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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Jude Ambe, Misc. Docket AG No. 21, September Term 2018, filed October 21, 2019. Opinion by Barbera, CJ.

https://mdcourts.gov/data/opinions/coa/2019/21a18ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action with the Court of Appeals alleging that Jude Ambe violated Maryland Attorneys' Rules of Professional Conduct 19-301.1 (Competence), 19-301.2(a) (Scope of Representation), 19-301.3 (Diligence), 19-301.4(a) and (b) (Communication), 19-301.5(a) (Fees), 19-301.15(a) and (c) (Safekeeping Property), 19-301.16(a) and (d) (Declining or Terminating Representation), 19-303.3(a) (Candor), 19-308.1(a) (Bar Admission and Disciplinary Matters), and 19-308.4(a), (c), and (d) (Misconduct). The charges stemmed from Ambe's representation of a Cameroonian immigrant who was applying for asylum while detained in California. Because of Ambe's numerous Rule violations arising from the representation of that client, Bar Counsel recommended that Ambe be disbarred.

Ambe failed to appear at a scheduled court proceeding before the United States Immigration Court without giving advance notice or securing substitute counsel for his client. In his reply to the Show Cause Order subsequently issued by the Immigration Court, Ambe explained that he was absent because he unexpectedly traveled to Cameroon due to a family emergency. In a statement under oath to Bar Counsel, Ambe stated that the trip to Cameroon was actually pre-planned. At a hearing before the Circuit Court for Montgomery County, Ambe testified that the trip was both pre-planned and due to a family emergency. The hearing judge found that Ambe was not credible and determined that Ambe misrepresented the reason for his absence to the Immigration Court and Bar Counsel.

The hearing judge also determined that Ambe did not perform meaningful work on his client's case or sufficiently review the work with his client before filing it with the court. Additionally, Ambe requested continuances without his client's consent and refused to turn over his client's file after he was terminated. The hearing judge further determined that Ambe failed to utilize an attorney trust account, keep accounting records of client funds, and withdraw funds only when earned.

Ambe excepted to several of the hearing judge's findings of fact and conclusions of law, and Bar Counsel excepted to none.

Held: Disbarred.

The Court of Appeals largely upheld the hearing judge's findings of fact and conclusions of law and overruled each of Ambe's exceptions to them. The Court agreed with Bar Counsel that disbarment was the appropriate sanction for the litany of violations Ambe committed. During the relevant period of representation, Ambe provided material misrepresentations to the Immigration Court and Bar Counsel, failed to appear on his client's behalf, neglected his client's case, and entirely failed to use an attorney trust account and keep accounting records.

There were no mitigating factors to lessen the sanction ordered. Rather, the Court found several aggravating factors that applied to Ambe. Chief among them, Ambe's client was vulnerable and heavily relied on him. His client was an immigrant who spoke limited English and was detained in California during nearly the entire representation. Particularly consequential among the remaining aggravating factors, Ambe was disciplined on two prior occasions and has practiced law for approximately a decade. Although the Court disagreed with the hearing judge that Ambe displayed a pattern of misconduct and obstructed the disciplinary proceedings, disbarment was nonetheless the appropriate sanction.

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Danny Trotman v. State of Maryland, No. 8, September Term 2019, filed October 18, 2019. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2019/8a19.pdf

PROSPECTIVE JURORS WITH DISABILITIES – AMERICANS WITH DISABILITIES ACT – MD. CODE ANN., CTS. & JUD. PROC. (1974, 2013 REPL. VOL., 2016 SUPP.) §§ 8-102(b) AND 8-103(b)(3)

Facts:

