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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Ferdinand Uchechukwu Ibebuchi, Misc. Docket AG No. 19, September Term 2019, filed November 20, 2020. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2020/19a19ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION.

Facts:

The Attorney Grievance Commission ("AGC"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action alleging that Ferdinand Uchechukwu Ibebuchi violated numerous provisions of the Maryland Attorneys' Rules of Professional Conduct ("MARPC"). The Petition alleged that Mr. Ibebuchi violated Rule 1.1 (Competence); Rule 1.3 (Diligence); Rule 1.4 (Communication); Rule 1.5 (Fees); Rule 1.16 (Declining or Terminating Representation); Rule 3.2 (Expediting Litigation); Rule 3.4 (Fairness to Opposing Party and Attorney); Rule 8.1 (Bar Admission and Disciplinary Matters); and Rule 8.4(a) and (d) (Misconduct). The charges arise from Mr. Ibebuchi's representation of a client who was alleged to be an at-fault driver in a multi-vehicle collision. The client was a native of Guatemala who did not speak or write any English.

The hearing judge found that Mr. Ibebuchi failed to timely respond to discovery requests, failed to appear for trial, and failed to advise his client that a default judgment had been entered against him. After the client learned about the default judgment from a notice issued by the Motor Vehicle Administration, Mr. Ibebuchi advised his client that he would file a motion to try to have the case reopened. Despite these assurances, Mr. Ibebuchi failed to take any action to assist his client with vacating the judgment, failed to follow up with the client, and failed to refund any portion of the fee charged for his services. After the client filed a complaint with the Attorney Grievance Commission, Mr. Ibebuchi failed to respond to several letters requesting information in connection with the investigation.

Based on these findings, the hearing judge concluded that Mr. Ibebuchi violated Rules 1.1, 1.3, 1.4(a) and (b), 1.5(a), 1.16(d), 3.2, 3.4(d), 8.1(b), and 8.4(a) and (d). The hearing judge also concluded there were several aggravating factors present. Specifically, the hearing judge found

that Mr. Ibebuchi (1) violated multiple provisions of the MARPC, (2) obstructed Bar Counsel's investigation into the alleged misconduct, (3) refused to acknowledge the wrongful nature of his conduct, and (4) made no effort regarding restitution "until the virtual eve of the evidentiary hearing[.]" The hearing judge also determined that Mr. Ibebuchi's client was a vulnerable victim because he did not speak or write English. With respect to mitigating factors, the hearing judge noted the absence of prior attorney discipline. Bar Counsel recommended that the Court impose a sanction of indefinite suspension.

Held: Indefinite Suspension.

Although the Court sustained one of Bar Counsel's exceptions to the hearing judge's findings of fact (pertaining to the length of Mr. Ibebuchi's practice in Maryland) and a couple of exceptions filed by Mr. Ibebuchi (pertaining to charges arising from the client's reliance on his own language interpreter and whether there was sufficient evidence in the record that Mr. Ibebuchi failed to provide his client with a copy of a motion for sanctions), the Court upheld most of the hearing judge's findings of fact. With respect to the conclusions of law, the Court concluded that there was clear and convincing evidence to support the hearing judge's conclusion that Mr. Ibebuchi violated Rules 1.1, 1.3, 1.4(a) and (b), 1.5(a), 1.16(d), 3.2, 3.4(d), 8.1(b), and 8.4(a) and (d). In connection with the imposition of sanctions, the Court agreed with the hearing judge that Mr. Ibebuchi had one mitigating factor—his lack of prior discipline. The Court also agreed with the hearing judge that there were several aggravating factors, specifically that Mr. Ibebuchi: (1) violated multiple provisions of the MARPC, (2) obstructed Bar Counsel's investigation into the alleged misconduct, (3) refused to acknowledge the wrongful nature of his conduct, (4) made no effort regarding restitution until the eve of the disciplinary hearing, and (5) that the client was an immigrant who did not speak or write English, making him a vulnerable victim. Accordingly, the Court concluded that in order to protect the public and ensure the integrity of the bar, indefinite suspension was appropriate.

