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ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Wayne Gordon Gracey. Bar Counsel alleged that Gracey made fraudulent transactions through his bank account, misappropriated client funds, knowingly allowed his employees to solicit potential clients by telephone and in-person, knowingly made false statements in connection with a disciplinary matter and failed to timely respond to requests from Bar Counsel. Thereafter, the Court of Appeals Court designated the Honorable Judge Susan Souder ("the hearing judge") to hear the matter and make findings of fact and conclusions of law.

The hearing judge found that Gracey had withdrawn money from two client accounts without authorization to do so. With regard to the scheme to defraud BB&T Bank,the hearing judge found that Gracey defrauded the bank of $24,683 by creating payments for services not rendered for fictitious client accounts which were deposited into one of seven checking accounts personally opened by Gracey. The hearing judge also found that Gracey did not maintain a client trust account and that Gracey's employees had also been soliciting potential clients through telephone and in-person. The hearing judge determined that Gracey had violated MLRPC 1.15(a) and (e), 1.16(d), 5.3(c), 8.1(a) and (b) and 8.4(a), (b), (c) and (d) but not 7.3.

Held:

There was clear and convincing evidence supporting Gracey's violation of MLRPC 1.15(a) and (e), 1.16(d), 5.3(c), 8.1(a) and (b) and 8.4(a), (b), (c) and (d) and the Court upheld the violations. The Court disbarred Gracey because his misappropriation of client funds as well as the scheme to defraud the Bank were dishonest, fraudulent, and criminal, reflecting adversely on his fitness as an attorney. Consequently, the Court had issued a Per Curiam Order disbarring Gracey on March 3, 2016.

Attorney Grievance Commission of Maryland v. Erica S. White, AG No. 80, September Term 2014, filed May 23, 2016. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2016/80a14ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION WITH THE RIGHT TO APPLY FOR READMISSION AFTER SIX MONTHS

Facts:

Petitioner, the Attorney Grievance Commission of Maryland ("Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Erica S. White, based upon her representation of clients in separate legal matters, non-compliance with a Conditional Diversion Agreement ("CDA"), an Amended CDA, and the mishandling of her trust account. Bar counsel alleged that Respondent violated the following Maryland Lawyers' Rules of Professional Conduct ("MLRPC"): Rule 1.1 (Competence), Rule 1.3 (Diligence), Rule 1.4(a) and (b) (Communication), Rule 1.15(a) and (d) (Safekeeping Property); 1.16(d) (Declining or Terminating Representation); 8.1(a) and (b) (Bar Admission and Disciplinary Matters); and Rule 8.4(a), (c), and (d) (Misconduct). Bar Counsel also alleged that Respondent violated Maryland Rules 16-606.1 (Attorney Trust Account Record-Keeping), 16-607 (Commingling of Funds), and 16-609 (Prohibited Transactions), and Md. Code (1989, 2010 Repl. Vol) § 10-306 of the Business Occupations & Professions Article ("Bus. Occ. & Prof.") (Misuse of Trust Money).

In March 2012, Respondent entered into a one-year CDA with Bar Counsel, where she conceded to prior misconduct concerning her trust account while representing a client in a divorce and custody matter. Under the CDA, Respondent was required to review continuing legal education materials regarding trust account management and comply with trust account rules. Respondent did not fulfill her obligations under the CDA. As a result, Bar Counsel amended Respondent's CDA ("Amended CDA") and she was assigned a law practice monitor ("monitor").

The Amended CDA provided, *inter alia*, that Respondent submit copies of her trust account records and related correspondence to her monitor on a monthly basis and attend a meeting with an accountant provided by the Commission. In April 2014, Respondent's Amended CDA was revoked for non-compliance with these terms and trust account violations involving misallocated client funds, miscellaneous or unidentified cash withdrawals and checks payable, repeated negative balances and overdraft fees, and a lack of proper accounting records. Respondent conceded to continued mismanagement of her trust account since the original CDA.

In late-2012, Respondent was retained by a client for representation in a landlord-tenant dispute where an unfavorable judgment was rendered. Respondent failed to advise the client of the thirty-day time period to amend or revise the judgment and filed successive post-judgment motions ninety-one days after the judgment was entered. The motions were denied. The client filed a subsequent post-judgment motion *pro se*, which was denied for failure to appear a hearing

on the motion. Notice of the motions hearing was sent by the court to Respondent's law office. However, Respondent neglected to check her mail or implement forwarding procedures during an illness and recuperation from surgery, so the client never received the notice. Ultimately, the client's wages were garnished to satisfy the judgment.

Respondent also failed to provide the client with copies of motions filed and failed to timely deliver the client's file despite continued requests. Respondent remained counsel of record until she withdrew her appearance as counsel in March 2014, approximately a year after her representation ended. Respondent maintained that her misconduct was attributable to illness, recuperation after surgery, and difficulties experienced as caretaker of her mother until her death, which impacted her practice.

Held:

The Court of Appeals accepted the Findings of Facts and Conclusions of Law of the hearing judge. Although the Court accepted the mitigating factor of Respondent's illness, it held that it did not obviate her admitted ignorance of trust account rules; her failure to remediate her misconduct or adhere to the protocols under consecutive CDAs; her lack of cooperation with Bar Counsel while under investigation; or her failure to implement safeguards during an illness or otherwise protect her clients interests in conformance with the Rules of Professional Conduct. Respondent engaged in conduct in violation of MLRPC 1.1, 1.3, 1.4(a) and (b), 1.15(a), 1.16(d), 8.1(a) and (b), 8.4(a), (c), and (d), and Md. Rules 16.606.1(a)(1)-(3), 16-607, 16-609(b) and (c), and § 10-306 of the Business Occupations & Professions Article. The Court ordered indefinite suspension with the right to apply for readmission after six months.

State of Maryland v. Brian Rice, Edward Nero & Garrett Miller, Nos. 96, 97 & 98, September Term 2015; *Alicia White & Caesar Goodson v. State of Maryland*, No. 99, September Term 2015, filed May 20, 2016. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2016/96a15.pdf

CRIMINAL LAW – PROPER PARTIES TO AN APPEAL – FIFTH AMENDMENT – DOUBLE JEOPARDY

CRIMINAL LAW – STATE'S RIGHT TO APPEAL

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COMPULSORY SELF-INCRIMINATION – FIFTH AMENDMENT

COMPULSORY SELF-INCRIMINATION – ARTICLE 22

Facts:

On April 12, 2015, Freddie Gray suffered an injury while in police custody; one week later, he died from those injuries. The State charged six Baltimore City police officers with crimes in connection with the events leading up to Mr. Gray's death—Officer William Porter, Officer Caesar Goodson, Sergeant Alicia White, Lieutenant Brian Rice, Officer Edward Nero, and Officer Garrett Miller. The trials of all six officers were specially assigned to the Honorable Barry Williams in the Circuit Court for Baltimore City. Officer Porter was tried first on November 30, 2015, and the trial ended in a mistrial on December 16, 2015. Before then, by letter dated September 15, 2015, the State notified the Circuit Court and the parties that Officer Porter was "a necessary and material witness" in Officer Goodson's and Sergeant White's trials, and it was therefore "imperative" that he be tried first. In compliance with that request, the Circuit Court scheduled Officer Goodson's trial for January 11, 2016, and Sergeant White's trial for February 8, 2016—both of which were after the mistrial was declared in Officer Porter's trial.

On December 11, 2015, the State served Officer Porter with two subpoenas, one compelling him to appear and testify in Officer Goodson's trial and the other compelling the same in Sergeant White's trial. Officer Porter moved to quash both subpoenas, arguing that compelling his immunized testimony would violate his privilege against compelled self-incrimination provided by the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights. The State then filed a Motion to Compel a Witness to Testify Pursuant to Section 9-123 of the Courts and Judicial Proceedings Article, alleging that Officer Porter's testimony "may be necessary to the public interest" and that Officer Porter had refused to testify on the ground of compelled self-incrimination. The Circuit Court denied Officer Porter's motion

to quash and granted the State's motion to compel, reasoning that the State could compel Officer Porter to provide immunized testimony in the trials of Officer Goodson and Sergeant White without violating either or both the Fifth Amendment and Article 22.

On January 14, 2016, the State moved to compel Officer Porter's testimony in the trials of Lieutenant Rice, Officer Nero, and Officer Miller ("Defendants"), asserting that Officer Porter's testimony in those trials likewise "may be necessary to the public interest" and that he was likely to refuse to testify on the basis of self-incrimination. Defendants and Officer Porter opposed the motions.

After hearing argument, the Circuit Court denied the State's motions on the record. The court concluded that the State sought to compel Officer Porter's testimony "in an attempt to control the schedule and order of the trials and to circumvent this Court's ruling that postponement in these cases was not appropriate." Consequently, the court denied the motions on the ground that it was "not in the public interest" for the State to file the motions to compel as "subterfuge" to resurrect the trial schedule the State had originally requested. Officer Porter noted an appeal from the Circuit Court's order granting the State's motions to compel in Officer Goodson's and Sergeant White's cases, and the State noted an appeal from the Circuit Court's orders denying the State's motions to compel in Defendants' cases. The Court of Appeals granted the State's petitions for writ of certiorari in all five cases to determine whether: (1) an order denying a motion to compel immunized testimony is immediately appealable; (2) a trial court has any discretion to deny a properly pled motion to compel immunized testimony; and (3) the statute providing for compelled immunized testimony granted Officer Porter sufficient protection against compelled self-incrimination.