The State, Respondent, charged Sergeant Danny Trotman, Petitioner, a correctional officer of the Department of Public Safety and Correctional Services, with second-degree assault, conspiracy to commit second-degree assault, and misconduct in office. At the start of trial, before the jury panel entered the courtroom, four prospective jurors disclosed to the Jury Commissioner's Office that they would either have difficulty using or be unable to use stairs, and the Jury Commissioner's Office gave that information to the circuit court. The circuit court separately called each of the four prospective jurors to the bench. In each instance, first, the circuit court expressly confirmed that the prospective juror was unable to use stairs; then, the circuit court informed the prospective juror that a staircase with twenty-five steps was the only way to reach the jury room. Ultimately, the circuit court excused the four prospective jurors for cause and directed them to return to the jury assembly room to be available for participation as jurors in another trial. Trotman's counsel objected to the circuit court excusing the four prospective jurors for cause and requested that the circuit court conduct the trial in another courtroom. The circuit court responded that no other courtroom was available, and trial proceeded in the assigned courtroom. The jury found Trotman guilty of two charges. Trotman appealed, and the Court of Special Appeals affirmed. Trotman filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that, under the Americans with Disabilities Act, Maryland statutes that govern jury service, and relevant case law, a trial court may not summarily excuse for cause prospective jurors with disabilities; instead, a trial court may excuse a prospective juror for cause on a disability-related ground if no reasonable accommodation is possible, and, at that particular trial, the particular disability would prevent the prospective juror from providing satisfactory jury service. The Court acknowledged that people with disabilities do not constitute a suspect, or quasi-suspect, class; accordingly, the Equal Protection Clause does not require trial courts to make special accommodations for prospective jurors with disabilities, and Batson challenges

based on disabilities are not permitted. But, the Court noted, Maryland and federal statutes protect prospective jurors from disability discrimination. Specifically, prospective jurors with disabilities have a right to an opportunity to participate in jury service under Md. Code Ann., Cts. & Jud. Proc. (1974, 2013 Repl. Vol., 2016 Supp.) § 8-102(b) ("A citizen may not be excluded from jury service due to . . . disability[.]") and 42 U.S.C. § 12132 (Generally, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in . . . the . . . activities of a public entity, or be subjected to discrimination by any such entity."). The Court observed that, under the Americans with Disabilities Act, failing to make reasonable accommodations constitutes disability discrimination, whereas failing to make fundamental alterations does not. The Court determined that, consistent with the Americans with Disabilities Act and the Maryland statutes that govern jury service, a trial court may excuse a prospective juror for cause on a disability-related ground if no reasonable accommodation is possible, and, at that particular trial, the particular disability would prevent the prospective juror from providing satisfactory jury service.

Applying relevant statutes and case law to the case's circumstances, the Court concluded that the circuit court did not abuse its discretion in excusing for cause the four prospective jurors who indicated that they were unable to use stairs. It is undisputed that, to reach the jury room, the jurors would have been required to walk up twenty-five steps. Each of the four prospective jurors at issue indicated that he or she was unable to do so. The circuit court's determination that no other courtroom was available was a factual finding, and was not clearly erroneous. Thus, no reasonable accommodation was possible. And, in that particular case, the four prospective jurors' inability to use stairs prevented them from providing satisfactory jury service.

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COURT OF SPECIAL APPEALS

AAC HP Realty, LLC v. Bubba Gump Shrimp Co. Restaurants, Inc., No. 1076, September Term 2018, filed October 31, 2019. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2019/1076s18.pdf

QUASI-CONTRACT – UNJUST ENRICHMENT – PRESENCE OF AN EXPRESS CONTRACT

Facts:

Bubba Gump Shrimp Co. Restaurants, Inc. ("Bubba Gump") entered into a lease at Harborplace shopping center in Baltimore City with AAC HP Realty, LLC ("AAC"). The lease obligates Bubba Gump to pay a "Minimum Annual Rental" in monthly installments for its use and occupancy of the leased premises "without deduction or set-off." The Minimum Annual Rental includes the "Joint Use and Operating Expenses," which are advance payments made in exchange for the landlord's commitment to maintain the shopping center's common areas in good order and repair. The lease permits AAC to appropriate any portion of the monthly rent toward maintenance "in its sole and absolute discretion."

During the lease term, Bubba Gump observed that AAC was not maintaining the property in good order. After withholding rent for a period of time, Bubba Gump sued AAC for several claims including breach of contract and unjust enrichment.

