminate, Maryland follows the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a *prima facie* case of discrimination based on retaliation, a plaintiff must produce evidence that he or she (1) engaged in a protected activity; (2) the employer took an adverse action against the employee; and (3) the employer's adverse action was causally connected to the employee's protected activity. If the plaintiff meets his or her burden of production in this regard, the burden of production then shifts to the defendant to offer a non-retaliatory reason for the adverse employment action. If the employer meets this burden, the burden of production shifts back to the plaintiff to show that the proffered reasons for the employment action were a mere pretext. An employee shows pretext by proving both that the reason was false and that discrimination was the real reason for the challenged conduct.

The *prima facie* inquiry is a preliminary matter, a mere allocation of burdens and presentation of proof, and when the case has proceeded to trial on the merits, the appellate court should focus on "the ultimate question whether plaintiff has established discrimination." Nevertheless, the evidence of the plaintiff's *prima facie* case can be helpful in determining the ultimate issue.

An employee's complaint about an employer's allegedly discriminatory conduct constitutes protected activity, as long as the employee shows that he or she held a good faith, objectively reasonable belief that the employer engaged in discriminatory conduct. A vague complaint alleging mere prejudice or general unfairness is insufficient; it must allege discrimination connected to a protected class.

To constitute actionable retaliation, the challenged conduct must be "materially adverse," i.e., an action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Here, none of the alleged actions prior to termination, including placing the employee on a performance improvement plan (PIP), constituted an adverse action. The employee's termination, however, was an adverse action.

After the circuit court found that the employee made out a *prima facie* case, the employer presented sufficient evidence of a non-discriminatory reason for the employee's termination: A 600 person RIF due to budget concerns. The employee was included in the RIF as one of the company's "low performers."

The employee then failed to produce evidence that this non-discriminatory reason was not the true reason, but rather, it was a pretext for illegal discrimination based on retaliation. He failed to show that the RIF was a sham or the RIF criteria was not objectively based. An employee making a claim of retaliation must produce some evidence that his or her inclusion in a reduction of force was retaliatory, as opposed to performance based. The employee failed to do so.

Daniel S. Yuan v. Johns Hopkins University, No. 600, September Term 2014, filed April 27, 2016. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2016/0600s14.pdf

LABOR AND EMPLOYMENT – WRONGFUL DISCHARGE

TORTS – CONVERSION – OWNERSHIP

TORTS – TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

Facts:

On December 13, 2013, Dr. Daniel S. Yuan, a researcher at Johns Hopkins University, filed a complaint for damages against JHU in the Circuit Court for Baltimore City, alleging wrongful termination in violation of public policy. Yuan based his wrongful discharge action on 42 C.F.R. § 93.100 et seq., which establishes a federal administrative mechanism to police intentional, knowing, or reckless "research misconduct" that represents "a significant departure from accepted practices of the relevant research community." *Id.* at § 93.104. He also asserted claims for conversion, and tortious interference with prospective economic advantage. JHU filed a motion to dismiss, which was granted by the circuit court. Yuan appealed.

Held: Affirmed.

The Court concluded that 42 C.F.R. Part 93 and the federal statute upon which it was based, 42 U.S.C. § 289b, did not set forth the clear public policy mandate needed to support a wrongful discharge action.

> The regulations police intentional, knowing, or reckless fabrication or falsification of federally funded research projects. Such language is not far afield from that found not actionable in *Parks v. Alpharma, Inc.*, 421 Md. 59 (2011) (unfair or deceptive trade practices, false or misleading statements, deception, fraud, false pretenses) and *Adler v. American Standard Corp.*, 291 Md. 31 (1981) (corporate fraud). The generality and extensiveness of such provisions undermine their utility as a basis for wrongful discharge. *Parks*, 421 Md. at 84-85. There is no bright line between falsity and misconduct and between scientific errors and wrongdoing.