On March 8, 2015, the Court entered two Per Curiam Orders on March 8, 2016, affirming the judgments of the Circuit Court in Officer Goodson's and Sergeant White's cases; reversing the judgments of the Circuit Court in the cases of Lieutenant Rice, Officer Nero, and Officer Miller; and lifting the stays in each case to allow the trials to move forward.

Held:

The Court held first that Officer Porter, rather than Defendants, was the proper Appellee in the State's appeal because Officer Porter, as the witness whose testimony the State sought to compel, was the party directly interested in the subject matter of the State's motions. The Court then concluded that the Circuit Court's orders denying the State's motions to compel constituted final judgments from which the State could appeal immediately. The Court reasoned that the Circuit Court's orders resolved all claims between the State and Officer Porter, and the State's request did not involve the merits of the State's charges against Defendants in their underlying criminal cases.

The Court also held that the immunity statute does not afford a trial court any discretion to deny a motion to compel immunized testimony. The immunity statute, Md. Code Ann., Cts. & Jud.

Proc. ("CJ") § 9-123(b)(1) (2014, 2013 Repl. Vol., 2015 Supp.), provides that "the court in which the proceeding is or may be held *shall issue, on the request of the prosecutor* made in accordance with subsection (d) of this section, an order requiring the individual to give testimony or provide other information which the individual has refused to give or provide on the basis of the individual's privilege against self-incrimination." CJ § 9-123(c)(1) (emphasis added). Subsection (d) then instructs that, "[i]f a prosecutor seeks to compel an individual to testify or provide other information, the *prosecutor shall request*, by written motion, the court to issue an order under subsection (c) of this section when the *prosecutor determines*" that the testimony is necessary and otherwise would be refused on self-incrimination grounds. CJ § 9-123(d) (emphasis added). The Court concluded that the plain language of CJ § 9-123 unambiguously requires the trial court to grant a motion that complies with the statutory pleading requirements and does not give the trial court any discretion to substitute its own judgment. The Court's assessment of that plain language is confirmed by reference to the statute's legislative history, which similarly reflects the General Assembly's intent to vest immunity determinations in the executive branch. Moreover, the Court's interpretation of CJ § 9-123 is wholly consistent with the federal courts' and other states' interpretation of materially identical statutes. The Court therefore held that the Circuit Court erred in denying the State's motions to compel on the ground that it was "not in the public interest" for the State to file the motion as "subterfuge" to regain control of the trial schedule because the State's motions satisfied the statute's prerequisites.

The Court held that the State's compelling Officer Porter to testify in the trials of his fellow officers, under the grant of use and derivative use immunity, does not violate Officer Porter's privilege against compelled self-incrimination under the Fifth Amendment. The Court explained that use and derivative use immunity was sanctioned by the United States Supreme Court as coextensive with the Fifth Amendment privilege and therefore constitutional. That Officer Porter is a defendant in his own trial does not change the fact that he is a witness in the trials of the remaining officers and does not alter the State's ability to compel his testimony in separate trials of other defendants.

The Court rejected as premature Officer Porter's claim that he could not be compelled to testify because he could not be assured that the State would not use, at his retrial, his immunized testimony or any evidence derived therefrom. The Court reasoned that any claim regarding what evidence the State may or may not use at Officer Porter's retrial is not ripe until such time as the State attempts to use it. If and when Officer Porter is retried, the trial court, at a *Kastigar* hearing, may refer to the transcript of the evidence the State used against him in his first trial and determine whether the State seeks to offer evidence different from that which was offered the first time. If so, the State would have to carry a substantial burden of establishing the independent sources from which the evidence was wholly derived. If the State cannot meet that burden, the Circuit Court may decide that Officer Porter cannot be retried. The Circuit Court cannot, however, deny the State's motions to compel on that basis.

Nor may the Circuit Court deny the State's motions to compel because Officer Porter believes the State will later charge him with perjury. The State may not use Officer Porter's immunized testimony to prove that he committed perjury during his trial, or use his trial testimony to prove

that his immunized testimony was false. If, however, his immunized testimony is false, then the State may charge Officer Porter with perjury under CJ § 9-123 without violating his constitutional privilege against compulsory self-incrimination.

The Court held finally that compelling Officer Porter's testimony under use and derivative use immunity does not violate his self-incrimination privilege under Article 22 of the Maryland Declaration of Rights because Article 22 has been interpreted as *in pari materia* with the Fifth Amendment.

Marshall Tyrone Stoddard v. Department of Health and Mental Hygiene, No. 81, September Term 2015, *Dennis Merchant v. State of Maryland*, Misc. No. 16, September Term 2015, filed May 23, 2016. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2016/81a15.pdf

CRIMINAL PROCEDURE – MENTAL HEALTH – RELEASE FROM COMMITMENT

Facts:

The Circuit Court for Prince George's County found Dennis Merchant ("Merchant") guilty of attempted carjacking but not criminally responsible at the time of the commission of the offense and committed him to the Department of Health and Mental Hygiene ("DHMH"). Between December 2000 and August 2014, the Circuit Court granted Merchant conditional releases on various occasions but each conditional release was subsequently revoked, resulting in Merchant's recommitment to DHMH for treatment. The certified questions arose out of the State's filing of a petition for revocation of Merchant's conditional release on August 20, 2014. Administrative Law Judge ("ALJ") D. Harrison Pratt for the Office of Administrative Hearings ("OAH") held a hearing on the State's petition for revocation. ALJ Pratt concluded that Merchant established he was eligible for conditional release by a preponderance of the evidence and recommended that Merchant be released conditionally. Per Md. Code (2001, 2008 Repl. Vol., 2015 Cum. Supp.), §§ 3-114 et seq., of the Criminal Procedure Article ("CP"), ALJ Pratt forwarded his "Report on Revocation of Conditional Release Hearing" to the Honorable Sean Wallace of the Circuit Court for Prince George's County for court action. Judge Wallace stated that the ALJ procedure under CP, Title 3 was unconstitutional and refused to apply the substantial evidence standard per the interpretation outlined in *Byers v. State*, 184 Md. App. 499, 966 A.2d 982 (2009). Judge Wallace held his own evidentiary hearing on ALJ Pratt's recommendations. He further concluded that while there was sufficient evidence to support the ALJ's recommendation that the defendant be released conditionally, he would not defer to the ALJ's decision. Thus, Judge Wallace revoked Merchant's conditional release.

The Circuit Court for Prince George's County found Marshall Stoddard ("Stoddard") guilty of attempted second-degree sexual offense but not criminally responsible at the time of the commission of the offense. The court committed Stoddard to DHMH. On December 27, 2013, Stoddard filed an application for conditional release. ALJ Michael J. Wallace held a hearing on the application for conditional release. ALJ Wallace found that Stoddard established he was eligible for conditional release by a preponderance of the evidence and recommended that he be conditionally released. ALJ Wallace forwarded his "Report on Release Eligibility" to Judge Wallace for court action pursuant to CP §§ 3-114 et seq. As in Merchant's case, Judge Wallace held his own evidentiary hearing on ALJ Wallace's recommendations and concluded that he was not personally persuaded Stoddard had met his burden of proof of eligibility for release and denied the petition for conditional release.

Held:

In *Stoddard*, the judgment of the Circuit Court for Prince George's County is reversed.

In *Merchant*, the certified questions were answered.

The statutory scheme of CP, Title 3 prescribes mandatory judicial review of an ALJ's report on revocation of conditional release or eligibility for conditional release. While CP § 3-118 is ambiguous as to whether subsection (a) requires the court to be persuaded of eligibility for release "by a preponderance of the evidence," or requires the court to determine whether there was substantial evidence for the ALJ to have been persuaded "by a preponderance of the evidence," the legislative history and other provisions of Title 3 make it clear that under CP §§ 3-114, et seq., the substantial evidence standard applies to a circuit court's review of an ALJ's findings of facts and recommendations. As the *Byers* court duly noted, the only place the General Assembly explicitly "affords the possibility of a court procedure" is in CP § 3-119(c) and "not in combination with but as an alternative to an administrative procedure." *Byers*, 184 Md. App. at 528, 966 A.2d at 1000. In comparison, the General Assembly utilized language elsewhere in Title 3 indicating that the court performs the task of judicial review. For example, CP § 3-117 (b)(1) states that "[t]he court shall hold the hearing on the record that was made before the Office." CP § 3-119(b)(2) further states that "[t]he provisions of this title governing administrative hearing and judicial determination of eligibility for release apply to any application for release under this subsection[,]" incorporating by reference the comprehensive administrative procedure set forth in CP §§ 3-114 through 3-118.