After a bench trial in the Circuit Court for Baltimore City, the trial court found that AAC breached its obligation to keep the common areas safe and in good repair and awarded Bubba Gump $32,300 for out-of-pocket security costs incurred due to AAC's breach and $5,000 in attorneys' fees, pursuant to the lease terms. The court, however, declined to award lost profits because Bubba Gump could not prove the damages with reasonable certainty. Instead, the court awarded Bubba Gump $1,096,270.51 as an "equitable rent reduction" under the unjust enrichment claim, as an alternative to the lost profits claim.

Held: Reversed in part and affirmed in part.

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The Court of Special Appeals held that Bubba Gump could not bring a claim for unjust enrichment because the lease fully addresses the consequences of the AAC's breach. The Court reversed the judgment to the extent that the trial court awarded damages for unjust enrichment.

Generally, a quasi-contractual claim cannot arise when an express contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests. In *County Commissioners of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83 (2000), the Court of Appeals listed four potential exceptions to this prevailing rule: "when there is evidence of fraud or bad faith, there has been a breach of contract or a mutual recission of the contract, when recission is warranted, or when the express contract does not fully address a subject matter." In this case, the trial court relied on two of the exceptions in justifying the equitable reduction in rent. First, the circuit court reasoned that AAC's breach of its obligation to maintain the property amounted to bad faith. Second, the circuit court reasoned that the lease does not fully address the remedy for AAC's breach.

The Court first held that the trial court erred in relying on the exception for bad faith. This exception requires evidence of bad faith or fraud in the formation of the contract, as opposed to the performance of the contract, and the circuit court did not find that AAC acted in bad faith when it entered into the lease.

The Court then held that the trial court also erred in relying on the exception for express contracts that do not fully address the relevant subject matter. The comprehensive lease addresses AAC's obligation to maintain Harborplace's common areas, and Bubba Gump pursued and received relief under the lease for AAC's breach of that obligation.

Therefore, Bubba Gump could not prevail on a claim of unjust enrichment.

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Lloyd Harris v. State of Maryland, No. 2298, September Term 2017, filed October 30, 2019. Opinion by Battaglia, J.

https://mdcourts.gov/data/opinions/cosa/2019/2298s17.pdf

CRIMINAL LAW – RIGHT OF ACCUSED OF COMPULSORY PROCESS – RELEVANCY OF ALTERNATIVE SUSPECT EVIDENCE

CRIMINAL LAW – DUE PROCESS – PRE-INDICTMENT DELAY

CRIMINAL LAW – ADMISSIBILITY OF EXPERT TESTIMONY – DUELING EXPERTS

Facts:

On October 2, 1996, the victim, then a 15-year old girl, was reported missing by her mother. Over two months later, her body was discovered in a wooded area of Frederick, Maryland. Prior to the discovery of the victim's body, appellant, Lloyd Harris, had resided at a "campsite" nearby in the wooded area, and, during the course of the investigation into the victim's death, became the primary suspect.

On January 22, 2016, a grand jury indicted Harris of first-degree murder, first-degree rape and third-degree sex offense.

Prior to trial, the State filed a motion *in limine* to exclude evidence about an individual who Harris contended was an alternative suspect in the case; namely, evidence relating to the individual's conviction of first-degree assault in connection with an attempted rape which took place in Frederick, Maryland on October 9, 19996, days after the victim went missing. The trial judge granted the State's motion, but reserved Harris's ability to cross-examine the State's witnesses about information regarding potential suspects that was developed during the investigation.

Harris, also before trial, filed a motion to dismiss the indictment against him, arguing that the 20-year delay caused him immense prejudice, that which he could not overcome. Harris, however, could not articulate how the State purposefully delayed the indictment to gain a tactical advantage over him, as required by caselaw to succeed in his request for dismissal. Accordingly, the trial judge denied Harris's motion, noting that the delay was a result of permissible prosecutorial discretion.