Attorney Grievance Commission of Maryland v. John T. Riely, Misc. Docket AG No. 20, September Term 2019, filed November 25, 2020. Opinion by McDonald, J.

Watts, J., dissents.

https://mdcourts.gov/data/opinions/coa/2020/20a19ag.pdf

ATTORNEY DISCIPLINE – COMPETENCE, DILIGENCE AND COMMUNICATION WITH CLIENT – MISREPRESENTATIONS – INDEFINITE SUSPENSION

Facts:

In 2016 Respondent John T. Riely had been a member of the Maryland Bar for approximately 30 years who practiced primarily immigration law when a Guatemalan couple was referred to him by another law firm. The couple, who had entered the United States illegally, met with Mr. Riely at the law firm and sought his assistance with the removal proceedings against them. The wife arguably had a basis for being granted asylum; the husband could ask immigration authorities to exercise their prosecutorial discretion in his favor. The couple did not execute a representation agreement or pay the modest deposit required by the agreement at that meeting, and it was unclear whether they would retain Mr. Riely. However, three weeks later, a few days before a hearing in immigration court, they paid the deposit to the law firm through which they had contacted Mr. Riely. Mr. Riely was informed of the payment and the couple's expectation that he would represent them, but failed to cover their hearings or inform them that he would not do so. As a result, the wife missed a deadline for applying for asylum. Although the immigration court later granted her an extension, Mr. Riely's failure to communicate with the couple put them at risk of removal from the United States without consideration of the asylum claim.

In 2017, a Venezuelan woman whom Mr. Riely had previously represented sought his assistance in the extension of her employment-based H-1B visa. Some years earlier, he had helped her – to her great satisfaction – escape an abusive employment relationship while maintaining legal status in the United States under the original iteration of the visa. As a result of confusion caused when Mr. Riely mis-addressed an invoice for filing fees, Mr. Riely did not act on the timetable for obtaining the visa extension that he himself had specified. He later made misleading statements to the client and an immigration enforcement agent as to whether he had made a required filing on the client's behalf by that deadline; in a later misrepresentation to Bar Counsel, he suggested that the client, rather than himself, was the cause of that deficiency. Although he helped rectify the situation by confessing to immigration authorities that he had provided the client with ineffective assistance, he had placed her in jeopardy of removal from the country.

There was extensive testimony at the hearing by attorneys and current and former clients of Mr. Riely about his good character, his accomplishments in representing clients with immigration

problems, and his dedication to his family, community, and clients. There was no evidence that Mr. Riely had profited monetarily from either representation.

In August 2019, the Attorney Grievance Commission filed a petition for disciplinary or remedial action against Mr. Riely alleging violations of the Maryland Attorneys' Rules of Professional Conduct ("MARPC"). The petition alleged violations of Rule 1.1 (competence); Rule 1.2(a) (scope of representation); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.16(d) (terminating representation); Rule 4.1(a) (truthfulness in statements to others); Rule 8.1 (disciplinary matters); and Rule 8.4 (a), (c), & (d) (misconduct).

The hearing judge found that Mr. Riely had violated the provisions charged by the Commission. The hearing judge also found certain mitigating factors (no prior disciplinary record, serious personal problem, remorse, good character and reputation, cooperation with Bar Counsel's investigation, good faith efforts to rectify misconduct, lack of dishonest or selfish motive) and aggravating factors (experience in the practice of law, vulnerable victims, multiple offenses).

Held: Indefinite suspension with right to apply for reinstatement no sooner than one year.

The Court of Appeals concluded that Mr. Riely had committed the violations found by the hearing judge. It also agreed with the hearing judge's assessment of aggravating and mitigating factors, except that the Court of Appeals concluded that the misrepresentations made by Mr. Riely were made with a selfish or dishonest motive to conceal his own failings. The Court concluded that, in light of the various mitigating factors in Mr. Riely's favor, the appropriate sanction was an indefinite suspension with a right to apply for reinstatement no sooner than one year.