Even where the committed person selects the "Court procedure," CP § 3-119(c)(5) provides that "[i]f the trier of fact renders a verdict for conditional release . . . the court shall release the committed person under conditions it imposes in accordance with specific recommendations for conditions under [CP] § 3-116(b)." These "specific recommendations for conditions under [CP] § 3-116(b)" are the conditions of release recommended by an ALJ. CP § 3-116(b) provides: "In recommending the conditions of a conditional release, the Office shall give consideration to any specific conditions recommended by the facility of [DHMH] that has charge of the committed person, the committed person, or counsel for the committed person." It is apparent that the statutory provisions require a court to defer to OAH's recommendations as to the conditions of release even where a committed person initiates the "Court procedure" in a circuit court. This demonstrates the General Assembly's intent to create an overall statutory scheme that calls for an administrative procedure, unless explicitly stated otherwise. To adopt the action taken by the Circuit Court in this case, or the procedure suggested by the appellees would result in inconsistencies within Title 3. This interpretation is also consistent with the purpose of Title 3 and its predecessor, Md. Code (1982, 1989 Cum. Supp.), § 12-101 et.seq., of the Health-General Article, which was enacted for the purpose of streamlining and strengthening the procedures for the release of a person who was found not criminally responsible.

Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al., No. 59, September Term 2015, filed May 23, 2016. Opinion by McDonald, J.

Battaglia, J., joins in the judgment only.

http://www.mdcourts.gov/opinions/coa/2016/59a15.pdf

CRITICAL AREA LAW – VARIANCE – REQUIREMENT TO SHOW UNWARRANTED HARDSHIP

CRITICAL AREA LAW – VARIANCE – REQUIREMENT TO SHOW NO ADVERSE ENVIRONMENTAL IMPACT

CRITICAL AREA LAW – VARIANCE – PRESUMPTION OF NON-CONFORMITY WITH PURPOSE AND INTENT OF LAW

Facts:

In the State's Critical Area law, the General Assembly has established a cooperative program with local jurisdictions to ensure that land near Chesapeake Bay and the Atlantic coastal bays has special protection against development that might cause environmental damage. Although that law allows a property owner to seek a variance from the law's restrictions, the law creates a presumption that a proposed variance does not conform to the purpose and intent of the Critical Area law and places the burden of proof on the applicant to demonstrate that all of the criteria for a variance have been met. Among other things, the applicant must show that the applicant would suffer an "unwarranted hardship" without the variance and that granting the variance will not have an adverse environmental impact.

In this case, Roy T. Schwalbach sought a variance from a provision in a Worcester County ordinance that limits piers to 100 feet in length. He sought the variance in order to build an extended pier to access navigable water from his waterfront property in a community where piers and boating are common. Mr. Schwalbach obtained necessary approvals from federal, State, and local environmental agencies. The Worcester County Board of Zoning Appeals (Board) granted the variance after holding an evidentiary hearing and finding that Mr. Schwalbach had borne the burden of proof on all of the requirements for a variance.

Petitioner Assateague Coastal Trust, Inc. (ACT), an environmental advocacy organization, sought judicial review of the grant of the variance, arguing that the Board's decision was defective for several reasons. The Circuit Court for Worcester County and the Court of Special Appeals both upheld the Board's decision in written opinions that analyzed the evidence before the Board on the criteria for a variance.

Before the Court of Appeals, ACT focused its contentions on three arguments. ACT argued: (1) that denial of the variance would not deny Mr. Schwalbach all reasonable and significant use of the entire property and therefore he could not establish an "unwarranted hardship"; (2) that Mr. Schwalbach did not show, and the Board did not explicitly find, that there would be no adverse environmental impact from granting the variance; and (3) that, although the Board's written decision concluded that Mr. Schwalbach had satisfied all standards for the variance, the Board did not make an explicit written finding that he had rebutted the statutory presumption of non-conformity with the Critical Area law.

Held: The Board's decision granting the variance was upheld.

In order to establish an "unwarranted hardship," Mr. Schwalbach was not required to show that he would be denied all reasonable and significant use of his land without the variance – in essence, a showing of an unconstitutional taking – but rather that he would be denied a reasonable and significant use throughout the entire property. There was sufficient evidence for the Board to conclude that Mr. Schwalbach had satisfied that standard as well as the standard that there be no adverse environmental impact from granting the variance. In addition, the Board's statement that the application had "satisfied all standards" adequately expressed its determination concerning the environmental impact standard and its conclusion that the evidence presented to it had overcome the statutory presumption of non-conformity.

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Stephen Sieglein v. Laura Schmidt, No.76, September Term 2015, filed May 20, 2016. Opinion by Battaglia, J.

Watts, J., concurs.

http://www.mdcourts.gov/opinions/coa/2016/76a15.pdf

ESTATES AND TRUSTS – LEGITIMACY – ARTIFICIAL INSEMINATION

FAMILY LAW – VOLUNTARY IMPOVERISHMENT

FAMILY LAW - INJUNCTION

Facts:

Stephen Sieglein and Laura Schmidt were married in 2008, both having had children in a previous marriage. Mr. Sieglein had undergone a vasectomy and, although Ms. Schmidt desired to have another child, Mr. Sieglein refused to have his vasectomy reversed. He did, however, accompany Ms. Schmidt to the Shady Grove Fertility Reproductive Science Center as well as support the process of obtaining medical assistance to conceive a child. Both Ms. Schmidt and Mr. Sieglein signed an "Assisted Reproduction: In Vitro Fertilization, Intracytoplasmic Sperm Injection, Assisted Hatching, and Embryo Freezing Consent" form in January of 2010, indicating the components of the in vitro fertilization (IVF) treatment that they agreed to undertake. Additionally, they both acknowledged by signature that they had been "fully advised of the purpose, risk and benefits" of the procedures to which they consented and were participating "free from pressure and coercion"

As a result of the IVF treatment, a son was born in 2012; his birth certificate listed Ms. Schmidt as the mother and Mr. Sieglein as the father. The parties separated shortly thereafter, however, and Ms. Schmidt filed a complaint in the Circuit Court for Harford County for a limited divorce on the grounds of cruelty and vicious conduct against her and her children, as well based upon voluntary separation; she also requested child support. Mr. Sieglein generally denied the allegations of the complaint as well as that he was the father of the boy, arguing that IVF was not the same as "artificial insemination" and, therefore, he was not the legal parent of the boy, under Section 1-206(b) of the Estates and Trusts Article. A hearing was held in the Fall of 2012 at which the Circuit Court for Harford County found that Mr. Sieglein was the parent of the child and, therefore, was obligated to pay child support.

The parties appeared in December of 2012 before Judge Angela Eaves of the Circuit Court for Harford County for a pendente lite hearing on custody, visitation and child support. Prior to the hearing, Ms. Schmidt filed an amended complaint for limited divorce in which she sought sole legal custody of the boy, child support and injunctive relief under Section 1-203(a)(2) of the Family Law Article on the ground of harassment. In support of her amended complaint, Ms.

Schmidt relied on a protective order issued by the District Court of Maryland for Harford County that ordered Mr. Sieglein to vacate the family home, to cease harassment of Ms. Schmidt, to refrain from contacting Ms. Schmidt and to stay away from her place of employment. The Circuit Court declined to revisit the issue of Mr. Sieglein's paternity, but did make a determination that he had voluntarily impoverished himself.

In January of 2013 sole physical and legal custody of the boy was granted to Ms. Schmidt, while Mr. Sieglein was ordered to pay monthly child support and an additional amount per month to reduce a child support arrearage covering the period from May 2012 to December 2012. Ms. Schmidt was granted an absolute divorce in 2013, and a final hearing to determine child support and to address her request for permanent injunctive relief was held in February of 2014. The circuit court determined, after considering Mr. Sieglein's physical condition, education, employment changes, relationship to Ms. Schmidt, efforts to find and retain employment and past work history, that he had voluntarily impoverished himself and calculated a child support payment from Mr. Sieglein to Ms. Schmidt of $1,007.00 monthly on behalf of the boy. The court also granted Ms. Schmidt's request for a permanent injunction against Mr. Sieglein on the basis of harassment. Mr. Sieglein appealed to the Court of Special Appeals, contending that the circuit court erred when it found him to be the father of a child born through IVF, found him voluntarily impoverished and granted a permanent injunction against him. The Court of Special Appeals affirmed.

Held: Affirmed.

The Court of Appeals held that the term "artificial insemination" as used in Section 1-206(b) of the Estates and Trusts Article includes artificial reproductive techniques, such as in vitro fertilization, that utilize donated sperm. Based upon the legislative history of Section 1-206(b) and concern at the time the section was enacted regarding the illegitimacy of children born when donated sperm was utilized, the Court determined that the intent of the Legislature was to legitimize children born to a married couple through the use of procedures utilizing donated sperm when the husband consented, rather than through only the specific technique of artificial insemination. The Court, however, specifically declined to consider gestational surrogacy under the statute and left that issue for another day.

The Court further held that the Circuit Court properly applied the traditional notion of "voluntary impoverishment", which involves an individual's intentional reduction of income through unemployment or underemployment. The Court of Appeals held that the Circuit Court did not abuse its discretion when it found Mr. Sieglein voluntarily impoverished himself. Finally, the Court concluded that it was within the Circuit's Court authority to grant a permanent injunction for harassment under Section 1-203(a) of the Family Law Article, and that the Circuit Court did not abuse its discretion in finding that Mr. Sieglein's conduct met the definition of harassment as contemplated by the statute.

