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http://www.mdcourts.gov/opinions/coa/2017/55a16.pdf

CRIMINAL LAW & PROCEDURE – FIFTH AMENDMENT – DOUBLE JEOPARDY – MANIFEST NECESSITY

Facts:

The State, Petitioner, charged Andrew Daniel Baker, Respondent, with assault against Darrell Ellis and his girlfriend, Kimberly Mitchell, and, through a separate indictment, illegal firearm possession. The State also charged Mr. Ellis with assault against Mr. Baker for an unrelated incident that occurred two days after the alleged assault by Mr. Baker against Mr. Ellis and Ms. Mitchell. The prosecutor at Mr. Baker's consolidated trial on both the assault charges and the illegal firearm possession charges was Assistant State's Attorney Karl Fockler ("ASA Fockler"). On the morning of Mr. Baker's trial, ASA Fockler learned that Mr. Ellis was refusing to testify for the State. ASA Fockler did not inform the trial court or defense counsel of this situation until that afternoon, after the jury for Mr. Baker's trial had already been impanelled and sworn. Following an afternoon recess, ASA Fockler stated that he intended to offer Mr. Ellis immunity in exchange for his testimony and presented the court with a motion to compel Mr. Ellis' testimony. After the trial court granted the motion, Mr. Baker's defense counsel suggested that someone call the public defender's office, because it was his understanding that Mr. Ellis' defense counsel for his pending assault charges against Mr. Baker was ASA Fockler's brother, Assistant Public Defender E.B. Fockler ("PD Fockler"). Upon learning this information, the trial court immediately took a recess.

During a forty-five-minute recess, the parties met in the judge's chambers to discuss the predicament presented by one of the State's witnesses, to whom it was offering immunity, being represented in another pending matter by the prosecutor's brother. Also during the recess, the parties went to the clerk's office to schedule a date for a new trial. When the parties returned to the courtroom following the recess, the trial court immediately declared a *sua sponte* mistrial

over Mr. Baker's objection. The trial court stated, "In light of these facts and circumstances, I do not believe it is possible for me to continue in this matter, for us to continue this trial. I do not think that I can conduct a hearing and/or permit the testimony of Mr. Ellis accompanied by his attorney being offered immunity when his attorney is the brother of the state's attorney." The court did not mention whether any reasonable alternatives to a mistrial had been considered, and the court did not make an explicit finding of "manifest necessity" for the mistrial.

After a new trial had been scheduled on the assault and illegal firearm possession charges, Mr. Baker filed a motion to dismiss the indictments on double jeopardy grounds. The same judge who had declared the mistrial presided over the hearing on Mr. Baker's motion to dismiss. At the hearing, the trial judge explained her mistrial ruling:

> In light of the fact that [PD] Fockler had been assigned to and represented Mr. Ellis, I found that it was not proper for me to assign to Mr. Ellis a new attorney, to appoint a different attorney for him for purposes of advisement with regard to this. Specifically he has the right to have his own counsel represent him. And additionally, this matter involved the same parties as the other. And I did not think it was proper for the [c]ourt to advise Mr. Ellis that he had to rely on the advi[c]e of another attorney chosen by the Public Defender's Office without the benefit of his counsel who was representing him in the other matter.
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> Based on the fact that the [c]ourt did not believe it appropriate to randomly assign a public defender other than [PD] Fockler to Mr. Ellis to advise him with regard to his Fifth Amendment privileges, advise him with regard to the possible consequences of immunity, I found no reasonable alternatives available at the time. The [c]ourt believed there was a manifest necessity to grant the mistrial. And in light of those findings, the [c]ourt is going to deny defendant's motion today.

Mr. Baker appealed the trial court's denial of his motion to dismiss the indictments. The Court of Special Appeals reversed and granted Mr. Baker's motion to dismiss. The State then petitioned the Court of Appeals for a writ of certiorari, which the Court of Appeals granted.

Held: Affirmed.

The trial court abused its discretion by declaring a *sua sponte* mistrial over Mr. Baker's objection after learning that the State's key witness, who was refusing to testify, was represented in a pending criminal case by the prosecutor's brother, a public defender. In order to support a finding that the mistrial was manifestly necessary, such that retrial of the defendant is not barred by double jeopardy principles, the trial court was required to consider, on the record, whether reasonable alternatives to a mistrial existed and were feasible. Based on the record before it, the Court of Appeals was unable to determine whether there were, in fact, no reasonable alternatives

to a mistrial available. Therefore, retrial of Mr. Baker is barred by double jeopardy principles, and the trial court erred in denying Mr. Baker's motion to dismiss. Accordingly, the Court of Appeals affirmed the Court of Special Appeals' ruling, which reversed the trial court and granted Mr. Baker's motion to dismiss.

Richard A. Edwards v. State of Maryland, No. 47, September Term 2016, filed May 24. 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/47a16.pdf

CRIMINAL JUSTICE – POST-CONVICTION DNA TESTING

Facts:

A jury convicted Richard A. Edwards of attempted first-degree rape, third-degree sexual offense, and second-degree assault. Edwards filed a direct appeal in the Court of Special Appeals, which affirmed the Circuit Court for St. Mary's County. Edwards next filed a Petition for Post-Conviction Relief, which was withdrawn. Edwards then filed a Petition for Post-Conviction DNA Testing, pursuant to § 8-201 of the Criminal Procedure Article and Maryland Rule 4-701. At the hearing on the petition, Edwards argued that because the victim testified that the perpetrator used her cigarette lighter prior to the assault and attempted rape that it was likely that the perpetrator of the crime transferred DNA samples on to several items that were recovered from the scene, including a cigarette lighter, a Forever 21 plastic shopping bag, and a pack of Marlboro Menthol cigarettes. Edwards' argued that the absence of his DNA on the items would support his assertion that he was falsely identified. Additionally, Edwards argued that the presence of another individual's DNA could be present on the items. The Circuit Court for St. Mary's County denied Edwards' petition on the basis that there "was no possibility that a DNA test performed on the items requested would exonerate Petitioner."