Additionally, Harris sought to exclude testimony from the State's expert, Dr. Stephen Cina, who would testify that the level of prostatic acid phosphatase found on the vaginal swabs taken from the victim allowed him to determine that the victim had sexual intercourse within a few hours of her death, contradicting Harris's claim that he had consensual intercourse with the victim three days before she went missing. Harris had requested a *Frye-Reed* hearing on the matter, arguing that Dr. Cina's conclusions were not supported by generally accepted methods in the relevant

scientific community. The trial judge denied Harris's motion, reasoning that, because Dr. Cina's methodology and conclusion were based upon acceptable practices in the relevant scientific community, and because Harris put on an expert to rebut such testimony, a determination as to which expert's testimony was more credible would best be left for the jury to decide.

A jury ultimately found Harris guilty of all charges and the trial court sentenced him to life in prison.

Held: Affirmed.

The Court of Special Appeals held that the trial judge properly exercised his discretion in excluding from evidence material in which Harris proffered to insinuate that another individual had committed the crime for which he had been charged. The Court concluded that the evidence in question did not give credence to the theory that someone other than Harris had committed the crime, and therefore, was properly excluded pursuant to Maryland Rule 5-403.

The Court also held that the trial judge did not err in denying Harris's motion to dismiss based upon a 20-year pre-indictment delay where Harris failed to demonstrate that the State purposefully delayed the indictment to gain a tactical advantage, pursuant to *Clark v. State*, 364 Md. 611 (2001), and solely argued that the State recklessly disregarded the risk that delay would impair his ability to mount an effective defense, a standard not recognized by Maryland case law and that was not argued below.

The Court lastly held that the trial judge properly exercised his discretion in admitting the State's expert witness, concluding that the expert's testimony, juxtaposed by the testimony of Harris's expert, provided the grist for the jury to best weigh, based upon a finding that the scientific testimony proffered, and the underlying methodology and conclusion thereof, was accepted by the relevant scientific community.

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In re Expungement Petition of Dione W., No. 2182, September Term 2018, filed October 30, 2019. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2019/2182s18.pdf

CRIMINAL PROCEDURE – EXPUNGEMENT

Facts:

In 2013, Dione W. received four traffic citations: speeding, driving on a suspended license, possessing a suspended license, and displaying a suspended license. Of these offenses, speeding is the only non-incarcerable offense. He pleaded guilty to one count of speeding. The State entered a nolle prosequi as to the other three counts.

In 2018, Dione petitioned to expunge records of the speeding conviction and other three charges. The State answered that the speeding violation was ineligible for expungement, because a person may not obtain an expungement of "a record about a minor traffic violation," Md. Code (2001, 2008 Repl. Vol., 2012 Supp.), § 10-102(c) of the Criminal Procedure Article, such as speeding.

The Circuit Court for Baltimore County denied the petition without prejudice because it was unsure whether it possessed the authority to grant a partial expungement as to the other three charges if it could not also expunge the speeding conviction.

Held: Reversed.

The Court of Special Appeals held that the circuit court erred in denying the petition. The existence of a minor traffic violation does not prevent a court from expunging other charges that arose from the same incident, transaction, or set of facts.

Dione was entitled to expungement of the charges for driving on a suspended license, possessing a suspended license, and displaying a suspended license. Dione had a statutory right to expungement of certain records maintained by the State if it entered a nolle prosequi, provided that he waited for three years.

Under § 10-107 of the Criminal Procedure Article, if two or more charges arise from the same incident, transaction, or set of facts, they are typically considered a "unit," and a petitioner is not entitled to expungement of any of those charges unless he or she is entitled to expungement of all of them. However, a charge for a minor traffic violation is not considered part of the unit even if it arises from the same incident, transaction, or set of facts as the other charges. The circuit court was required to grant expungement as to the three charges other than the minor traffic violation.

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Dominique Guillaume v. Chantal Guillaume, No. 2928, September Term 2018, filed October 30, 2019. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2019/2928s18.pdf

IN BANC APPEALS – RESERVATION OF ISSUES

IN BANC APPEALS – REQUIREMENTS FOR NOTICE FOR IN BANC REVIEW

Facts:

Dominique Guillaume ("Father") and Chantal Guillaume ("Mother") are the parents of three children. On May 10, 2017, the parties executed a "Memorandum of Agreement" in an effort to resolve legal and physical custody, child support, alimony, and some property issues. Two days later, the Circuit Court for Montgomery County entered a consent order incorporating the provisions of the Memorandum of Agreement.