Edward J. and Vicki Fangman, et al. v. Genuine Title, LLC, et al., Misc. No. 19, September Term 2015, filed May 20, 2016. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2016/19a15m.pdf

MD. CODE ANN., REAL PROP. (1974, 2015 REPL. VOL.) § 14-127 – PRIVATE RIGHT OF ACTION

Facts:

This case involves a purported class action lawsuit in the United States District Court for the District of Maryland ("the federal court") against Genuine Title, LLC ("Genuine Title"), various mortgage lenders ("the Lender Appellees") and alleged sham companies that were formed by Genuine Title (together with Genuine Title, "the Genuine Title Appellees") (collectively "Appellees"), for allegedly engaging in a home mortgage kickback scheme in which Genuine Title, by itself and through the sham companies, provided cash payments and marketing materials to mortgage brokers who referred clients to Genuine Title for settlement services.

Edward J. Fangman and Vicki Fangman (collectively "the Fangmans") seek to represent a class of approximately 4,000 to 5,000 individuals (collectively "Appellants") who, from 2009 to 2014, retained Genuine Title for settlement and title services and utilized the Lender Appellees for the purchase and/or refinancing of their residences. All Appellants allegedly used Genuine Title's settlement and title services as a result of referrals from the Lender Appellees. According to the second amended complaint, Appellees allegedly concealed the payments from Appellants and failed to disclose the payments on Appellants' HUD-1 settlement statements. Additionally, Appellants alleged that Genuine Title and the Lender Appellees failed to disclose that Genuine Title was participating with referring loan officers/banks and with the Genuine Title Appellees, and also failed to disclose their affiliated business relationships.

At some point, regulators began to investigate the alleged scheme. Appellants alleged that, once the investigation began, Genuine Title drafted and back-dated sham title services agreements for the purpose of disguising cash payments as legitimate fees for alleged services provided. Appellants alleged that cash payments were not made in accordance with the fee schedule contained in the title services agreement. Appellants alleged that, as a result of the kickback scheme, they were deprived of "kickback[-]free settlement services and process" and their settlement fees would have been "much lower" had the kickback scheme not been in place.

The Fangmans filed in the Circuit Court for Baltimore County an initial class action complaint against Genuine Title. Genuine Title then removed the case to the federal court. The Fangmans filed amended complaints adding plaintiffs and defendants. In the second amended complaint, Appellants alleged that the Genuine Title Appellees and Lender Appellees violated 12 U.S.C. § 2607(a) and (b), part of the Real Estate Settlement Procedures Act ("RESPA"); Md. Code Ann.,

Real Prop. (1974, 2015 Repl. Vol.) ("RP") § 14-127; and Md. Code Ann., Com. Law (1975, 2013 Repl. Vol.) ("CL") § 13-301, part of the Maryland Consumer Protection Act.

In response, the Genuine Title Appellees and Lender Appellees filed in the federal court eleven separate motions to dismiss. The federal court conducted a hearing on the motions to dismiss. The federal court issued a memorandum opinion in which the federal court, with one exception, denied the motions to dismiss the RESPA claims, granted the motions to dismiss the Maryland Consumer Protection Act claims, and stayed the motions to dismiss the RP § 14-127 claims so that the Court of Appeals could determine whether RP § 14-127 permits a private right of action. To that end, the federal court certified to the Court of Appeals the following question of law: "Does Md. Code Ann., Real Prop. [(1974, 2015 Repl. Vol.) ("RP")] § 14-127 imply a private right of action?"

Held: Certified question of law answered in the negative.

The Court of Appeals held that RP § 14-127 does not contain an express or implied private right of action, as neither RP § 14-127's plain language, legislative history, nor legislative purpose demonstrates any intent on the General Assembly's part to create a private right of action.

The Court held that nothing within RP § 14-127 generally, or RP § 14-127(c)(1) specifically, expressly provides a private right of action for anyone who is allegedly harmed by a violation of RP § 14-127(c)(1).

The Court held that, on its face, RP § 14-127(c)(1) does not specifically identify a class for whose benefit it was enacted. The Court stated that, nonetheless, there is a group who could receive the benefit of RP § 14-127—consumers of residential and commercial settlement services. In other words, RP § 14-127(c)(1) could inure to the benefit of consumers or members of the public who use residential and commercial settlement services because the prohibition in RP § 14-127(c)(1) could theoretically keep costs down by eliminating hidden costs and excess fees that may be associated with the solicitation, obtainment, or arrangement of real estate settlement business. The Court concluded that, s consumers of settlement services, Appellants are members of a class that would conceivably benefit from RP § 14-127, although there is no evidence that RP § 14-127 was designed specifically to protect consumers of settlement services.

The Court concluded that that RP § 14-127's legislative history fails to reveal any intent on the General Assembly's part to create a private right of action, either expressly or impliedly. The Court stated that the legislative history of RP § 14-127's prohibition against persons connected "with the settlement of real estate transactions involving land in the State . . . pay[ing] to or receiv[ing] from another any consideration to solicit, obtain, retain, or arrange real estate settlement business" is completely devoid of any mention whatsoever of an intent to create a private right of action on behalf of consumers of settlement services.

The Court determined that it is evident from RP § 14-127's plain language and legislative history that its purpose is to criminalize kickbacks in relation to settlement services, not to protect a certain class of individuals or to create a private right of action on behalf of a specific class of individuals. The Court stated that RP § 14-127's predecessor's placement in a criminal law article is not consistent with the intent to create a private right of action, but rather supports the conclusion that RP § 14-127's purpose is—and has always been—to criminalize behavior related to settlement kickbacks. The Court concluded that, as originally enacted, it is clear that Art. 27, § 465A's purpose was criminal in nature in that it created a new crime and set forth the possible punishments for conviction of that crime.

The Court held that, from RP § 14-127's plain language and legislative history, it had no difficulty in concluding that RP § 14-127's purpose was criminal in nature, and not to create an implied private right of action on behalf of a specified protected class of individuals. Moreover, the Court noted that, in addition to criminalizing kickbacks in connection with settlement services, RP § 14-127 effectively prevents practices that could increase the costs of settlement and limit competition among providers of settlement services; i.e., RP § 14-127 helps keep the costs of settlement down and provides consumers with a wider choice of providers of settlement services than would otherwise be available absent the prohibition against kickbacks.

The Court also considered whether RP § 14-127 gives rise to an actionable duty that inures to the benefit of Appellants, and determined that there is no such enforceable duty arising under RP § 14-127. The Court stated that a review of RP § 14-127's plain language, legislative history, and legislative purpose does not reveal any indication on the General Assembly's part to protect an identifiable class of persons. The Court held that, although Appellants, as consumers of settlements services, are members of a class who incidentally receive the benefit of RP § 14-127, at core, RP § 14-127 is a criminal statute that fails to mention, let alone identify with any specificity, consumers of settlement services, the public in general, or some other group of persons who are intended to be protected by RP § 14-127. Rather, RP § 14-127(c)(1) simply contains a general prohibition that persons connected "with the settlement of real estate transactions involving land in the State may not pay to or receive from another any consideration to solicit, obtain, retain, or arrange real estate settlement business"; *i.e.*, RP § 14-127(c)(1) contains only a prohibition, the by-product of which is a benefit that inures to consumers of settlement services. And, RP § 14-127's legislative history does not reveal that RP § 14-127 was enacted to create a tort duty that applies to persons who are connected with settlements.

Ann Lane v. Supervisor of Assessments of Montgomery County, No. 41, September Term 2015, filed May 3, 2016. Opinion by Barbera, C.J.

Battaglia and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/41a15.pdf

TAXATION – STATUTORY CONSTRUCTION – MARYLAND TAX COURT – ADMISSIBILITY OF EVIDENCE

TAXATION – MARYLAND TAX COURT – ARTICLE 15 OF THE MARYLAND DECLARATION OF RIGHTS – UNIFORMITY OF ASSESSMENTS

TAXATION – MARYLAND TAX COURT – SUFFICIENCY OF THE EVIDENCE

Facts:

In December 2010, Respondent, the Supervisor of Assessments of Montgomery County ("Supervisor"), notified Petitioner, Ann Lane, that her condominium would be assessed at a value of $2,130,000, as that was the new market value of her property as of January 1, 2011. Petitioner's condominium is located in Parc Somerset, which is a seventeen-story building located in Chevy Chase, Maryland. Her condominium ("unit 1003") is located on the tenth floor in the "03" stack, meaning all units in the "03" stack, from floors three to twelve, are 2,498 square feet and have the same design and layout.

Petitioner appealed her assessment to the Supervisor, who made no change to the assessment. Petitioner then appealed to the Property Tax Assessment Appeal Board for Montgomery County ("PTAAB"). Her appeal before the PTAAB was consolidated with nine other owners from Parc Somerset, including owners of units 803 and 703. The PTAAB reduced the assessments for units 803 and 703 and affirmed Petitioner's assessment.