Dale K. Byrd v. State of Maryland, No. 4, September Term 2020, filed November 20, 2020. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2020/4a20.pdf

CRIMINAL LAW – DISCOVERY

Facts:

In 2011, Dale K. Byrd pled guilty in two separate cases to possession of heroin with intent to distribute in the Circuit Court for Baltimore City. The circuit court sentenced him to two concurrent sentences of twelve years of incarceration, with all but four years suspended, and three years of probation. After the completion of his sentence and probation, he pled guilty to another offense in the United States District Court for the District of Maryland. Believing that if he could have his two prior pleas vacated he might receive a shorter sentence in the federal case, Mr. Byrd filed a petition for writ of error coram nobis in the Circuit Court for Baltimore City. At the coram nobis hearing he presented evidence of alleged misconduct of several of the officers involved in his arrests that may have been included in their Internal Investigations Division files. Although the alleged misconduct did not relate to his arrests, Mr. Byrd argued that he could have used the evidence to impugn the officers' credibility at trial, and that he would not have waived his right to trial had the State provided him with the information prior to his pleas.

Mr. Byrd argues that the State's failure to disclose this evidence of police misconduct constituted a violation of the State's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). He also argues that the nondisclosure, combined with the fact that the State proffered facts in support of his pleas at his plea hearing and indicated that the officers would testify if necessary at trial, constituted a misrepresentation regarding the officers' credibility under *Brady v. United States*, 397 U.S. 742 (1970). According to Mr. Byrd, these violations rendered his guilty pleas involuntary. The circuit court denied his petition, finding that none of his constitutional or fundamental rights had been violated—a necessary condition for issuance of a writ of error coram nobis. In a reported opinion the Court of Special Appeals affirmed that ruling. *Byrd v. State*, 243 Md. App. 616 (2019).

Held: Affirmed

The Court of Appeals first held that the nondisclosure of the evidence of the officers' misconduct did not constitute a violation of *Brady v. Maryland*. The Court explained that the Supreme Court's opinion in *United States v. Ruiz*, 536 U.S. 622 (2002) established that the prosecution does not have a constitutional obligation to disclose potential impeachment evidence prior to the defendant entering a guilty plea. The Court also held that the nondisclosure did not constitute a misrepresentation under *Brady v. United States*. The Court reasoned that the State never made

any representations to the defendant regarding the credibility of its potential witnesses and the officer misconduct did not have any relation to Mr. Byrd's arrests. Thus, the Court found Mr. Byrd's pleas to be voluntary and affirmed the denial of his petition for coram nobis relief.

Eric Wise v. State of Maryland, No. 73, September Term 2019, filed November 24, 2020. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2020/73a19.pdf

CRIMINAL LAW – HEARSAY – PRIOR INCONSISTENT STATEMENT – POSITIVE CONTRADICTION

CRIMINAL LAW – HEARSAY – PRIOR INCONSISTENT STATEMENT – MATERIALITY

Facts:

Petitioner, Eric Wise, ("Wise") was tried in the Circuit Court for Baltimore City for the murder of Edward Bruce "Bunkhouse" Thomas. The jury convicted Wise of assault in the first degree, use of a firearm in the commission of a crime of violence, and wearing, carrying or transporting a handgun. The jury acquitted him of the charges of first-degree murder, conspiracy to commit murder in the second degree, and assault in the second degree. The State's case against Wise hinged on the eyewitness testimony of Byron Harris, who described the events leading to the murder in a signed, handwritten statement to the police.