Held: Remanded with direction to order DNA testing of cigarette lighter.

The Court of Appeals held that Edwards, in seeking DNA testing, under § 8-201 of the Criminal Procedure Article and the Maryland Rules, did not need to establish that DNA testing of the cigarette lighter has a reasonable probability to *exonerate* him of the crime, only that DNA testing of the cigarette lighter has the scientific potential to produce *exculpatory* or *mitigating* evidence, which the evidence did establish. The Court of Appeals reasoned that with respect to the other items for which Edwards requested DNA testing (shopping bag and cigarettes) a claim that the perpetrator *may possibly* have come in contact with those items was insufficient to satisfy the reasonable probability standard that is required for DNA testing.

Michael Vito et al. v. Candace Grueff, No. 75, September Term 2016, filed May 22, 2017. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2017/75a16.pdf

TRUSTS – TRUST INTERPRETATION – INTENTION OF SETTLOR

Facts:

In 1983, James Vito ("Vito") established an irrevocable trust ("the irrevocable trust") naming his four children, Michael Vito ("Michael"), Judith Vito Seal ("Judith"), John Timothy Vito ("Timothy"), and Candace Vito Grueff ("Candace") as beneficiaries. At the time, Vito owned a contract to purchase property improved by a building in New York. The preamble of the irrevocable trust stated that Vito intended to give the contract to purchase property to the trust as a gift for the immediate benefit of his four children, whom he identified by name, of the fee interest in the property in which Vito was the owner of all buildings and improvements thereon. The preamble further provided that Vito granted all of his right, title and interest in and to the fee interest in the property in equal shares to his four children, thereby establishing a trust fund subject to the terms and conditions therein under which the trustee agreed to hold the trust fund for the benefit of and in behalf of Vito's children. Item Sixth of the irrevocable trust provided for equal 25% shares for each Candace, Judith, Michael, and Timothy. Item Eighth of the irrevocable trust stated that, in the event of the death of any of Vito's four children prior to the termination of the trust, the beneficial interest of the deceased person shall pass to his or her estate. And, Item Tenth of the irrevocable trust stated: "This Agreement may be revoked, altered or amended from time to time by an instrument in writing, signed by the holders of not less than seventy-five (75%) interest herein and delivered to the Trustee."

Over the years, the irrevocable trust was amended four times pursuant to the protocol set forth in Item Tenth. In the midst of the amendments, the beneficiaries became embroiled in litigation. In 1999, Vito created a separate, revocable trust ("the revocable trust"), which, in pertinent part, established a residuary trust, separate from a marital trust, under which Vito's four children had an interest. In April 2011, Vito amended the revocable trust, specifying that Candace's 25% interest in an entity would be reduced by a 10% interest that had been previously granted to Candace's son. Each of Judith, Timothy, and Michael retained a 25% interest in the entity. Candace subsequently filed a guardianship proceeding, alleging that Vito had dementia, that Michael and Judith had taken advantage of Vito, and that Michael and Judith had convinced one of the trustees to draft the amendment without informing Vito or their mother of its implications.

On August 9, 2013, with respect to both the irrevocable trust and the revocable trust, Candace, Respondent, filed in the Circuit Court for Montgomery County ("the circuit court") a complaint against, among other, Michael and Judith, Petitioners, alleging that Michael and Judith were misallocating funds from both trusts. Candace requested that the circuit court remove Michael and Judith as trustees of the irrevocable trust and appoint a successor trustee, and Candace

sought to require Michael and Judith to provide a full accounting of any funds taken from the trusts.

On October 21, 2013, subsequent to the filing of Candace's complaint, pursuant to Item Tenth of the irrevocable trust, Judith, Michael, and Timothy executed Amendment V to the irrevocable trust, purporting to remove Candace as a beneficiary under the irrevocable trust. Amendment V purported to delete Item Sixth in its entirety and replace it with a new Item Sixth, which provided for 33 1/3% shares to Judith, Michael, and Timothy. Less than two weeks later, on November 1, 2013, Judith and Michael filed in the circuit court a motion to dismiss and/or for summary judgment as to Counts I and V of Candace's complaint, which pertained to removal of Michael and Judith as trustees of the irrevocable trust and the request for an accounting of their dealings with regard to the irrevocable trust. In the motion, Michael and Judith claimed that Candace lacked standing to challenge their appointment as trustees because she was no longer a beneficiary of the irrevocable trust or to request an account of any transaction involving the irrevocable trust that occurred after the date on which Amendment V was executed.

On December 19, 2013, the circuit court conducted a hearing, and on January 27, 2014, the circuit court issued an opinion and order granting Michael's and Judith's motion to dismiss and/or for summary judgment, finding that Candace lacked standing to bring her claims. Specifically, the circuit court concluded that Item Tenth could be used to remove a beneficiary from the irrevocable trust. Candace filed a motion to alter or amend the circuit court's judgment, and following a hearing, the circuit court issued an order clarifying that only partial summary judgment had been entered in favor of Michael and Judith on Count V, the accounting claim, and that Candace's claim for an accounting for the period of time up to October 21, 2013, would remain pending. On November 3, 2014, the parties filed a line of dismissal, asking that the remaining pending counts of the complaint be dismissed with prejudice. Two days later, on November 5, 2014, Vito died.

Candace noted an appeal, and in a reported opinion, the Court of Special Appeals reversed, in part, the circuit court's judgment, by reversing the dismissal of Counts I and V, which pertained to removal of Michael and Judith as trustees of the irrevocable trust and the request for an accounting of their dealings with regard to the irrevocable trust, and otherwise affirmed the circuit court's judgment. *See Grueff v. Vito*, 229 Md. App. 353, 385, 145 A.3d 86, 104 (2016). The Court of Special Appeals held "that a broadly worded power to amend in an irrevocable trust instrument cannot be used by a majority of beneficiaries to divest a minority beneficiary of her interest in the trust when doing so would be contrary to the settlor's intent in creating the trust." *Id*. at 356, 145 A.3d at 87.