Petitioner appealed to the Maryland Tax Court. Petitioner submitted a refinancing appraisal of unit 803, which valued unit 803 at $1,649,000, and she argued that her property should likewise be valued at that amount plus an additional $20,000 floor premium for a total valuation of $1,669,000. Alternatively, Petitioner argued the Tax Court should assess the value of her property consistent with the PTAAB's assessments for units 803 and 703 plus a $10,000 per floor assessment. The Supervisor submitted sales from three comparable units in Parc Somerset to support its valuation of Petitioner's property. Petitioner objected to the admission of this evidence because those comparable properties were sold in May 2011, after the date of finality, January 1, 2011.

The Maryland Tax Court rejected Petitioner's argument and explained the court's policy of accepting evidence occurring after the date of finality when relevant to the valuation. The court concluded that the Supervisor's evidence was most relevant to determining the value of

Petitioner's property and "a modicum of further relief" was warranted. The Tax Court reduced Petitioner's assessment to $2,075,000.

Held: Affirmed.

The Court of Appeals held that the Maryland Tax Court may consider sales of comparable properties occurring after the date of finality when determining the value of property. For purposes of tax assessment, real property "shall be its value on the date of finality." Md. Code Ann., Tax-Prop. ("TP"), § 8-102(a). The "date of finality" is "the January 1 immediately before the 1st taxable year to which the assessment based on the new value is applicable." TP § 8-104(b)(2). The Court rejected Petitioner's argument that TP § 8-104(b)(2) prohibited the Tax Court from relying upon post-date of finality sales. Neither TP § 8-104 nor any other provision of Title 8 of the Tax Property Article prescribes how property value is to be calculated on the date of finality. The General Assembly's intent for real property assessments is for assessment to reflect the full cash value of the property as of the date of finality. The Court noted that nothing in the Tax Property Article, legislative history of TP § 8-104(b)(2), or case law prohibits the Tax Court from relying upon relevant evidence to accurately assess the property's value.

Moreover, the Court explained that the Tax Court reviews the appeal de novo and may alter the valuation to reflect the full cash value of the property. Md. Code Ann., Tax-Gen. ("TG") §§ 13-523; 13-528. Because property valuation is not an exact science, the Tax Court had the responsibility to decide the relevancy of evidence and the weight to be accorded such evidence when determining the full cash value of Petitioner's property.

The Court of Appeals also rejected Petitioner's argument that the Tax Court violated Article 15 of the Maryland Declaration of Rights, which requires uniformity of assessments, by relying upon evidence of sales that were not considered by the PTAAB. Because the Tax Court reviews appeals de novo, it was not constrained to consider only evidence relied upon by the PTAAB. The Court further rejected Petitioner's contention that the Tax Court's valuation of her property violated her right to uniformity of assessments when the Tax Court declined to assess her condominium consistent with PTAAB's assessment of other condominiums in her building. The Court reasoned that the Tax Court's valuation of Petitioner's property did not violate Article 15's uniformity requirement because the Court assessed the value of her property at its full cash value.

Finally, the Court of Appeals concluded that the Tax Court's decision was supported by sufficient evidence. After considering evidence presented by both parties, the Tax Court properly exercised its discretion by discrediting Petitioner's evidence and crediting the Supervisor's evidence as more probative to an accurate assessment. The Tax Court's reliance on the post-date of finality sales was sufficient to support its assessment of Petitioner's property.

Motor Vehicle Administration v. Sundar Seenath, No. 82, September Term 2015, filed May 23, 2016. Opinion by Watts, J.

Hotten, J., dissents.

http://www.mdcourts.gov/opinions/coa/2016/82a15.pdf

MD. CODE ANN., TRANSP. (1977, 2012 REPL. VOL., 2015 SUPP.) § 16-205.1 –IMPLIED CONSENT, ADMINISTRATIVE PER SE LAW – ADVICE OF RIGHTS FORM – DUE PROCESS

Facts:

An officer of the Montgomery County Police Department issued to Sundar Seenath ("Seenath"), Respondent, a holder of a commercial driver's license, an "Officer's Certification and Order of Suspension" that contained the following facts. While driving a non-commercial motor vehicle, Seenath was stopped for changing lanes in an unsafe manner. Seenath had bloodshot eyes and a strong odor of alcohol. Seenath took the three-part Standardized Field Sobriety Test, on which he performed poorly. Seenath took a preliminary breath test, which indicated an alcohol concentration of 0.161.

The officer arrested Seenath and provided him with an Advice of Rights form, which stated in pertinent part: "If your test result is an alcohol concentration of at least 0.08 but less than 0.15: The suspension will be 45 days for a first offense and 90 days for a second or subsequent offense. If your test result is an alcohol concentration of 0.15 or more: The suspension will be 90 days for a first offense and 180 days for a second or subsequent offense. If you refuse to submit to a test: The suspension will be 120 days for a first offense and one (1) year for a second or subsequent offense . . . . If your test result is an alcohol concentration of 0.08 but less than 0.15: The suspension may be modified or a restrictive license issued at a hearing in certain circumstances[.] If you refuse a test, or take a test with a result of 0.15 or more: You will be ineligible for modification of the suspension or issuance of a restrictive license, unless you participate in the Ignition Interlock System Program[.]"

Seenath consented to take an alcohol concentration test. An alcohol concentration test of Seenath's breath indicated an alcohol concentration of 0.15. Officer Romack confiscated Seenath's commercial driver's license, which was to be suspended for 90 days.

Seenath requested an administrative hearing, at which Seenath did not testify about any matter with regard to his signing or understanding of the Advice of Rights form. After testifying, Seenath, through counsel, moved for no action with respect to the suspension of his commercial driver's license, on the ground that the Advice of Rights form "did not fully advise him of all the potential consequences." Specifically, Seenath's counsel argued that the Advice of Rights form did not advise that, if a commercial driver's license holder's license is suspended, the driver

cannot have access to a commercial driver's license through a restrictive license or participation in the Ignition Interlock System Program.

An administrative law judge ("the ALJ") denied the motion for no action, concluding that "due process does not require that the driver be told of every conceivable incentive for taking a chemical test for alcohol[.]" Through counsel, Seenath declined to participate in the Ignition Interlock System Program. The ALJ concluded that Seenath had violated Md. Code Ann., Transp. (1977, 2012 Repl. Vol., 2015 Supp.) § 16-205.1, and suspended Seenath's commercial driver's license for 90 days. As a result of having consented to take the alcohol concentration test—as opposed to refusing to take the alcohol concentration test—Seenath's ability to drive commercial motor vehicles was not disqualified for one year.

Seenath petitioned for judicial review. The Circuit Court for Montgomery County ("the circuit court") reversed the decision of the ALJ, concluding that the Advice of Rights form did not "adequately advise" Seenath of the consequences of failing an alcohol concentration test. The Motor Vehicle Administration ("the MVA"), Petitioner, filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Reversed.

The Court of Appeals noted that it was unclear whether Seenath raised an as-applied challenge or a facial challenge to the Advice of Rights form. In the petition for a writ of *certiorari*, however, the MVA presented an issue that encompassed both an as-applied and a facial challenge: "Does the standard Advice of Rights form (DR-15) provide the necessary information to a driver who holds a commercial driver's license of the consequences of submitting to a test of blood alcohol content if the driver's results are 0.08 or more?" Given that the MVA framed the issue broadly to include both the as-applied and facial validity of the Advice of Rights form—and, in doing so, sought guidance from the Court as to the propriety of the Advice of Rights form's future use—the Court addressed both the as-applied issue and the facial issue.

The Court held that the Advice of Rights form did not violate the Due Process Clause as applied in this case, as the record contained no indication whatsoever that Seenath had been misled by the Advice of Rights form. At the administrative hearing, Seenath did not testify about any matter pertaining to the Advice of Rights form. In other words, Seenath did not testify that he was misled by the Advice of Rights form into consenting to take an alcohol concentration test; that he might have chosen to refuse to take an alcohol concentration test had the Advice of Rights form provided additional information; or that the Advice of Rights form caused him to incorrectly believe that, if he failed an alcohol concentration test, he would be eligible for a restrictive license. In short, Seenath failed to establish any link between his decision to consent to take an alcohol concentration test and any alleged omission or misleading information in the Advice of Rights form. Additionally, Seenath incurred no negative consequences as result of the decision to take an alcohol concentration test. Because he decided to take the alcohol concentration test, Seenath was subject to a mandatory suspension that was 30 days shorter than

it would have been had he refused to take the alcohol concentration test, and Seenath avoided being disqualified from driving commercial motor vehicles for 1 year. Seenath was also ineligible for a restrictive commercial driver's license, regardless of whether he failed or refused to take the alcohol concentration test. In sum, Seenath suffered no prejudice as a result of his decision to consent to take an alcohol concentration test.