A broader remedy, such as damages, for research misconduct would invite judicial intrusion into the norms of the academy, the Court added. This may be one reason why Congress did not expressly create a damage remedy for research misconduct. Nor could one be implied under existing Supreme Court case law. Title 42 U.S.C. § 289b is the kind of statute where Congress

carefully balanced competing values and interests, as well as duties and liabilities, the Court said. To imply a private right of action to sue by a whistleblower would destroy this careful balance. Because the Court concluded that under state law, the federal provisions on research misconduct did not set forth a clear public policy mandate, it did not need to decide whether 42 U.S.C. § 289b would preempt a Maryland common law damage remedy for alleged violations of the federal statute. Yuan also pointed to the federal statute criminalizing False Statements, 18 U.S.C. § 1001(a), as an alternative source for the public policy mandate needed to advance a wrongful discharge claim. However, the federal statue contains language similar to that found deficient in *Parks*.

Turning to Yuan's other claims, the Court held that by denying Yuan access to research data created during his employment, JHU did not convert his property. Under the policies of the research institution, ownership remained with the institution, not the employee. The appellate court also said that the circuit court did not err when it dismissed Yuan's claim of tortious interference with prospective business relations because he did not identify who made false references about him to a prospective employer and did not describe the contents of these statements.

Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Maryland Public Service Commission, et al., No. 2437, September Term 2014, filed March 30, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/2437s14.pdf

PUBLIC UTILITIES LAW – JUDICIAL REVIEW OF FINAL DECISIONS

PUBLIC UTILITIES LAW – ELECTRIC GENERATION FACILITY PLANNING – CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Facts:

Dominion Cove Point LNG, LP ("Dominion"), planned to build an electric generating station to power a natural gas liquefaction facility. Pursuant to Md. Code (1998, 2010 Repl. Vol., 2014 Supp.), §§ 7-207 and 7-208 of the Public Utilities Article ("PUA"), Dominion applied for a certificate of public convenience and necessity from the Public Service Commission.

Accokeek, Mattawoman, Piscataway Creeks Communities Council ("AMP"), an environmental advocacy organization, was among the parties that intervened in the proceedings before the Commission.

After extensive review, the Power Plant Research Program (PPRP) recommended that the Commission could approve the application if it imposed an extensive set of conditions on the facility. The Commission's staff also recommended that the certificate could be granted, subject to certain conditions.

Witnesses from state agencies and from Dominion testified before the Commission about economic effects of the project, including the expected property taxes for Calvert County. Those experts estimated that the generating station would account for a relatively small percentage of the economic effects of the larger facility that it would power.

At a public hearing, the Board of County Commissioners for Calvert County announced its unanimous support for approval of the certificate. The Board sent a letter to the Commission to formalize its recommendation.

After the evidentiary and public hearings, Dominion informed the Commission that it would accept the conditions proposed by the state agencies. To provide additional benefits that would justify granting the certificate, Dominion offered to contribute $400,000 to the Maryland Energy Assistance Program (MEAP), and to provide $20.38 million in grants to electric distribution utilities to promote greenhouse gas reduction goals.

In a comprehensive written opinion, the Commission found that, even if Dominion adopted all of the proposed conditions, the economic and other benefits of the generating station would still not

outweigh its other environmental and other societal costs. The Commission further determined that the benefits from Dominion's proposed direct monetary contributions were "too speculative and insufficient" to offset the public harms.

The Commission approved the application subject to Dominion's acceptance of over 200 environmental and other conditions set forth in an appendix to the opinion. As additional conditions, the Commission directed Dominion to contribute $8 million to MEAP over 20 years and to contribute $40 million over five years to the Strategic Energy Investment Fund (SEIF). Dominion accepted all of the conditions, including the direct payment provisions.

AMP petitioned for judicial review of the Commission's order in the Circuit Court of Baltimore City. The court affirmed the Commission's decision. AMP appealed. Both the Commission and Dominion participated as appellees.

Held: Affirmed.

The circuit court correctly denied the AMP' petition for judicial review, because AMP failed to show that the order was: (1) unconstitutional, (2) unsupported by substantial evidence, (3) outside of the Commission's authority, or (4) arbitrary or capricious.

First, AMP contended that the Commission violated AMP's due process rights by failing to articulate certain findings about economic effects of the generating station.

In contested proceedings, the Public Service Commission is required to issue a written statement of the grounds for its decision. Those findings must be detailed enough to apprise parties of the evidentiary basis for the decision. But a party's opportunity for meaningful review of the Commission's decision is not necessarily an opportunity for exhaustive review every conceivable basis for a challenge. The Public Utilities law only requires the Commission to give "due consideration" to factors including "the effect of the generating station" on "economic[]" and other considerations. Because this statute requires the Commission to "consider[]" those factors, a written decision is sufficiently detailed as long as it supports the conclusion that the agency considered those factors.