Michael and Judith thereafter filed a petition for a writ of *certiorari*, which this Court granted. *See Vito v. Grueff*, 450 Md. 664, 150 A.3d 819 (2016).

Held: Affirmed.

The Court of Appeals held that, taking into account the language of the entire irrevocable trust, the plain language of Item Tenth did not grant authority for three beneficiaries of the trust to remove the fourth beneficiary, and that the irrevocable trust clearly demonstrated Vito's intent for the trust to benefit his four children—the four beneficiaries—equally. In other words, Amendment V—in which three of the four beneficiaries purported to divest the fourth beneficiary, Candace—was impermissible under the terms of the irrevocable trust.

The Court of Appeals determined that Item Tenth did not provide 75% of the beneficiaries with the power to divest the remaining beneficiary. Although Item Tenth gives 75% of the beneficiaries authority to revoke, alter, or amend the terms of the irrevocable trust, an interpretation that grants three beneficiaries the power to divest the fourth beneficiary would directly contravene Vito's express intent, as ascertained from the language of the irrevocable trust, which was that the irrevocable trust benefit his four children equally.

The Court of Appeals concluded that the trust agreement is to be construed based on the settlor's intent, as ascertained from the language of the provision at issue, within the context of the document as a whole, and that, in this case, Vito's intent to have the irrevocable trust benefit his four children equally was evident from the totality of the irrevocable trust's language. The Court of Appeals observed that, in more than one instance, Vito provided that the irrevocable trust was intended to benefit his four children equally, including Candace.

The Court of Appeals stated that, beyond the language of Item Tenth authorizing the alteration, revocation, or amendment of the irrevocable trust, no language in the irrevocable trust even remotely suggested that Vito intended to permit 75% of the beneficiaries to divest the remaining beneficiary. The Court of Appeals noted that, Amendment V, by amending only Item Sixth of the irrevocable trust, and not amending the preamble and other provisions of the irrevocable trust, created an instrument that was internally inconsistent, and pointed to the preamble, which explicitly continued to provide that the named beneficiaries, including Candace, were to share equally in the benefits of the irrevocable trust.

The Court of Appeals observed that Amendment V also produced the unacceptable result of rendering the 75% amendment provision of Item Tenth illogical. Item Tenth does not require unanimity for alterations, amendments, or revocations of the terms of the irrevocable trust, but rather provides that such changes would require approval of at least 75% of the beneficiaries. By reducing the number of beneficiaries to three, the Court of Appeals determined that Amendment V made it impossible to amend the irrevocable trust without unanimity because, without Candace as a beneficiary, only three beneficiaries remain, and it is mathematically impossible to have an exact 75% majority of three people.

The Court of Appeals further determined that Amendment V violated well-established Maryland law regarding the testamentary power of appointment because under Maryland's common law, any amendment granting a majority of beneficiaries the power to apportion to themselves a larger share of a trust than that to which they were originally entitled would have to be explicitly stated in the original trust instrument. The Court of Appeals observed that the irrevocable trust did not contain such a provision; yet, with Amendment V Michael, Judith, and Timothy

increased each of their own shares of the benefits of the trust from 25% to 33 1/3%. The Court of Appeals thus concluded that, by executing Amendment V, Michael, Judith, and Timothy impermissibly granted to themselves a greater apportionment of the trust property than Vito intended, and that, because they lacked the explicit appointment power to do so, the action was prohibited under Maryland case law.

Jayson Amster v. Rushern L. Baker, County Executive for Prince George's County et al., No. 63, September Term 2016, filed May 22, 2017. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2017/63a16.pdf

MARYLAND PUBLIC INFORMATION ACT – MARYLAND CODE (1957, 2014 REPL. VOL.), § 4-335 OF THE GENERAL PROVISIONS ARTICLE – CONFIDENTIAL COMMERCIAL INFORMATION EXEMPTION

Facts:

In October 2011, Calvert Tract submitted a zoning application to the Prince George's Planning Board of the Maryland-National Capital Park and Planning Commission seeking to use land it owns in Prince George's County for a mixed-use town center. Around the same time, Calvert Tract entered into a lease with Whole Foods for a grocery store to "anchor" the new development. Calvert Tract voluntarily provided a redacted version of the lease to Prince George's County Executive Rushern L. Baker "as part of the ongoing discussions of the development of the property."

In April 2012, Petitioner filed a Maryland Public Information Act ("MPIA") request with Baker seeking access to the lease. The Prince George's County Office of Law denied Petitioner's request. In July 2012, Petitioner filed a complaint against Baker in the Circuit Court for Prince George's County seeking access to the lease. The court granted Calvert Tract's motion to intervene as a defendant, and both Calvert Tract and Baker filed motions for summary judgment arguing that the lease was exempt from disclosure as confidential commercial information. Petitioner argued that information within the lease had already been announced at a public meeting and that the County could not "refuse to release to [Petitioner] what has already been made public."

The trial court applied the test established in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), to determine what constitutes confidential commercial information under the federal Freedom of Information Act ("FOIA"). It concluded that the lease was confidential commercial information and granted summary judgment. The Court of Special Appeals affirmed.

Held: Vacated and remanded.

The Court of Appeals held that the trial court applied the correct test for determining what constitutes "confidential commercial information" under the MPIA—it explicitly adopted the *Critical Mass* test. It explained that under this test commercial information is "confidential"—

and therefore exempt from MPIA disclosure—if it "would customarily not be released to the public by the person from whom it was obtained."

The Court held, however, that the trial court did not conduct a thorough enough inquiry to determine whether all aspects of the lease are "confidential" under the *Critical Mass* test. The confidential commercial information exemption, the Court explained, applies to specific information within requested documents—it does not protect the entirety of any document that contains confidential commercial information. Accordingly, the Court held that Calvert Tract's assertion that it does not customarily release its leases is not a sufficient description of the requested record for the trial court to determine that all of the information within the lease falls within the exemption. It is merely "conclusory testimony" that does not carry the County's burden to justify nondisclosure. Furthermore, although the exact length of the lease at issue is unknown, it is a single document that the trial court could presumably review *in camera* without an unreasonable exertion of judicial resources. The Court instructed the trial court to gather more specific information about the contents on the lease to determine whether any portions of it should be disclosed under the MPIA.