Addressing the facial issue, the Court held that the Advice of Rights form was not misleading as to a commercial driver's license holder's eligibility for a restrictive commercial driver's license where the driver fails an alcohol concentration test while driving a non-commercial motor vehicle. The Court found no merit in Seenath's contention that the Advice of Rights form indicated that mandatory suspensions applied only to a commercial driver's license holder's ability to drive non-commercial vehicles. In no uncertain terms, the Advice of Rights form advised detained drivers that mandatory suspensions "shall be imposed against your license[.]" In no way did the Advice of Rights form imply that the mandatory suspensions applied only to the ability to drive a non-commercial motor vehicle, or that the mandatory suspensions did not apply to commercial driver's licenses and/or the ability to drive a commercial motor vehicle.

Seenath's contention that the Advice of Rights form indicated that it would be possible for a restrictive license to result where a holder of a commercial driver's license fails an alcohol concentration test was also incorrect. The language describing the issuance of a restrictive license in the Advice of Rights form did not reference holders of commercial driver's licenses; i.e., the language in no way affirmatively indicates that a restrictive license is available to holders of commercial driver's licenses. Additionally, the Advice of Rights Form did not guarantee that any driver would be eligible for a restrictive license. By using the terms "may" and "in certain circumstances" as qualifiers, the Advice of Rights form made clear that a detained driver—a holder of a commercial driver's license or a holder of a non-commercial driver's license—would not necessarily be eligible for a restrictive license if the driver took an alcohol concentration test that indicated an alcohol concentration of at least 0.08 but less than 0.15.

Nor did the Advice of Rights form in any way indicate that a driver would definitely be eligible for a restrictive license if the driver took an alcohol concentration test that indicated an alcohol concentration of at least 0.15. The Advice of Rights form stated that, under that circumstance, "[y]ou will be ineligible for modification of the suspension or issuance of a restrictive license, unless you participate in the Ignition Interlock System Program[.]" (Emphasis added). By using the word "unless," the Advice of Rights form made clear that, if the driver took an alcohol concentration test that indicated an alcohol concentration of at least 0.15, then participation in the Ignition Interlock System Program would be necessary for eligibility for a restrictive license. But participation in the Ignition Interlock System Program alone was not sufficient for eligibility for a restrictive license. In other words, after taking an alcohol concentration test with a result of 0.15 or higher, participation in the Ignition Interlock System Program was a prerequisite, but not the only prerequisite, for eligibility for a restrictive license. One such prerequisite for eligibility for a restrictive license was that the driver held a non-commercial driver's license. Thus, contrary to Seenath's position, the Advice of Rights form did not indicate that a holder of a commercial driver's license who failed an alcohol concentration test could obtain a restrictive commercial driver's license merely by participating in the Ignition Interlock System Program.

COURT OF SPECIAL APPEALS

Mary Harvey, et al. v. Joseph Sines, et al., No. 691, September Term 2015, filed June 2, 2016. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2016/0691s15.pdf

DORMANT MINERAL INTERESTS ACT – CONSTITUTIONALITY – DUE PROCESS – RETROACTIVITY

DORMANT MINERAL INTERESTS ACT – CONSTITUTIONALITY – DUE PROCESS – VESTED RIGHTS

DORMANT MINERAL INTERESTS ACT – CONSTITUTIONALITY – TAKINGS

Facts:

In 2010, the General Assembly enacted the Maryland Dormant Mineral Interests Act, now codified at Section 15-1201, *et seq*. of the Environment Article ("Env."), Maryland Code (1982, 2014 Repl. Vol.), to allow surface owners to terminate severed mineral interests that had gone unused for twenty years or more. Toward the end of 2014, Joseph L. Sines and Sandra S. Sines ("the Sineses"), appellees, brought an action in the Circuit Court for Garrett County to terminate an undivided half-mineral interest owned by the descendants of Henry B. Harvey—Mary Harvey and Patricia Sue Lannom née Harvey ("the Harveys"), appellants. Henry B. Harvey's ownership of the severed mineral interest was evidenced by a deed dated March 26, 1912 and recorded in the Garrett County land records.

On April 17, 2015, the parties filed cross-motions for summary judgment. The record showed that there had been no use of the mineral interest for at least the past 40 years. The Sineses asserted that because there was no use during the past 40 years, the court should enter an order terminating the dormant mineral rights, pursuant to Env. §§ 15-1203(a), -1205(c). The Harveys asserted that, among other things, the statute was unconstitutional because it abrogated vested rights. On May 12, 2015, the court entered an order, granting summary judgment for the Sineses, denying the Harveys' motion, and terminating the dormant mineral interest in the property.

On appeal, the Harveys argued that the Act violated Article 24 of the Maryland Declaration of Rights and Article III, Section 40 of the Maryland Constitution because it retroactively impaired vested rights and took property without just compensation. The Sineses responded that the

statute was constitutional because it did not impermissibly divest the mineral interest owner of a vested right.

Held: Affirmed.

The Court held that, the Act was valid under Article 24 of the Maryland Declaration of Rights and Article III, Section 40 of the Maryland Constitution, because the Act did not operate retrospectively. The Court distinguished *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544 (2011), and held that, in this case, the law did not impermissibly impact the reasonable reliance and settled expectations of mineral interest owners: 1) because the continued non-use of the mineral interest demonstrated little reliance on the property, and 2) because the law provided procedural safeguards and fair notice in the form of a grace-period before petitions could be filed.

The Court held that severed mineral interest constituted a property right, and, thus, a vested right. The Act satisfied due process as required by Article 24 of the Maryland Declaration of Rights because, similar to adverse possession, the Act allowed a person, after twenty years of neglect, to file an action analogous to a petition to quiet title, which allowed the land and minerals beneath it to be put to beneficial use.

Finally, the Court held that the termination of dormant mineral interest did not constitute a taking without just compensation. The General Assembly, under the State's police power, has some ability to regulate and restrict the rights of private property owners without providing just compensation—including doctrines such as adverse possession, abandonment, and escheat, and this legislation regulating dormant mineral interests.

Lauren St. Cyr v. Mark St. Cyr, No. 327, September Term 2015, filed June 1, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/0327s15.pdf

FAMILY LAW — AMOUNT AND DURATION OF ALIMONY AWARD

FAMILY LAW — POSSESSION AND USE OF FAMILY HOME

Facts:

Husband and Wife were married in 1994. Before the marriage, Wife had a college degree and she earned around $45,000 per year. She stopped working in 1995 after the birth of the first of three children. Wife served as the primary child care provider, while Husband served as the sole wage earner. Husband ascended to a management position and increased his income over time.

Husband nearly lost the family home to foreclosure in 2004 and 2010. Wife did not return to work.

In 2009 Wife was diagnosed with cancer, which went into remission after chemotherapy. Husband provided little emotional support to Wife at that time. The parties separated in 2012 after Wife learned that Husband had started an extramarital affair and he had deceived Wife about the nature of that relationship.

In July 2013 Husband filed for divorce in the Circuit Court for Harford County. Wife asserted various counterclaims.

At the time of trial, Husband had an extensive work history and an annual income over $200,000 per year. Wife had no income and no work experience for nearly two decades. A central issue at trial was whether she had the ability to gain employment. Wife testified that she was physically weak from her cancer treatment and that she continued to experience episodes of depression. She believed that she did not have the energy to work full time. She offered no medical evidence regarding her condition. Other testimony showed that Wife was active in her children's athletic and academic activities. Wife appeared energetic throughout long trial days.

Wife asked the court conclude that she was permanently unable to work and to award indefinite alimony. Husband asked the court to impute income to Wife based on a finding that she could work 40 hours per week and earn $10 per hour. Husband asked the court to fix alimony at two years, but he offered no evidence to support a conclusion that she would become self-supporting in that time period.

The court granted absolute divorce on the ground of Husband's adultery. Wife received sole legal custody of two minor children. The court granted sole possession and use of the family home to Wife until February 2016 and ordered Husband to pay the mortgage, taxes, and

insurance during that time period. The court directed that the house be sold at the end of that period so that the proceeds could be divided evenly between the parties.

Finding that Wife was voluntarily impoverished, the court imputed income to Wife of $17,333.33 per month. The court found Husband's monthly income to be $18,614.00. The court evaluated the alimony and child support claims based on those findings. The court commented that that it would not "speculate" on the questions of "how long it [would] take" for Wife to become self-supporting or "how far she [could] be expected to progress." The court awarded rehabilitative alimony of $1,800 per month for 15 years. The court commented that it would take some time for Wife to earn enough income so that the parties' standards of living would not be unconscionably disparate.

Wife appealed.

Held: Affirmed in part and vacated in part.

The trial court did not err or abuse its discretion when it imputed income to Wife for alimony and child support purposes. The court was not required to accept Wife's testimony that her medical conditions prevented her from working. The court was entitled to evaluate her testimony in light of the other evidence about her active lifestyle and in light of the judge's first-hand observations. Even where there is uncontradicted testimony that a person has medical problems, the court need not necessarily conclude that the person has a disability that makes the person incapable of earning income. The court reasonably concluded that Wife, as a college-educated, 47-year-old woman, had the potential to reenter the workforce and to work full time at a modest hourly rate despite her various health problems and her multi-decade employment gap.