The Commission's opinion here included sufficient findings as to the requisite factors, including the economic effects of the generating station. Expressly addressing that factor, the Commission recounted testimony about economic benefits from tax revenue, temporary and permanent jobs, highway improvements, re-establishment of oyster beds, and land preservation. The Commission also found potential negative economic effects from increased consumer gas prices and decreased revenues for certain compliance costs. The Commission was not required to reduce all of these qualitatively different costs and benefits into a single quantity or range of quantities.

As a related challenge, AMP contended that the Commission's conclusion about economic benefits of the generating station was unsupported by substantial evidence. More specifically,

AMP argued that the Commission could not reach its decision without direct testimony about the portion of property taxes attributable to the generating station. AMP further argued that the Commission was required to assign a specific numerical value for that component of its analysis.

Substantial evidence in the record supported the Commission's reasonable conclusion that significant benefits would accrue to Calvert County through property tax payments from the generating station. The Commission relied on testimony showing that the overall facility would produce up to $40 million per year in property taxes, along with estimates from Dominion and from state agencies that the power plant represented between 5 percent and 20 percent of the overall economic value. The Commission could reasonably infer that the property taxes attributable to the generating station likely accounted for a fraction of the total property taxes, somewhere near that range of percentages. Even though it may have been possible to refine the estimates by obtaining better evidence, the Commission was entitled to make its decision based on those rough approximations.

As its third challenge, AMP argued that the Commission exceeded its statutory authority by requiring Dominion to contribute a total of $48 million to certain government-administered funds as conditions for approving the certificate. AMP argued that these provisions were "taxes" that the Commission lacked authority to impose.

AMP had standing to challenge the order on the theory that conditions essential to the order were unlawful "taxes." PUA § 3-202 conferred standing on AMP because AMP was a "party" to the proceeding and it was "dissatisfied by" the Commission's "final decision" to authorize construction of the generating station. AMP did not need to show that it was also aggrieved by the Commission's subsidiary decision to require Dominion to make certain payments.

The direct payment conditions imposed by the Commission had some characteristics of a tax, because the payments to the Maryland Energy Assistance Program and the Strategic Energy Investment Fund were involuntary charges that resulted in public benefits. However, the primary purpose of those conditions was not to generate public revenue. Dominion could not simply make the payments and then carry on its business without complying with the hundreds of other regulatory conditions imposed by the Commission. The Commission determined the payment amounts and fund recipients so as to offset the identified consequences of the particular project. The principal purpose of the payments and the other conditions imposed by the order was to calibrate a final outcome consistent with the statute's public convenience and necessity standard.

As a final argument, AMP contended that the Commission acted arbitrarily and capriciously in the way in which it considered to the unanimous recommendation of the Board of County Commissioners. AMP argued that the Commission ignored evidence that the Board had based its recommendation on its support for the larger facility rather than the generating station itself.

In addition to the Commission's assessment of the economic and other effects of a proposed generating station, PUA § 7-207(e)(1) requires the Commission to give due consideration to the recommendation from the local governing body. Under this scheme, the local elected officials

may be guided by public opinion and other political considerations outside of the enumerated statutory criteria for approval. The Commission's proper role is to give due consideration to the preferences of the local governing body without examining the subjective motives of the legislators or trying to determine whether the governing body has narrowed its rationale to the same factors considered by the Commission.

ATTORNEY DISCIPLINE

*

By an Opinion and Order of the Court of Appeals dated March 25, 2016, the following attorney has been indefinitely suspended, effective April 25, 2016:

ALEXANDER MANJANJA CHANTHUNYA

*

By an Opinion and Order of the Court of Appeals dated April 22, 2016, the following non-admitted attorney is excluded from exercising the privilege of practicing law in this State for a period of sixty days:

LARRY D. HUNT

*

By an Opinion and Order of the Court of Appeals dated April 22, 2016, the following attorney has been indefinitely suspended:

RICHARD WELLS MOORE, JR.