By October 2017, both Father and Mother filed had petitions for contempt. Following a two-day hearing, the circuit court took the matters under advisement. Ultimately, the court found Mother in contempt, and dismissed Mother's contempt petition against Father. In addition to its contempt rulings, the court ordered Mother to pay Father $35,000 in attorney's fees. Mother timely filed a Notice for *In Banc* Review.

Father filed a motion to dismiss Mother's *in banc* appeal. In his motion, he claimed that the *in banc* panel lacked jurisdiction to review Mother's appeal pursuant to *State v. Phillips*, 457 Md. 481 (2018), because Mother's Notice for *In Banc* Review "listed no points or questions to be reviewed and gave no reasons why the Contempt Order was incorrect."

The *in banc* panel denied Father's motion to dismiss the appeal, and ultimately vacated the contempt order as well as the circuit court's award of attorney's fees. In vacating the award of attorney's fees, the *in banc* panel determined that the circuit court's contempt order improperly blurred the lines between a custody modification order and a contempt order. The *in banc* panel also held that the circuit court erred by failing to properly consider the factors set forth in Md. Code (1984, 2012 Repl. Vol.), § 12-103(b) of the Family Law Article ("FL"). Father timely appealed the *in banc* panel's decision.

Held: Affirmed.

Maryland Rule 2-551, which governs the procedures for seeking *in banc* review, does not require an *in banc* appellant to include the issues for review in the notice of appeal in order to properly "reserve" them. That Rule simply requires a party to reserve issues in the manner set forth in Rules 2-517 and 2-520. Notably, Rules 2-517 and 2-520 appear to contemplate lodging

objections to rulings that precede the final judgment, and require the objecting party to lodge the objection to those "non-final" rulings as soon as practicable.

Similarly, *Phillips* does not hold that an *in banc* appellant must include the issues for review in the notice of appeal *in banc*. There, Phillips moved in limine to exclude evidence from his pending murder trial. *Phillips*, 457 Md. at 484. When he prevailed, the State filed a notice of appeal *in banc* from the circuit court's interlocutory order granting Phillips's motion in limine. Id. at 484-85. The *in banc* panel ultimately reversed the circuit court's order. *Id*. at 485. On appeal, the Court of Appeals held that, in the context of that interlocutory order, the State did not timely object to the in limine ruling and therefore did not reserve issues for *in banc* review. Id. at 511.

Here, because the *in banc* panel rendered a final judgment, Mother could appeal that judgment in the same way that a party may appeal a final judgment from the circuit court to the Court of Special Appeals. Accordingly, neither Rule 2-551 nor *Phillips* require an *in banc* appellant to include issues in a notice of appeal *in banc*. Mother therefore was not required to include issues for review in her Notice for *In Banc* Review, and the *in banc* panel had jurisdiction to review the circuit court's decision.

Additionally, the *in banc* panel did not err in vacating the attorney's fees award. Contrary to Father's assertions, the circuit court did not appear to award attorney's fees under FL § 12-103(c). Instead, in rendering its decision, the court specifically mentioned factors that appear in FL § 12-103(b), but not in FL § 12-103(c). To the extent the court awarded attorney's fees under FL § 12-103(b), it erred because there was insufficient evidence in the record concerning the parties' financial circumstances and needs.

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Selective Way Insurance Company v. Nationwide Property and Casualty Insurance Company, et al., No. 755, September Term 2018, filed October 30, 2019. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2019/0755s18.pdf

LIABILITY INSURANCE – DAMAGES FOR BREACH OF DUTY TO DEFEND

Facts:

Questar Builders undertook to oversee the construction of an apartment complex from 2001 through 2004. Questar entered into contracts with dozens of subcontractors. Each subcontract required the subcontractor to maintain liability insurance with primary and noncontributory coverage and to name Questar as an additional insured.