Nevertheless, the court did not complete the analysis of Wife's future earning capacity that was required for its alimony determination under Md. Code (1984, 2012 Repl. Vol.), § 11-106(b) and (c) of the Family Law Article ("FL"). The court found that Wife was capable of earning $1,733.33 in monthly income, but the court did not expressly determine her reasonable monthly expenses. Without a clear finding about her reasonable needs, the appellate court could not determine whether Wife would be self-supporting even after achieving her potential income and receiving alimony.

Wife sought indefinite alimony under FL § 11-106(c)(2), which authorizes an award indefinite alimony if "even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate." The court must evaluate and compare the parties' post-divorce incomes and standards of living as a separate step in evaluating an indefinite alimony claim. There must be some relation between the length of the award and the court's prediction of when a party will become self-supporting. Trial judges often face a difficult conundrum: the court cannot speculate, but it must make a projection based on the evidence.

The court here did not make the necessary evaluation and comparison. The court concluded that it lacked adequate evidence to make a meaningful prediction about Wife's future income prospects, but then it went on to award alimony in a specific amount and duration. Husband argued that Wife failed to meet her burden of proof, but he could not explain how the 15-year term was "rehabilitative."

Remand was necessary for the court to receive additional evidence about Wife's earning potential so that it could make findings to complete the required analysis under FL § 11-106(b) and (c). If there is conclusive evidence that Wife is entitled to alimony in some amount and duration but the parties still produce insufficient evidence for the court to complete the analysis required by the statute, the court should consider appointing a vocational rehabilitation specialist as a neutral expert under Md. Rule 5-706.

Finally, the trial court did not abuse its discretion in limiting the time period for Wife's possession and use of the family home. The court found that the interests of the children would be served by allowing them to continue to live in the family home until the end of high school and that Wife had an interest in continuing to use the home as a dwelling. But the court also found that Husband would suffer a hardship if he were required to continue paying the mortgage in addition to his other obligations because the monthly payments were scheduled to increase dramatically. The trial court properly exercised its discretion to establish a time limit that would balance those competing interests.

Harriette Stein, Personal Representative of the Estate of Carl Stein, et al. v. Pfizer Inc., No. 1231, September Term 2014, filed May 31, 2016. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2016/1231s14.pdf

TORTS – APPARENT MANUFACTURER – ASBESTOS – PRODUCT LIABILITY

Facts:

From 1949 until his retirement in 1985, Carl Stein ("the decedent") worked as a bricklayer at Bethlehem Steel Corporation's Sparrows Point plant. He became ill as a result of occupational exposure to asbestos, and he filed suit, in the Circuit Court for Baltimore City, against more than two dozen vendors (none of which is a party to the instant appeal), which had, allegedly, sold asbestos-containing products to Bethlehem Steel, which were purportedly used by the decedent in performing his work at the plant. Several decades later, the decedent developed mesothelioma and ultimately died of that disease.

Thereafter, his widow, Harriette Stein, individually, and as the personal representative of his estate, together with his surviving children, Carl B. Stein, Jr., Mark A. Stein, Robert B. Stein, and Patricia A. Robinson (collectively, "the Stein family"), filed an amended complaint, in the same action, adding Pfizer Inc., as a defendant in that suit, as well as several new counts averring loss of consortium and wrongful death. The theory underlying the Stein family's claims against Pfizer was that the decedent's exposure to an asbestos-containing refractory cement, called "Insulag," which was supplied to his employer, Bethlehem Steel, by Pfizer's subsidiary, Quigley Company, Inc., was a substantial factor in bringing about his illness and resultant death from mesothelioma and that, because Quigley's invoices and marketing materials also bore Pfizer's trademarks, as well as its own, and because, in some instances, the words: "Manufacturers of Refractory Products," appeared beneath the depiction of those trademarks, Pfizer had, in effect, held itself out as a "manufacturer" of Insulag and was therefore liable for the illness and death of Mr. Stein, as an "apparent manufacturer" of that product.

Quigley had sold asbestos-containing refractory materials, including Insulag, to steel mills, power plants, and refineries, since the 1930's. Beginning in the 1950's, Quigley sold Insulag to Bethlehem Steel and regularly shipped that asbestos-containing cement to the Sparrows Point steel mill. In 1968, Pfizer purchased all of the stock of Quigley, which thereafter continued to operate as a wholly-owned subsidiary of Pfizer. After its acquisition, Quigley continued to operate independently of Pfizer, designing and manufacturing its own products, and maintaining its own sales and distribution network. Quigley's marketing and promotional materials, and its invoices, began to include the Pfizer name, logo, and trademark. Moreover, during the period after its acquisition by Pfizer, Quigley continued to sell Insulag to Bethlehem Steel, shipping that product to the Sparrows Point plant until 1974, when Insulag was replaced by an asbestos-free substitute.

Eventually, more than 160,000 asbestos-related lawsuits were filed against Quigley (approximately 100,000 of which also named Pfizer as a defendant), leading Quigley to seek bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York. That court ultimately issued a "channeling injunction," which barred all suits against Quigley and most, but not all, suits against Pfizer, directing instead that claimants seek recovery from an asbestos trust created from Quigley's remaining assets, as augmented by Pfizer's contribution. After several years of litigation in the Quigley bankruptcy case, the United States Court of Appeals for the Second Circuit ultimately clarified the scope of the "channeling injunction," explaining that it did not bar suits against Pfizer in which the underlying claims do not "in any legal sense" depend upon Pfizer's ownership, management, or control of Quigley. As pertinent here, the "channeling injunction" was held not to bar a suit against Pfizer, alleging that it was an "apparent manufacturer" of Insulag, which is why the Stein family's amended complaint, in this case, alleged such liability.

Pfizer and the Stein family filed cross-motions for summary judgment in the Maryland case. After a hearing, the Circuit Court for Baltimore City granted Pfizer's motion and denied the Stein family's, prompting the Stein family to appeal.

Held: Affirmed.

The Court of Special Appeals first reviewed the history of the "apparent manufacturer" doctrine, tracing its roots to consumer reliance upon a product seller's reputation and assurances of product quality. At the time the "apparent manufacturer" doctrine was originally conceived, a manufacturer's liability in tort for a defective product was fault-based, and an actual manufacturer was generally held to a higher duty of care than a mere seller or distributor of such a product. The aim of the "apparent manufacturer" doctrine, in holding "apparent manufacturers" to the same duty of care as actual manufacturers, was to provide a remedy for consumers injured by unsafe products; it was developed in the context of suits by consumers against sellers of dangerous chattels, and nearly all the cases imposing liability on this basis involved defendants who were retailers or distributors.

Despite the subsequent emergence of strict liability, which extended liability to all entities in the distribution chain of a defective product, from the actual manufacturer to the retail seller, the "apparent manufacturer" doctrine did not fall into disuse, as courts subsequently began to apply it to certain categories of non-sellers, such as trademark licensors.

Three tests, for determining whether a defendant, in a products liability action, should be deemed an "apparent manufacturer," have emerged: (1) an objective "reliance" test, under which a court asks whether a reasonable consumer would have relied upon a business's label or advertising materials in purchasing the product at issue; (2) an "actual" reliance test, under which a claimant must show not only that it was reasonable to rely upon the seller's representation that it was the "apparent manufacturer" of the defective product at issue but that he or she actually did so; and (3) an "enterprise liability" test, applicable only to trademark licensors, under which a trademark

licensor is liable for harm caused by defective products distributed under its trademark when it participates substantially in the design, manufacture, or distribution of the licensee's products.

Regardless of which of those three tests is applied, Pfizer, under the facts of this case, cannot be deemed an "apparent manufacturer" of Insulag, the defective refractory product at issue. That product was designed, manufactured, and sold to Carl Stein's employer, Bethlehem Steel Corporation, by Quigley, Inc., both before and after Quigley became a wholly-owned subsidiary of Pfizer, and there was no evidence that Pfizer ever participated substantially in the design, manufacture, or sale of Insulag. And, although there were product advertisements and promotional materials, issued by Quigley, during the time period when it was Pfizer's wholly-owned subsidiary, which displayed the trademarks of both Pfizer and Quigley, and which stated: "Manufacturers of Refractory Products," there were also otherwise similar product advertisements and promotional materials, issued by Quigley, before the time period when it was Pfizer's wholly-owned subsidiary, which displayed only Quigley's trademark, and which also used the plural, "Manufacturers of Refractory Products." No reasonable purchaser of refractory products, in the position of a purchaser of such products for Bethlehem Steel, would have relied upon Pfizer's trademark as an assurance of quality, in deciding to purchase Insulag, and there was no evidence that either Bethlehem Steel or Mr. Stein actually relied upon Pfizer's trademark in deciding to purchase or use Insulag.

William Harris, a minor by his mother Natonia Ratchford v. Housing Authority of Baltimore City, No. 43, September Term 2015, filed April 27, 2016. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2016/0043s15.pdf

TORTS – LEAD PAINT – LOCAL GOVERNMENT TORT CLAIMS ACT

Facts:

Appellant William Harris was born on January 11, 2003. From 2003 to 2010, he lived at or frequented a row house owned by the Housing Authority of Baltimore City ("HABC"). William's blood tested positive for lead several times between December 30, 2003 and June 14, 2007, reaching a high of 19 micrograms per deciliter on July 16, 2004.