Mr. Harris observed Mr. Thomas engaged in an argument with Wise on the front porch of Mr. Harris's home. Mr. Thomas ran into the house while also pushing inside Mr. Harris, who turned to see Wise and another man each brandishing a pistol. Hours later, Mr. Harris heard two gunshots outside. He ran to his front window and saw, from behind, two individuals run away from the front porch and flee on their bicycles. A month later, Mr. Thomas identified Wise in a police photo array as the man present at the scene and responsible for Mr. Thomas's murder.

In an unrelated incident, two years later, a man attempted to rob Mr. Harris while he stood beside a mailbox. The man struck Mr. Harris's head with a gun, causing Mr. Harris to sustain a severe brain injury. Mr. Harris underwent emergency brain surgery, resulting in memory loss and some cognitive defects. The circuit court deemed Mr. Harris competent to testify, but the memory loss interfered with Mr. Harris's factual recall, and he provided a different and contradictory version of events at trial. Over objection, the State admitted Mr. Harris's statement to police under the prior inconsistent statement exception to the hearsay rule.

Wise appealed his convictions to the Court of Special Appeals. He argued that the circuit court erred in admitting Mr. Harris's handwritten statement under the prior inconsistent statement exception to the hearsay rule because Mr. Harris's actual memory loss prevented a finding of inconsistency as a matter of law. The Court of Special Appeals affirmed the circuit court and held that Mr. Harris's conflicting testimony satisfied the requirements for admitting prior inconsistent statements under Maryland Rule 5-208.1(a). The Court of Special Appeals concluded that a party may admit a statement under the rule if there is a material contradiction between the prior statement and trial testimony. The reason for the material contradiction, actual

memory loss or otherwise, does not factor into the legal analysis. Wise duly noted an appeal to the Court of Appeals.

Held: Affirmed.

The Court of Appeals affirmed. The Court held that a witness's written description of a murder made to police before trial, was admissible under the prior inconsistent exception to the hearsay rule, because the witness offered a contradictory and irreconcilable version of events at trial. The witness's memory loss, sustained between his prior statement to police and trial testimony, does not necessarily preclude an inconsistency under Md. Rule 5-802.1. An inconsistency may arise for any reason, including real or feigned memory loss; if it yields a contradiction at trial, the prior statement is admissible

The Court also held that a prior inconsistent statement must contain a material inconsistency compared with the declarant's trial testimony. Maryland Rule 5-208.1(a) codified *Nance v. State*, 331 Md. 549, 569, 629 A.2d 633, 643 (1993), which originally approved of the substantive admission of prior inconsistent statements when the proponent shows both sufficient trustworthiness of the declarant's original statement and an inconsistency with the declarant's testimony. The materiality requirement furthers *Nance*'s purpose by admitting prior inconsistent statements only with sufficient substantive and probative value. Proponents cannot admit an entire prior inconsistent statement predicated on minor or peripheral factual differences in a declarant's testimony.

State of Maryland v. Darrayl John Wilson, No. 64, September Term 2019, filed October 26, 2020. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2020/64a19.pdf

WITNESS TAMPERING – OBSTRUCTION OF JUSTICE – SPOUSAL TESTIMONIAL PRIVILEGE – MERGER

Facts:

Witness informed a law enforcement officer that her boyfriend, Darrayl John Wilson, Respondent/Cross-Petitioner, told her that he and Raymond Posey were involved in the murder of Crystal Anderson. In the Circuit Court for Charles County, the State, Petitioner/Cross-Respondent, separately charged Wilson and Posey with first-degree murder of Anderson and other crimes, initiating the cases of *State v. Darrayl John Wilson*, No. 08-K-15-000551 (Cir. Ct. Charles Cty.) ("*Wilson I*") and *State v. Raymond Daniel Posey III*, No. 08-K-15-000121 (Cir. Ct. Charles Cty.) ("*Posey*").