The Court also held that information that has already been released to the public cannot logically classify as confidential commercial information. Indeed, when a source of commercial information has already revealed it to the public, the Court reasoned, it can hardly be said that the information "would customarily not be released to the public by the person from whom it was obtained." Thus, the Court explained, such information should not be withheld under the MPIA's confidential commercial information exemption.

Gary Alan Glass v. Anne Arundel County, Maryland, et al., No. 20, September Term 2016, filed May 25, 2017. Opinion by McDonald, J.

Watts, J., concurs.

http://www.mdcourts.gov/opinions/coa/2017/20a16.pdf

PUBLIC INFORMATION ACT – CUSTODIAN OF RECORDS.

PUBLIC INFORMATION ACT – REASONABLENESS OF SEARCH.

PUBLIC INFORMATION ACT – LIABILITY FOR DAMAGES – KNOWING AND WILLFUL VIOLATION.

PUBLIC INFORMATION ACT – PERSONNEL RECORDS EXCEPTION – POLICE INTERNAL AFFAIRS FILES.

Facts:

On September 14, 2010, Gary Glass was cited by Mark Collier, an off-duty Anne Arundel County police officer, for following too closely. Displeased with the treatment he received during that traffic stop, Mr. Glass filed a complaint against Officer Collier with the Police Department, whose Internal Affairs Division launched an investigation into the incident.

A few months later, in March 2011, Mr. Glass submitted a request ("2011 Request") to the Police Department under Maryland's Public Information Act ("PIA") seeking "all records . . . that refer to or pertain to Gary A. Glass," including "all internal affairs files on [the] investigation into [Officer] Collier's conduct" during the traffic stop ("IA File"). The Police Department declined to provide Officer Collier's IA File, citing the PIA's "personnel records" exception to disclosure. Mr. Glass challenged that action in the Circuit Court, but that court – and later, the Court of Special Appeals – upheld the County's decision to withhold Officer Collier's IA File. The Court of Appeals subsequently denied Mr. Glass's writ of certiorari in that case.

While that litigation was pending, in February 2012, Mr. Glass submitted another PIA request ("2012 Request") to the Police Department, this time seeking "[a]ny and all records of the police department . . . on Gary A. Glass." Unlike the 2011 Request, the 2012 Request did not identify any specific subject of interest, files, or time period. When asked by the Police Department for help clarifying the scope of this broadly-phrased request, Mr. Glass provided a list of numerous Police Department employees – including the Police Chief – whom he believed might have records "that pertain to [him] or to the [traffic] incident on September 14, 2010."

In its search for responsive records, the Police Department enlisted the help of the County's Office of Information Technology ("OIT"), which archived all Police Department emails more

than 90 days old. Writing to Mr. Glass, the Police Department noted that it had retrieved several thousand possibly-responsive emails from OIT, but that, if he wanted them, Mr. Glass would have to pay a substantial fee – nearly $5,000 – to cover the cost of reviewing them for privileged material. The Police Department suggested one possible method of narrowing the search (and, therefore, reducing the fee) and asked Mr. Glass "how [he] would like to proceed." Mr. Glass did not respond to this letter; instead, he filed another lawsuit, alleging that the County's response to his 2012 Request violated the PIA.

Protracted litigation ensued in the Circuit Court, where Mr. Glass challenged numerous aspects of the County's search. In January 2013, as a resolution of a discovery dispute, the court ordered the County to produce a USB stick that contained all of the archived emails obtained from OIT; in February 2013, Mr. Glass moved for summary judgment, noting that the USB stick contained no emails dated before November 2011 and alleging that the County violated the PIA when it did not produce pre-November 2011 emails in response to his 2012 Request. In March 2013, Mr. Glass amended his Circuit Court complaint, noting that he had filed a second complaint against Officer Collier with the Police Department and alleging that the County violated the PIA when it did not produce – or even address – Officer Collier's IA File in response to his 2012 Request. And finally, in October 2014, Mr. Glass filed another motion for summary judgment, noting that he had obtained, from an independent source, a record from the Police Chief's Office that mentioned Mr. Glass by name and alleging that the County violated the PIA when it did not produce this letter in response to his 2012 Request.

Over the course of several months, various judges of the Circuit Court made numerous rulings. As to the archived emails, the court found that the County violated the PIA when it did not produce pre-November 2011 emails until ordered to do so, and that this violation was knowing and willful. As to Officer Collier's IA File, the court found that the County violated the PIA when it did not produce the severable portions of that file until ordered to do so, but that this violation was not knowing and willful because the law on the PIA's personnel records exception was in flux at the time. Finally, as to the Police Chief's records, the court found that the County violated the PIA because it knew that the Police Chief's Office filed its records chronologically but did not provide a date range to that office, and that this violation was knowing and willful.

Both parties appealed to the Court of Special Appeals. There, the County disputed both of the Circuit Court's findings that the County had knowingly and willfully violated the PIA, and Mr. Glass argued that the Circuit Court erred when it failed to order the County to order a follow-up, or "remedial" search of the Police Chief's Office. The Court of Special Appeals overturned both of the Circuit Court's findings that the County knowingly and willfully violated the PIA, but upheld the Circuit Court's decision not to order a "remedial" search.

The Court of Appeals granted Mr. Glass's petition for a writ of certiorari.

Held:

The Court of Appeals held that the County did not violate the PIA when responding to Mr. Glass's 2012 Request. Therefore, the issue of injunctive relief in the form of a "remedial" search was moot.