Ms. Natonia Ratchford, William's mother and an Appellant in her own capacity, filed a suit on behalf of William in the Circuit Court for Baltimore City on September 6, 2012. She also executed an affidavit after filing the suit, stating that, about 8 years earlier, in or around 2004, she went to the HABC rental office to show the employees there the results of William's blood lead level tests, and told them that she was planning to sue the HABC. She did not provide the names of any individual that she spoke to, nor did she provide any independent evidence of this notice.

HABC filed a motion for summary judgment on the ground that Appellants had failed to strictly or substantially comply with the Local Government Tort Claims Act's notice requirement—Maryland Code (1973, 2002 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 5-304—and had failed to demonstrate good cause for the waiver of the notice requirement. HABC also filed an affidavit from its Director of Housing Administration detailing the difficulty he had encountered—at the time of the Appellants' complaint—in finding any information concerning Harris's injury when it was alleged to have occurred in 2003 or 2004.

After oral argument on HABC's motion for summary judgment, the court granted summary judgment for HABC on the grounds that Appellants had not substantially complied with the LGTCA's notice requirement and had not demonstrated good cause for its waiver. In its discussion of substantial compliance, the circuit court stated that "[f]ulfilling the purpose of the statutory notice requirement is an essential element in determining substantial compliance." The court "h[eld] that [Appellants] cannot satisfy the LGTCA notice requirement on the basis of Ms. Ratchford's testimony that she gave notice of an intention to sue orally only."

Held:

The Court of Special Appeals first observed that Appellants' oral notice had failed to strictly comply with the LGTCA's notice requirement. The Court nonetheless noted that a plaintiff who fails to strictly comply with the requirement may still demonstrate substantial compliance by fulfilling a four-part test, the last part of which is that the given notice must fulfill the LGTCA's notice requirement's purpose, which is to apprise the local government of its possible liability at a time when the local government entity could conduct its own investigation. The Court opined that the purpose is fulfilled when the entity can conduct an investigation while the evidence was still fresh and the recollection of the witnesses was undiminished by time, sufficient to ascertain the character and extent of the injury and entity's responsibility in connection with it. The Court then determined that Appellants' oral notice—Ms. Ratchford's oral threat to sue the HABC in its rental office sometime in 2004 as sworn to in her affidavit—did not fulfill the purpose of the HABC's notice requirement. Therefore, the Court held that Ms. Ratchford's oral notice did not substantially comply with the LGTCA's notice requirement.

The Court of Special Appeals determined, based on the wording of CJP § 5-304, that it is the duty of the trial court to determine whether a plaintiff has demonstrated good cause for the failure to comply with the LGTCA's notice requirement. The Court observed that a plaintiff demonstrates good cause for the waiver of the requirement when the plaintiff prosecutes his claim with the degree of diligence that an ordinarily prudent person would have exercised in the same or similar circumstances. The Court concluded that the circuit court did not abuse its discretion in finding that good cause was lacking in the present case, when eight years elapsed between the Appellants' oral notice in 2008 and the eventual filing of the suit in 2012. The Court further concluded that that it was not an abuse of discretion for the circuit court to consider the length of time between the oral notice and the time of filing suit in its good cause determination.

The Court of Special Appeals then observed that, pursuant to CJP § 5-304, a circuit court should not inquire into whether the local government need has been prejudiced by a failure to provide timely notice until the court has found that good cause exists to waive the requirement of notice. The Court also concluded that the circuit court did not improperly rely on hearsay in HABC's affidavit in its grant of summary judgment because any potential hearsay was relevant only to HABC's prejudice, an issue the circuit court did not reach.

Jenny J. Copsey, et al. v. John S. Park, M.D., et al., No. 2170, September Term 2014, filed May 31, 2016. Opinion by Reed, J.

http://www.mdcourts.gov/opinions/cosa/2016/2170s14.pdf

NEGLIGENCE – ACTIONS – EVIDENCE – ADMISSIBILITY – PROXIMATE CAUSE

Facts:

On February 4, 2010, Lance Copsey reported to the emergency room at the Anne Arundel Medical Center ("AAMC") after falling and hitting his head on a racquetball court earlier that day. Over the course of the next few months, Mr. Copsey experienced a variety of symptoms as a result of his racquetball injury, including nausea, headaches and dizziness. In early June, Mr. Copsey began experiencing numbness on the right side of his body, double-vision, and trouble walking. Therefore, on June 4, 2010, he reported back to the AAMC emergency room and underwent a head CT scan and a brain MRI. Dr. John S. Park interpreted the CT scan and MRI and found both to be normal. Later that day, Dr. Park's findings were confirmed by Dr. Larry Blum, one of the AAMC neurologists.

On June 9, 2010, Mr. Copsey reported back to the emergency room, this time complaining of hiccups and trouble swallowing. Concerned about these new symptoms, Dr. Blum ordered a second brain MRI and requested an urgent interpretation. The June 9th MRI was interpreted at 4:02 p.m. the same day by Dr. Vijay Viswanathan. Dr. Viswanathan noted abnormalities, but did not notify the on-call neurologist, Dr. Damanhuri Alkaitis, until approximately 10:30 p.m. that evening. For his part, Dr. Blum could have accessed the dictation of Dr. Viswanathan's findings in the AAMC database and/or followed up with the radiology department when the "urgent" interpretation he requested was taking longer than normal, but did neither. Finally, when Dr. Alkaitis was advised of Dr. Viswanathan's findings, he took no action whatsoever. Then, at approximately 4:00 a.m. on June 10, 2010, Mr. Copsey suffered a stroke in his home. The stroke was so severe that it ultimately led to his death on June 13, 2010.

The original suit in this case was brought by Mr. Copsey's wife, minor daughters, and mother (collectively the appellants) against Drs. Park, Viswanathan, Blum, and Alkaitis. However, because Drs. Blum and Alkaitis entered into pre-trial settlement agreements and Dr. Viswanathan was voluntarily dismissed, Dr. Park was the sole remaining defendant at trial. At said trial, Dr. Park completely denied liability, but argued alternatively that even if he did negligently interpret the June 4th CT/MRI, he was not the proximate cause of Mr. Copsey's death because the subsequent acts of negligence by Drs. Viswanathan, Blum, and Alkaitis broke the causal chain. The trial court allowed Dr. Park to present evidence pertaining to the negligence of the other three doctors and instructed the jury on superseding cause. Ultimately, the jury did not reach the issue of proximate causation because they found that Dr. Park did not negligently interpret the June 4th CT/MRI.

On appeal, the appellants argued that the trial court improperly admitted the evidence pertaining to the negligence of the subsequent treating physicians and that the trial court also erred where it instructed the jury on superseding cause. The appellees responded that the evidence was admissible pursuant to *Martinez ex rel. Fielding v. The Johns Hopkins Hosp.*, 212 Md. App. 634 (2013), and that the jury instruction was proper because the evidence admitted more than one inference regarding superseding cause.

Held: Affirmed.

The trial court did not abuse its discretion where it admitted evidence of negligence by the subsequent treating physicians. The holding in *Martinez* that "evidence of both negligence and causation attributable to a non-party is relevant where a defendant asserts a complete denial of liability," *id*. at 664, was unqualified. Therefore, it is irrelevant that the negligence of Drs. Viswanathan, Blum, and Alkaitis occurred after, not before, the alleged negligence of Dr. Park. Furthermore, had the evidence pertaining to the negligence of the other three doctors been deemed inadmissible, "the jury [would have been] given a materially incomplete picture of the facts, which [would have] denied [Dr. Park] a fair trial." *Copsey, et al. v. Park, et al*., No. 2170, slip. op. at 13 (filed April 21, 2016) (quoting *Martinez*, 212 Md. App. at 666).

The trial court did not err in generating the "superseding cause" jury instruction. While it is true that Dr. Park, if negligent, could have been liable for the negligence of subsequent treating physicians, his liability could also have been cut off if the subsequent act(s) of negligence amounted to a *superseding cause*. *See Thomas v. Corso*, 265 Md. 84 (1972); *Mehlman v. Powell*, 281 Md. 269 (1977). Given the subsequent acts of negligence committed by Drs. Viswanathan, Blum, and Alkaitis, the facts admitted more than one inference with respect to superseding cause. Therefore, the jury was in the best position to determine whether Dr. Park remained a proximate cause of Mr. Copsey's death.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated May 18, 2016, the following attorney has been disbarred by consent:

JASON ERIC FISHER

*

By an Order of the Court of Appeals dated May 18, 2016, the following attorney has been suspended:

CLAIRE L. K. KENNEDY OGILVIE

*

By an Order of the Court of Appeals dated May 19, 2016 the following attorney has been suspended:

ANDRE P. BARBER

*

By an Order of the Court of Appeals dated May 19, 2016, the following attorney has been disbarred by consent:

JENNIFER VETTER LANDEO

*

This is to certify that the name of

DONALD SAUNDERS LITMAN

has been replaced upon the register of attorneys in this state as of May 19, 2016.

*

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By an Opinion and Order of the Court of Appeals dated May 23, 2016, the following attorney has been indefinitely suspended:

ERICA S. WHITE

*

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