Selective Way Insurance Company sold liability insurance to four of Questar's subcontractors. Those policies extended this coverage to an additional party if the subcontractor entered into a contract requiring it to provide insurance for that additional party. Hence, Questar became an additional insured under Selective Way's policies.

In 2006, the purchaser of the apartment complex filed a lawsuit alleging that Questar failed to properly oversee the work of its subcontractors and that construction defects resulted in extensive property damage.

Nationwide Property and Casualty Insurance Company and Nationwide Mutual Insurance Company ("Nationwide") defended Questar. Selective Way denied or failed to respond to requests to defend Questar under its policies.

In 2008, Nationwide filed a complaint for a declaratory judgment in the Circuit Court for Baltimore County against various insurers, various subcontractors, and Questar itself. Nationwide sought a declaration that the subcontractors' insurers were obligated to defend Questar in the construction-defect lawsuit. Nationwide sought reimbursement for all defense costs incurred in that lawsuit, prejudgment interest, and attorneys' fees and expenses incurred in the declaratory judgment action.

In the declaratory judgment action, the court granted partial summary judgment in favor of Nationwide. The court determined that Selective Way and 11 other insurers for subcontractors each had a duty to defend Questar in the construction-defect lawsuit. Nationwide reached settlements with all insurers except Selective Way.

The court held a jury trial to determine whether Selective Way was liable for the defense costs that Nationwide paid in the construction-defect lawsuit and, if so, in what amount. On a special verdict sheet, the jury found: that Selective Way had received timely notice of the construction-

defect lawsuit; that Nationwide had proven damages of $994,719.54; that the defense costs were "readily apportionable" among Questar's subcontractors; and that Nationwide was not "required to apportion" those costs.

Nationwide moved for an award of $810,556.72 in attorneys' fees and expenses incurred in the declaratory judgment action. The court rejected Selective Way's request for a jury trial on that claim. Nationwide also submitted a letter asking the court to award $430,534.82 in prejudgment interest on the damages found by the jury. The court granted the full amounts requested.

On May 2, 2018, the court issued a declaratory judgment stating that Selective Way owed a duty to defend Questar in the construction-defect lawsuit. The judgment made Selective Way liable in the following amounts: $994,719.54 for the defense costs from the construction-defect lawsuit; $430,534.82 for prejudgment interest on those defense costs; and $810,556.72 for attorneys' fees and expenses incurred in the declaratory judgment action. The court reduced the total by $588,152.00, to account for the amounts that Nationwide had received from settlements with other insurers. In aggregate, the court entered judgment in the amount of $1,647,659.00 against Selective Way.

Selective Way appealed.

Held: Affirmed in part; reversed in part; vacated in part; case remanded.

First, the Court of Special Appeals upheld the declaration that Selective Way owed a duty to defend Questar in the construction-defect lawsuit and the damage award of $994,719.54 for the costs of defending the entire suit against Questar. Next, the Court reversed the award of $430,534.82 for prejudgment interest. Finally, the Court vacated the award of $810,556.72 in attorneys' fees and expenses. The Court remanded the case for a jury trial solely to determine the amount of reasonable and necessary fees and expenses incurred by Nationwide in the declaratory judgment action as a result of Selective Way's breach of the duty to defend.

The Court determined that Selective Way owed a duty to defend Questar. The suit was based on allegations that Questar failed to properly oversee and supervise the construction and that the resulting construction defects caused property damage. Selective Way's policies made Questar an additional insured "with respect to" the subcontractor's work. Under some policies, Questar was an additional insured with respect to liability "arising out of" the subcontractor's work, or with respect to liability for damage "caused, in whole or in part, by" the subcontractor's work. Although the suit included allegations of additional negligence by others, there was a possibility that Questar might be found liable with respect to the work performed by the four subcontractors insured by Selective Way.

The Court upheld the decision to permit the jury to make Selective Way liable for the costs of defending the entire suit against Questar. Generally, if any claims potentially come within the

policy coverage, a liability insurer is obligated to defend all claims, notwithstanding alternative allegations outside the coverage. An insurer that breaches this duty is liable for the costs of defending the entire suit. This general rule requiring the insurer to defend all claims prevails where the potentiality of coverage turns on causation.