While incarcerated and awaiting the trial in *Wilson I*, Wilson engaged in multiple telephone and video conversations with witness and others in which he indicated that he wanted to marry witness so that she could refuse to testify at his and Posey's trials. One day before the State was scheduled to call witness as a witness in Posey's trial, and eighteen days before the trial in *Wilson I* was scheduled to begin, Wilson and witness married via a telephone conversation with a pastor. While testifying at Posey's trial, witness attempted to invoke the spousal testimonial privilege. The circuit court ruled that she could not do so and required her to answer the prosecutor's questions. In *Wilson I*, before trial, the State filed a motion to preclude witness from invoking the spousal testimonial privilege, which the circuit court granted. Wilson later pled guilty to offenses in the case.

Subsequently, the State charged Wilson with witness tampering and obstruction of justice as to *Wilson I* and *Posey* on the ground that Wilson married witness to try to have her invoke the spousal privilege and thus preclude her from testifying in both cases. A jury found Wilson guilty of witness tampering and obstruction of justice as to *Wilson I*, but not guilty of witness tampering and obstruction of justice as to *Posey*.

Wilson appealed. The Court of Special Appeals reversed the convictions for insufficient evidence, reasoning that the State failed to prove the "corrupt means" element of witness tampering and obstruction of justice. The State filed a petition for a writ of certiorari, and Wilson filed a conditional cross-petition for a writ of certiorari. The Court granted the petition and granted the conditional cross-petition as to one issue.

Held: Reversed and remanded with instruction to affirm the circuit court's judgments.

The Court of Appeals held that, where a person marries a potential witness for the State with the intent to enable the witness to invoke the spousal testimonial privilege at a criminal proceeding, the evidence is sufficient to support convictions for witness tampering and obstruction of justice. Consistent with our holding in *Romans v. State*, 178 Md. 588, 16 A.2d 642 (1940), *cert. denied*, 312 U.S. 695 (1941), and in accord with the determinations of federal appellate courts, the Court concluded that conduct constituting corrupt means under the witness tampering and obstruction of justice statutes may include conduct that is in and of itself legal. The Court concluded that use of corrupt means involves acting with corrupt intent, *i.e.*, a person uses corrupt means by marrying with the intent to preclude another person from testifying at a criminal proceeding, even though the conduct involved—entering into a marriage—is otherwise lawful. Applying the holding to the circumstances of the case, the Court concluded that the evidence was sufficient to support Wilson's convictions for witness tampering and obstruction of justice given the ample evidence that Wilson married witness with the corrupt intent of having her invoke the spousal testimonial privilege at his upcoming murder trial to prevent the State from compelling her testimony.

The Court also held that Wilson's conviction for witness tampering did not merge for sentencing purposes with his conviction for obstruction of justice in light of an "anti-merger" provision, Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol., 2019 Supp.) ("CR") § 9-305(d), which states: "A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section." The Court determined that, given the plain language of CR § 9-305(d), it was not necessary to determine whether the required evidence test mandates merger of Wilson's convictions for witness tampering and obstruction of justice, and neither the rule of lenity nor the principle of fundamental fairness required merger.

Saint Luke Institute, Inc. v. Andre Jones, No. 62, September Term 2019, filed November 20, 2020. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2020/50a19.pdf

DISCOVERY OF MENTAL HEALTH RECORDS UNDER THE MARYLAND CONFIDENTIALITY OF MEDICAL RECORDS ACT, HEALTH GENERAL ("HG") §§ 4-301 THROUGH 309 ("CONDIFENTIALITY ACT").

HEALTH CARE PROVIDER'S STANDING TO RAISE PATIENT'S OBJECTIONS TO DISCLOSURE.