*

By an Opinion and Order of the Court of Appeals dated April 25, 2016, the following attorney has been disbarred:

BRUCE AUGUST KENT

*

By an order of the Court of Appeals dated April 25, 2016, the following attorney has been disbarred by consent:

RICHARD JOSEPH KWASNY

*

Return to ToC

UNREPORTED OPINIONS

	Case No.	*Decided*
A.		
Abbasov, Milana v. Dahiya	0608	April 29, 2016
Abularach, Silvia Maria v. Schmelzer	0985	April 11, 2016
Amaro, Mario v. State	0748	April 29, 2016
Armstead, James v. State	2750 *	April 8, 2016
B.		
Bailey, Gregory D. v. State	2223	April 18, 2016
Bainbridge St. Elmo Bethesda v. White Flint Exp.	0376 *	April 5, 2016
Baltimore Co. v. Mayor & Council of Baltimore	2036 *	April 13, 2016
Baroni, Camille v. Avenel Comm. Ass'n.	0857	April 26, 2016
Bd. Of Educ. Prince George's Co. v. Brady	0781	April 26, 2016
Bechtold, Brian v. DHMH	0347 *	April 8, 2016
Boggan, N. Crisman v. Mohr	1061	April 14, 2016
Bourdelais, Michelle v. Durniak	1154	April 8, 2016
Brown, Antonio Maurice v. State	0485	April 27, 2016
Brown, Charles v. Estate of McLain	1802 *	April 7, 2016
Brunson, Demar Anthony v. State	0974	April 13, 2016
Butler, Kerri v. Abbett	0198	April 5, 2016
C.		
Cain, Clifford, Jr. v. Midland Funding	0530 *	April 21, 2016
Calpino, William M., Jr. v. Comptroller	0732	April 26, 2016
Camino, William v. State, et al.	0438	April 15, 2016
Carino, Leticia v. Monacco Exclusive Renovation	0383	April 5, 2016
Chandler, Anthony v. State	1920 *	April 25, 2016
Chisolm, Quincy v. State	2711 **	April 26, 2016
Chow, Ming v. Brown	2275 *	April 29, 2016
Cooper, Anthony v. State	2220 *	April 4, 2016
Copsey, Jenny J. v. Park	2170 *	April 21, 2016
Coster, Susan Yowell v. Coster	1753 *	April 21, 2016
Crawford, Michael DeJuan v. State	2420 *	April 18, 2016

September Term 2015
* September Term 2014
** September Term 2013
*** September Term 2011

D.

Dansby, Barbara v. Jackson Investment Co.	0317	April 15, 2016
Davis, James v. State	1109 ***	April 6, 2016
Dept. of Permitting Servs. v. Brault	0195	April 1, 2016
Dickson, Anthony v. State	1156 *	April 11, 2016
Doane, Daryl Ann v. Frigm	0603	April 1, 2016
Doby, James Earl v. State	1968 *	April 4, 2016
Donophan, William Kyle v. State	2777 *	April 4, 2016

E.

Early, Brandon v. State	2481 *	April 29, 2016
Elvaton Towne Condo. v. Rose	1033 *	April 21, 2016

G.

Gafari, Fatai A. v. Morgan	1584 **	April 25, 2016
Garrett, Andre Lee v. State	0358	April 29, 2016
Gillespie, Edward v. Gillespie	1849	April 25, 2016
Griffin, Jasmine v. Jontiff	0725	April 25, 2016
Gutrick, Don Lowell v. State	0596	April 13, 2016

H.

Haight, Bobby v. Kuta	0604	April 26, 2016
Heflin, Jeffrey v. Ulman	0156	April 6, 2016
Hill, Reginald v. State	2835 *	April 4, 2016

I.

In re: Adoption/Guardianship of R.S. and R.S.	1995	April 28, 2016
In re: Brianna L.	1432	April 4, 2016
In re: Cody H.	1190	April 4, 2016
In re: Da'rhon J.	2720 *	April 4, 2016
In re: Devontaye S.	1267	April 4, 2016
In re: Dion L.	0423	April 8, 2016
In re: E. P.	2192	April 14, 2016
In re: L.B. and D. B.	0532	April 29, 2016
In re: Laizel J.	0244	April 8, 2016
In re: Micah M.	0313	April 29, 2016

September Term 2015
* September Term 2014
** September Term 2013
*** September Term 2011