The Court distinguished *Loewenthal v. Security Ins. Co. of Hartford*, 50 Md. App. 112, 123 & n.5 (1981), *cert. denied*, 292 Md. 596 (1982), which permitted an insurer to pay only the costs of defending bodily-injury claims and not the costs of defending property-damage claims that were excluded from coverage. The Court declined to follow *Reliance Ins. Co. v. Mogavero*, 640 F. Supp. 84, 87 (D. Md. 1986), which held that an insurer has no duty to defend where the allegations creating the potentiality of coverage are "incidental" or "*de minimus*."

Through legal subrogation, Nationwide could recover the entire costs of defending Questar. Selective Way's policies made the additional-insured coverage for Questar "primary and not contributory," while Nationwide's policies made its coverage "excess" over any other primary insurance for which Questar was an additional insured. Where an excess insurer provides a defense that another insurer was primarily obligated to provide, the primary insurer must reimburse the excess insurer for the costs of defense.

Although the Court affirmed the judgment with respect to the jury's damage award, the Court held that the circuit court erred when it added prejudgment interest to those damages. Nationwide was not entitled to prejudgment interest, as a matter of right, on the damage claim for attorneys' fees and expenses incurred in defending the lawsuit against Questar. The claim was unliquidated, because its amount was not fixed by agreement and could not be exactly determined by rules of arithmetic or law. Thus, prejudgment interest was discretionary for the jury. The court was not authorized to award prejudgment interest where no such claim was presented to the jury.

Finally, the Court vacated the judgment with respect to the order making Selective Way liable for $810,556.72 of attorneys' fees and expenses incurred by Nationwide in the declaratory judgment action. The circuit court erred in denying Selective Way's requests for a jury trial to determine the amount of liability for those fees and expenses. The damages resulting from a liability insurer's breach of a contractual duty to defend include the attorneys' fees and expenses incurred in litigation to establish the duty to defend. The breaching insurer is entitled to have the amount of fees and expenses proven with the certainty and under the standards ordinarily applicable for proof of contractual damages. These damages are not exempt from the right to have a jury determine the amount of damages under Article 23 of the Maryland Declaration of Rights.

The Court remanded the case for a jury trial on the amount of fees and expenses incurred in the declaratory judgment action. On remand, Nationwide would bear the burden of proving, by a preponderance of the evidence, the amount of reasonable and necessary attorneys' fees and expenses that it incurred as a result of Selective Way's breach of contract. Selective Way could be held liable for expenses reasonably related to the claim against Selective Way in the declaratory judgment action. A clear delineation in billing records of the time spent with respect

to the particular claims in the action was not absolutely required for recovery. The fees and expenses which Nationwide could recover included those incurred by Nationwide in connection with all previous proceedings in the circuit court and in the Court of Special Appeals.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated October 4, 2019, the following attorney has been suspended:

OLEKANMA ARNNETTE EKEKWE

*

By an Order of the Court of Appeals dated October 4, 2019, the following attorney has been disbarred by consent:

KIM YVETTE JOHNSON

*

By an Opinion and Order of the Court of Appeals dated October 21, 2019, the following non-admitted attorney is excluded from exercising the privilege of practicing law in this State:

JUDE AMBE

*

By an Order of the Court of Appeals dated October 23, 2019, the following attorney has been disbarred by consent:

RICHARD LEE SAVINGTON

*

By an Order of the Court of Appeals, dated October 24, 2019, the following attorney has been disbarred by consent:

JAMES KEVIN REED

*

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*

By an Order of the Court of Appeals, dated October 24, 2019, the following attorney has been disbarred by consent:

JOHN WINFIELD TURNER

*

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JUDICIAL APPOINTMENTS

*

On September 25, 2019, the Governor announced the appointment of **Anthony Francis Vittoria** to the Circuit Court for Baltimore City. Judge Vittoria was sworn in on October 29, 2019 and fills the vacancy created by the retirement of the Hon. Timothy J. Doory.

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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