The Court held that the County's handling of the archived emails did not violate the PIA. First, the Court rejected the County's argument that the archived emails were in the custody of the OIT – not the Police Department – and, therefore, that the Police Department had no responsibility to address those emails in any way when responding to Mr. Glass's 2012 Request. The Court noted that the Police Department had accessed archived emails for its own purposes; that, in its initial response to Mr. Glass's 2012 request, it responded as the custodian of those emails; and that, under the PIA, only someone at the Police Department – not at OIT – would have the necessary knowledge and ability to parse through those records as the PIA requires. Therefore, the Court held that the Police Department remained, for purposes of the PIA, the "custodian" of those emails. Second, however, the Court held that the County never actually denied Mr. Glass access to the archived emails. The Court noted that the County merely quoted a fee for reviewing the emails, suggested one less-expensive alternative, and queried "how [he] would like to proceed." Because Mr. Glass never replied to this letter – and proceeded instead to file suit – the Court agreed with the Court of Special Appeals' evaluation that there was "no actual withholding in the first place." Therefore, the County did not violate the PIA when handling the archived emails.

The Court also held that the County's application of the personnel records exception to Officer Collier's IA File did not violate the PIA. Despite the personnel records exception, IA Files may be released under the PIA when all identifying information can be redacted in such a manner as to render the files anonymous – i.e., no longer a "personnel record *of an individual*." The Court, however, rejected Mr. Glass's contention that the County should have released Officer Collier's IA File in such a redacted form. Due to the extensive history between the County, Mr. Glass, and Officer Collier, the Court held that simply redacting Officer Collier's name from his IA File would be insufficient to preserve that file's anonymity and that, therefore, the County was not required to do so. Therefore, the County did not violate the PIA when handling Officer Collier's IA File.

Finally, the Court held that the County's search of the Police Chief's Office was reasonable under the PIA and that, therefore, no "remedial" search was necessary. The Court noted that Mr. Glass's 2012 Request was extremely broad – seeking "any and all" records concerning him – and did not specify a time period; in fact, Mr. Glass conceded that he had asked for all relevant records produced since his birth. As a result, the Police Department did not have a date range when it gathered records from the Police Chief's Office; it was, thus, irrelevant that the Police Department knew that that office filed its records chronologically. The search of the Police Chief's Office that was undertaken was reasonable; therefore, the County did not violate the PIA and need not conduct any "remedial" search.

Return to ToC

Jenny J. Copsey, Individually and as Personal Representative of the Estate of Lance D. Copsey, Deceased, et al. v. John S. Park, M.D., et al., No. 34, September Term 2016, filed May 24, 2017. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2017/34a16.pdf

NEGLIGENCE – NON-PARTY EVIDENCE – SUPERSEDING CAUSE

Facts:

Lance Copsey's estate, wife, minor daughters, and mother ("petitioners") allege the respondent, John S. Park, M.D. ("Dr. Park"), was negligent in his interpretation of radiological images of Mr. Lance Copsey ("Mr. Copsey"), the deceased patient, on June 4, 2010. In his defense, Dr. Park presented evidence that he did not act below the standard of care and, moreover, even if he was found to be negligent, three subsequent acting physicians, who were non-parties to the case at bar, treated Mr. Copsey six days later in a negligent manner and were thus intervening and superseding causes to Mr. Copsey's death. These doctors did not rely on Dr. Park's interpretations of the brain scans from June 4, 2010 and expert testimony from both parties indicated that each of them had acted negligently in their treatment of Mr. Copsey on June 9-10. The petitioners moved *in limine* to exclude all evidence relating to the subsequent treating physicians' prior statuses as defendants or pre-trial settlements of claims against them, in this case, because they were no longer parties to the litigation. In addition, the petitioners sought to preclude Dr. Park and his employer, the only remaining party-defendants, from raising as a defense that the negligence of the subsequent treating physicians was a superseding cause of the patient's death. Both motions were denied by the trial judge and the Court of Special appeals affirmed because the *Martinez* case permits the introduction into evidence of non-party negligence and causation. *Martinez ex rel. Fielding v. John Hopkins Hosp.*, 212 Md. App. 634, 70 A.3d 397 (2013).

Held: Affirmed.

We hold that when a defendant generally denies liability in a negligence action the defendant may present evidence of a non-party's negligence and causation in his or her defense. Although the petitioners argue that permitting evidence of the non-parties' negligence and causation would prejudice the jury in not finding the defendant negligent, evidence of the non-parties' negligence was relevant and necessary in providing the defendant doctor and his employer a fair trial. This evidence tended to show that Dr. Park was not negligent; thus, the alleged prejudice did not outweigh its probative value.

Ultimately, it is for a jury to determine whether an intervening act of a third party was a superseding cause of the injury. Dr. Park presented evidence that his conduct did not fall below

the standard of care. In addition, he presented evidence that tended to show that independent and intervening acts of three subsequent treating physicians superseded the acts of Dr. Park and was the proximate cause of the patient's death.

Terrence Rogers v. Home Equity USA, Inc., No. 57, September Term 2016, filed May 30, 2017. Opinion by Adkins, J.

Watts, J., concurs.
Getty, J., dissents.

http://www.mdcourts.gov/opinions/coa/2017/57a16.pdf

NEGLIGENCE – LEAD-BASED PAINT – SOURCE OF LEAD EXPOSURE
NEGLIGENCE – LEAD-BASED PAINT – SOURCE CAUSATION

Facts:

Terrence Rogers was born on February 28, 1994. In April 1994, Rogers and his mother, Toni Rogers-Coy, moved to 6149 Chinquapin Parkway ("Chinquapin"), where they lived for over two years. In October 1996, they moved to 3738 Towanda Avenue ("Towanda"), a row house in northwest Baltimore and the subject property in this case. After about six months, Rogers and his mother moved to 2534 Loyola Northway ("Loyola"). In the first four years of his life, Rogers' blood lead level was tested six times, with the following results:

Date	Age	Blood Lead Level	Property
June 29, 1995	1 year, 4 months	7 µg/dL	Chinquapin
March 25, 1996	2 years, 1 month	14 µg/dL	Chinquapin
January 8, 1997	2 years, 10 months	21 µg/dL	Towanda
March 26, 1997	3 years, 1 month	20–21 µg/dL	Towanda
April 30, 1997	3 years, 2 months	17–18 µg/dL	Loyola
August 22, 1997	3 years, 6 months	13 µg/dL	Loyola

In 1976, the Baltimore City Health Department ("the Health Department") conducted an investigation of Towanda and testing detected lead-based paint on 19 surfaces throughout the interior of the home and flaking paint on an additional seven surfaces. In October 1976, the Health Department issued an abatement card indicating that the flaking paint had been corrected. Between 1976 and 1996, the Baltimore Department of Housing and Community Development issued various building permits for construction projects at Towanda, but none described lead abatement.