In the Matter of M.B.	1915	April 29, 2016
J.		
Jean, Rick A. v. State	0332	April 8, 2016
Johnson, Sequan Taiurque v. State	1136	April 29, 2016
Jones, Alvin, Jr. v. State	0442	April 25, 2016
Jones, Dion v. Montgomery Co.	1910 *	April 5, 2016
Jones, Kendall v. Warden, NBCI	1071	April 6, 2016
K.		
Kiknadze, Melvud v. Sonneman	1490 *	April 12, 2016
L.		
Lammond, Cibel v. Covelli	0301	April 26, 2016
Lawson, Mahdi v. State	1495 *	April 7, 2016
Locklair, Charles v. Tester	1628	April 19, 2016
M.		
Mack, John Ervin, Jr. v. State	0064	April 15, 2016
Mack, Kevin Eugene v. State	2677 *	April 8, 2016
Mackall, Jamar Sherman v. State	0584	April 19, 2016
Mallette, Robert W., III v. Moorer	2083 *	April 13, 2016
Maxwell, Ruben v. Mazor	2830 *	April 18, 2016
McCoy, Antonio v. State	2627 *	April 8, 2016
McInnis, Lamont Dashawn v. State	1225	April 5, 2016
Mock, Clifford Eugene v. State	0649	April 15, 2016
Morales, Nathaniel v. State	1436 *	April 8, 2016
Mundi Enterprises v. Service Energy	0879	April 13, 2016
Myers, Monica Monique v. State	1976 *	April 8, 2016
Myles, Meredith v. State	1501 *	April 4, 2016
N.		
Neal, Jane McGrath v. Monument Realty	0266 *	April 29, 2016
Newman, Antoine Anthony v. State	0226	April 25, 2016
Nova Partners v. O'Sullivan	0607	April 13, 2016

September Term 2015
* September Term 2014
** September Term 2013
*** September Term 2011

O.		
Ortuno, Romer Rolando v. State	0706	April 18, 2016
P.		
Park Avenue Property v. Wetzel & Kimball	1261 *	April 25, 2016
Preston, Anthony v. State	0549 *	April 29, 2016
Pribble, Tracey v. Pribble	0876	April 21, 2016
R.		
Reid, Nelson v. State	2164 *	April 19, 2016
Rivera, Manuel D. v. Uno Restaurants	0277 *	April 5, 2016
Roach, Anthony v. State	2523 **	April 26, 2016
Robertson, Keith v. Comptroller	1319 *	April 21, 2016
Robinson, Jermaul Rondell v. State	0119	April 29, 2016
S.		
Salaam, Clifton v. State	1101 *	April 4, 2016
Salliey, Quincy v. State	1698 *	April 25, 2016
Serrano, David v. State	2219	April 15, 2016
Shim, Fabian v. State	0940 **	April 13, 2016
Sikes, Lindsey W., Jr. v. Ward	0027	April 8, 2016
Sollberger, Karl Ray v. State	2128 *	April 12, 2016
Solomon, Olakunle Gabriel v. State	0407	April 19, 2016
State v. McMillan, James	2697 *	April 18, 2016
State v. Walker, Lancelot	1561	April 19, 2016
Stewart, Edward Stanley, III v. State	0409	April 5, 2016
Stull, Karl Edward v. State	0556	April 6, 2016
Suleman, Fatali Aderemi v. Egenti	1791	April 12, 2016
V.		
Vach, David v. Ward	0831	April 26, 2016
Vasilakopoulos, Konstantinos v. Miklasz	0702	April 19, 2016
W.		
Walker, Donavan F. v. State	1087	April 5, 2016
Walker, Harry R., Jr. v. State	2279 *	April 29, 2016
Wells, Anthony K., Jr. v. State	1440 *	April 19, 2016

September Term 2015
* September Term 2014
** September Term 2013
*** September Term 2011

Wheeler, Charles F., Jr. v. State	1079 *	April 26, 2016
Williams, Angela L. v. Wilburn	1316	April 29, 2016
Williams, Steven Donnell v. State	2421 *	April 14, 2016
Kivitz, Murray A. v. Erie Insurance Exchange	2299	April 29, 2016
Weiskerger, Ernest, Jr. v. Paik's Decorators	0618	April 29, 2016

September Term 2015
* September Term 2014
** September Term 2013
*** September Term 2011