A Health Department caseworker visited Towanda on March 17, 1997 and noted that the home was in a "very dilapidated condition." She observed Rogers mouthing the windowsills and reported that the property contained flaking paint "all over." In an intake interview with the Kennedy Krieger Institute Lead Poisoning Prevention Clinic on March 26, 1997, Rogers-Coy

reported flaking paint on the ceiling, walls, and window frames at Towanda. She also stated that Rogers spent all of his time at Towanda.

On May 29, 2013, Rogers filed a complaint in the Circuit Court for Baltimore City against Home Equity for negligence and unfair trade practices in violation of the Maryland Consumer Protection Act. Rogers alleged that he was exposed to lead while he lived at Towanda and suffered permanent brain damage as a result. He claimed that he has undergone extensive medical treatment and will suffer "substantial" loss of wages as a result of his injuries. Rogers requested damages "in excess of $75,000," plus costs, for each claim.

In October 2014, Arc Environmental, Inc. conducted testing on the exterior of Towanda and detected lead-based paint on the front porch, front door frame, and one window. Jeanette R. McDaniel, M.D., a pediatrician, filed a report concluding that Towanda was a substantial contributing factor to Rogers' elevated blood lead levels. Dr. McDaniel testified that it takes 30 to 45 days for blood to reflect either an increase or decrease in lead exposure. Dr. McDaniel also testified that Rogers' April 30, 1997 blood test, which showed that his lead level dropped to 17–18 μg/dL one month after he moved out of Towanda, indicated to her that Towanda was a source of Rogers' lead exposure.

Home Equity moved for summary judgment. It argued that Rogers had not provided enough evidence to establish that Towanda was a source of his lead exposure or that any such exposure caused his elevated blood lead levels. The trial court granted summary judgment and the Court of Special Appeals affirmed.

Held: Reversed.

The Court of Appeals held that Rogers had presented sufficient evidence to survive summary judgment as to both source and source causation. It held that Rogers established that it was reasonably probable that Towanda was a source of his lead exposure and that his exposure at Towanda caused his elevated blood lead levels. The Court rejected Home Equity's argument that Rogers was required to rule out Chinquapin as a source of his lead exposure and elevated blood lead levels to survive summary judgment.

As to source, Rogers presented evidence that the interior of Towanda—not only the exterior—contained lead-based paint. The Court reasoned that the 1976 interior testing was particularly persuasive when viewed in light of the law at the time, which only required landlords to abate lead paint within four feet of the floor. Furthermore, the Court of Appeals explained that the building permits issued between 1976 and 1996 suggested that Towanda was never fully rehabilitated. Additionally, the Court considered the fact that Rogers' blood lead levels remained elevated throughout his residence at Towanda. They did not begin to decline until he moved out of the property.

As to source causation, the Court held that a jury could reasonably infer that Towanda was a substantial contributing source of his elevated blood lead levels from his blood lead tests. The

Court rejected the argument that Rogers could not establish Towanda as a reasonably probable source of his elevated blood lead levels because of the gap in blood lead testing between March 1996 and January 1997. Although Rogers could not prove that his blood lead levels increased when he moved from Chinquapin to Towanda, the Court explained that they remained elevated without decrease while he lived at Towanda. Dr. McDaniel testified that once Rogers was no longer exposed to lead, his blood lead levels would decrease after about 30 to 45 days. From this, the Court explained, a jury could reasonably infer that if Towanda was not a contributing source, his March 1997 lead level—a test conducted six months after he left Chinquapin—would have been lower. Furthermore, a jury could reasonably infer that his blood lead level declined in April 1997 because he had left the source of his exposure, which was Towanda.

Cassandra Parker, et al. v. William Hamilton, et al., No. 78, September Term 2016, filed May 22, 2017. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/coa/2017/78a16.pdf

WRONGFUL DEATH – COMPUTATION OF PERIOD OF LIMITATION

Facts:

On June 9, 2015, Appellant Cassandra Parker (acting individually and as the Personal Representative of the Estate of her son, Craig Junior Parker), and her minor grandchild, Appellant Z. (Mr. Parker's son), filed survival and wrongful death actions against Appellee William Stevens Hamilton, arising out of the death of Craig Junior Parker. Appellants alleged that on or about August 22, 2009, Mr. Hamilton shot and killed Mr. Parker and buried his remains to conceal his wrongdoing.

Mr. Hamilton filed a motion to dismiss with prejudice, or in the alternative, motion for summary judgment. The circuit court held a motions hearing, after which it issued a written opinion granting the motion to dismiss as to the wrongful death claims, and denying the motion as to the survival claims of Mr. Parker's estate. The wrongful death claims were dismissed by the circuit court as time-barred under Maryland Code, § 3-904 of the Courts & Judicial Proceedings Article ("Cts. & Jud. Proc.").

Appellants filed a motion for reconsideration, which was denied without a hearing. Appellants filed a timely appeal to the Court of Special Appeals. The Court of Appeals granted certiorari before the Court of Special Appeals' consideration of the direct appeal. *Parker v. Hamilton*, 450 Md. 664, 150 A.3d 819 (2016).

Held: Reversed.

The Court of Appeals determined that Cts. & Jud. Proc. § 5-201 addressed the Court's holding in *Waddell v. Kirkpatrick*, 331 Md. 52, 626 A.2d 353 (1993) that wrongful death claims brought by minor plaintiffs were not tolled during the period of minority. Thus, the Court held that Cts. & Jud. Proc. § 5-201 in its current form provides a tolling provision for wrongful death actions that accrue in favor of a minor plaintiff during the period of minority. Accordingly, under the version of Cts. & Jud. Proc. § 5-201 applicable here, the minor plaintiff's wrongful death claims were tolled during the period of his minority.

Further, the Court of Appeals determined that the circuit court erred in failing to consider that the time limitation to file a wrongful death action is tolled when the defendant engages in fraudulent conduct that prevents the plaintiffs from bringing a wrongful death action within three years from the date of death, pursuant to Cts. & Jud. Proc. § 5-203. In the amended complaint,

Appellants pled that (1) on or about August 22, 2009, Mr. Hamilton shot and killed Mr. Parker and (2) Mr. Hamilton buried Mr. Parker's remains in order to conceal his wrongdoing. These allegations were sufficient to reflect Mr. Hamilton's fraudulent conduct, and facts from which Mr. Hamilton's fraud can necessarily be implied. *See Antigua Condo. Ass'n v. Melba Inv'rs Atl., Inc.*, 307 Md. 700, 735, 517 A.2d 75, 93 (1986) ("General or conclusory allegations of fraud are insufficient. A plaintiff must allege facts which indicate fraud or from which fraud is necessarily implied."); *Parish v. Md. & Va. Milk Producers Ass'n*, 250 Md. 24, 72, 242 A.2d 512, 539 (1968) ("It is equally well-settled that it is not necessary to charge the defendants specifically with 'fraud' or with 'acting fraudulently' if the facts alleged indicate fraud or are such that fraud is necessarily implied from the alleged facts."). The allegations in Appellants' amended complaint were sufficient to invoke Cts. & Jud. Proc. § 5-203.

COURT OF SPECIAL APPEALS

Theodore Priester v. Baltimore County, Maryland, et al., No. 1817, September Term 2015, filed March 29, 2017. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2017/1817s15.pdf

CIVIL PROCEDURE – EXHAUSTION OF ADMINISTRATIVE REMEDIES

Facts:

Appellant Theodore Priester, a firefighter, exercised his rights under the administrative grievance process established by a memorandum of understanding between his union and his employer, Baltimore County—the appellee here—to challenge the County's termination of his employment. After a four-member administrative hearing board deadlocked and was unable to reach a final decision on his *de novo* appeal, the board notified Priester that it would rehear his grievance. Before the board scheduled a new hearing, Priester filed suit seeking writs of administrative and traditional mandamus in the Circuit Court for Baltimore County, asking the court, *inter alia*, to order that the board issue its preliminary tied vote as a final order. The circuit court granted summary judgment in favor of the County, and Priester appealed.

Held: Reversed with instructions to dismiss the action.

First, the Court held that the board's decision to re-hear Priester's appeal was not a final decision. Without a final administrative decision, Priester could not seek judicial review unless an exception to the exhaustion doctrine applied.

In 1980, the Court of Appeals set out five exceptions to exhaustion *in Prince George's Cnty. v. Blumberg*, 288 Md. 275, 283-85 (1980). Since then, a vast array of cases have pared down and clarified those exceptions. Most of these cases tend to address only a single exception to the doctrine, but the petitioner's wide-ranging claims in this case presented an opportunity to examine and clarify each of the exceptions. Thus, the Court recounted the most recent developments to the exceptions and conducted an independent appraisal of each exception's continued vitality.

Ultimately, the Court held that Priester's action did not fall within a recognized exception to the exhaustion doctrine. Because the board had not yet issued a final order and planned to rehear the appeal, and Priester had not exhausted his administrative remedies, the underlying mandamus action was not properly before the circuit court and should have been dismissed.

Casey O. Johnson v. State of Maryland, No. 2465, September Term 2015, filed March 29, 2017. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2017/2465s15.pdf

CRIMINAL LAW – WARRANTLESS SEARCHES – *CARROLL* DOCTRINE

Facts:

A Montgomery County police officer became suspicious of criminal activity after he stopped Casey O. Johnson ("Johnson") and her two automobile passengers for a broken tail light in Germantown, Maryland. The officer showed Johnson the broken tail light, and conducted a consent search of her two jacket pockets and found nothing. The officers then asked the vehicle's occupants to step out of the vehicle so that they could conduct a canine scan for contraband. One officer conducted a consent search of the front-seat passenger as he exited the vehicle and smelled PCP on the front-passenger's breath. The search revealed a baggie of marijuana in the front seat passenger's waistband, and he was immediately placed under arrest. Rather than permit the canine unit to scan the car, the officers proceeded to search Johnson's entire vehicle, including the trunk, under the presumption that finding the marijuana on the front-seat passenger provided the necessary probable cause for a search under the *Carroll* doctrine. The search of the trunk revealed additional contraband—a digital scale and marijuana found inside a backpack. The officers then arrested Johnson, and during the search incident to arrest, found $544.00 on her person.¬¬¬

A grand jury charged Johnson with possession of marijuana with i9ntent to distribute and conspiracy possession of marijuana with intent to distribute. Before trial in the Circuit Court for Montgomery County, Johnson moved to suppress all evidence seized by the police, who she claimed, violated the protection afforded her under the Fourth Amendment to the United States Constitution against unreasonable searches and seizures. The circuit court denied Johnson's motion, and the case proceeded to trial. The jury found Johnson guilty of possession of marijuana with intent to distribute, and the court sentenced Johnson to five years suspended in favor of supervised probation.

Held: Reversed.

The Court of Special Appeals held that that the suppression court erred by concluding the officers were permitted to conduct a warrantless search of the trunk pursuant to the *Carroll* doctrine because the officers lacked probable cause to believe that drugs were in the trunk based solely on the drugs found in the waistband and on the breath of the front passenger. *See Carroll v. United States*, 267 U.S. 132 (1925). Because the scope of a warrantless search of an automobile "is defined by the object of the search and the places in which there is probable cause

to believe that it may be found," *United States v. Ross*, 456 U.S. 798, 799 (1982), before the police may conduct a warrantless search of the trunk of a vehicle, the police must either have probable cause to believe drugs are in the car generally, or, as in this case, where the police find drugs on a passenger, they must articulate a particularized basis to search the trunk, such as the reasons for their belief that the passenger had access to the trunk. Here, the permissible scope of the search was defined by the object of the search: to find contraband that the passenger may have left or concealed within the vehicle. The police did not articulate a reasonable suspicion to believe that contraband was hidden in the trunk, or somewhere generally in the car, or beyond the passenger compartment; consequently, the police lacked probable cause to support a warrantless search of Johnson's trunk.

Marrick Homes LLC, et al. v. Adam Rutkowski, et al., No. 655, September Term 2016, filed May 31, 2017. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2017/0655s16.pdf

NEGLIGENCE – DUTIES – NONDELEGABLE DUTIES – BREACH – CAUSATION – ASSUMPTION OF RISK – CONTRIBUTORY NEGLIGENCE

Facts:

This case is an appeal from a jury verdict of the Circuit Court for Calvert County in a personal injury action brought by Adam Rutkowski and Sara Mastropole, appellees, husband and wife. Adam Rutkowski was injured on November 11, 2012, when a safety guardrail in his home failed, causing him to fall twelve to thirteen feet to the concrete below. The appellees filed suit against Marrick Properties, Inc. ("Marrick"), the builder and general contractor that constructed their home, as well as against Creative Trim, Inc. ("Creative Trim"), the subcontractor that was responsible for the construction and installation of the failed safety guardrail. The appellees also brought suit against the individual owners of Creative Trim and the previous owners of the home. All parties other than Marrick were dismissed prior to trial. The jury returned a verdict for the appellees, and Marrick appealed, arguing that (1) the duty to comply with the relevant provisions of the building code had been delegated to Creative Trim, (2) insufficient evidence supported the jury's negligence verdict, and (3) as a matter of law, Rutkowski assumed the risk and/or was contributorily negligent when he leaned on the guardrail.

Held: Affirmed.

The Court of Special Appeals held that Marrick's duty to comply with the building code was "nondelegable." Maryland follows the general rule that an employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his employees. This general rule, however, is riddled with a number of common-law exceptions. Pursuant to § 424 of the *Restatement (Second) of Torts*, "[o]ne who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions." The Court of Special Appeals held that Marrick, as general contractor, could not delegate its own liability for harm caused by violation of the building code to an independent subcontractor. Marrick bore the statutory duty to provide specified safeguards or precautions pursuant to the controlling building code and is, therefore, subject to liability for harm caused by the failure of its subcontractor to provide such safeguards.

The Court rejected Marrick's assertion that insufficient evidence supported the jury's negligence verdict. The Court held that sufficient evidence existed with respect to the breach element because an expert in residential construction and homebuilding testified that Marrick breached the standard of care by failing to properly supervise the construction of a defective guardrail and/or by failing to properly instruct the subcontractor as to how a guardrail should be constructed. The Court held that sufficient evidence existed with respect to the causation element of the negligence claim because a home construction expert testified that the improper construction of a guardrail was the cause of the guardrail's failure.

Finally, the Court of Special Appeals rejected Marrick's argument that it was entitled to judgment as a matter of law because Rutkowski assumed the risk of his injuries and/or was contributorily negligent when he leaned against this guardrail without previously inspecting the guardrail to ensure that it would hold his weight. The Court observed that evidence was presented that the guardrail appeared to be constructed properly because the improper fasteners were concealed by trim. The Court of Special Appeals held that both affirmative defenses were properly submitted to the jury.

Women First Ob/Gyn Associates, LLC v. Yolanda Harris, No. 315, September 2016 Term, filed May 31, 2017. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2017/0315s16.pdf

TORTS – VICARIOUS LIABILITY – RESPONDEAT SUPERIOR – VOLUNTARY DISMISSAL WITH PREJUDICE OF AGENT – RULE 2-506.

Facts:

Plaintiff brought a medical malpractice action against a doctor and the medical group that employed her. The claim against the medical group was based solely on respondeat superior, with no allegations of independent negligence. At the outset of trial, counsel for the plaintiff voluntarily dismissed the plaintiff's claim against the doctor with prejudice. There was no release, no settlement, and no payment of consideration to the plaintiff for the dismissal. The medical group moved for judgment on the ground that the dismissal with prejudice of the claim against the doctor precluded it from being held vicariously liable for the doctor's negligence. The court denied the motion. After a verdict against it, the medical group appealed.

Held: Affirmed.

The doctor and medical group were an agent and principal, so agency principles applied. They were not joint tortfeasors. The dismissal with prejudice of the claim against the agent meant that the agent could not be sued again on the same claim. Given that there was no actual finding of non-negligence on the part of the doctor, no release, and no value paid by the doctor to the plaintiff in consideration for the dismissal with prejudice, the dismissal simply dropped the doctor as a party to the case. It did not have the effect of precluding a determination by the fact finder that the doctor had acted negligently to cause the plaintiff's injuries; and therefore did not preclude the medical group, as the employer/principal of the doctor, who was acting within the scope of her employment at the relevant time, from being held vicariously liable for the doctor's negligence.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated May 1, 2017, the following attorney has been disbarred by consent:

DYLAN RICHARD EMERY

*

By an Order of the Court of Appeals dated May 1, 2017, the following attorney has been suspended:

STEPHEN ROWE JONES

*

By an Order of the Court of Appeals dated May 3, 2017, the following attorney has been indefinitely suspended by consent:

STEPHEN ROWE JONES

*

By an Order of the Court of Appeals dated May 15, 2017, the following attorney has been indefinitely suspended by consent:

JARRETT L. LEVITSKY

*

By an Order of the Court of Appeals dated May 18, 2017, the following attorney has been suspended:

ARTEMIO RIVERA

*

*

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

ROGER LEE HARRIS, JR.

*

By an Order of the Court of Appeals dated May 30, 2017, the following attorney's indefinite suspension has been continued by consent:

SUSAN MYRA GELLER KIRWAN

*

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

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

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