Facts:

This case arose in the context of a civil case filed in Massachusetts wherein a group of plaintiffs alleged they were sexually abused by Brother Edward Anthony Holmes while they were minor children residing in a children's group home that employed Brother Holmes. One of the Massachusetts plaintiffs, Andre Jones, filed a proceeding in Maryland in the Circuit Court for Prince George's County seeking discovery of Brother Holmes' mental health records, which he believed were in the custody of Maryland-based Saint Luke Institute, Inc. ("SLI"). In accordance with the Maryland Confidentiality of Medical Records Act, Health General ("HG") § 4-301, et seq. (the "Confidentiality Act"), Mr. Jones filed a motion for a court order seeking production of Brother Holmes' mental health records. SLI opposed Mr. Jones' motion for a court order, arguing the circuit court needed to examine pleadings in the Massachusetts action to properly determine whether Brother Holmes' mental condition had been raised and whether such evidence was relevant.

The circuit court did not review the Massachusetts pleadings, nor did the court review the mental health records sought in order to determine the relevance of the records to the Massachusetts action. Without conducting a hearing, the circuit court entered an order requiring SLI to produce any responsive records "under seal to the Superior Court of the Commonwealth of Massachusetts." The circuit court rejected SLI's argument that it was required to examine the pleadings in the Massachusetts action prior to ordering disclosure of the mental health records because the court did not believe two separate courts should be required to review what are likely extensive pleadings to adjudicate a discovery request.

SLI timely appealed to the Court of Special Appeals. In a reported opinion, the intermediate appellate court reversed and remanded the case for further proceedings. *St. Luke Inst., Inc. v. Jones*, 242 Md. App. 617 (2019).

Held: Affirmed.

The Court of Appeals held that, where mental health records are requested by a private party litigant in a civil case in which the patient has not authorized disclosure, the Confidentiality Act, the Maryland discovery rules, and Maryland case law establish the following process for disclosure. The party seeking discovery should file a motion seeking or compelling the disclosure and requesting a court order under HG § 4-307. The movant must establish a "need to inspect"—in other words, a reasonable possibility that review of the records would result in discovery of usable evidence. In considering whether the movant has a need for access to the records, the court should consider the nature of the underlying litigation, the relationship between the records and any claim or defense, and the likelihood that review of the records would result in the discovery of relevant information.

Once the movant makes a threshold proffer sufficient to enable the court to determine that there is a "need to inspect," the court should undertake an *in camera* review of the documents sought to be disclosed to ensure that the records sought are relevant, and to ensure that disclosure is limited to only those records that may be relevant. In undertaking the in camera review and relevancy analysis, the trial court is not required to review the records on a line-by-line basis and redact accordingly. If the court determines that the records are relevant, it should enter an order under Maryland Rule 2-403(b) authorizing the disclosure with adequate provisions or restrictions to protect the patient's privacy interests as it determines are appropriate on a case-by-case basis. Such conditions or restrictions should include a provision prohibiting redisclosure and requiring the return of original records and the return or destruction of any copies made, at the conclusion of the litigation.

The Court further held that under the plain language of the Confidentiality Act, HG § 4-307(k)(6), where a litigant is seeking discovery of mental health records, the health care provider or custodian has standing to raise a patient's "constitutional right or other legal authority in opposition to disclosure."

The Court determined that, based upon the proffer made by Mr. Jones in his motion requesting production of the records, he had demonstrated a sufficient "need to inspect." However, given the balancing of interests that the circuit court is required to make and the statutory restriction that the court is only permitted to disclose relevant information, the Court remanded the matter to the circuit court for the court to examine the complaint filed in the Massachusetts Action, and to undertake an *in camera* review of the records and a relevancy analysis. Assuming the court determines that the records are relevant, the circuit court should order the portion of Brother Holmes' mental health records deemed to be relevant to be produced under seal to the Massachusetts Court for that court's determination as to what should be released to counsel.

Tyson Farms, Inc., et al. v. Uninsured Employers' Fund, No. 5, September Term 2020, filed November 20, 2020. Opinion by Watts, J.

McDonald, J., dissents.

https://www.mdcourts.gov/data/opinions/coa/2020/5a20.pdf

WORKERS' COMPENSATION – DETERMINATION OF EMPLOYER-EMPLOYEE RELATIONSHIP – CO-EMPLOYMENT

Facts:

Mauro Jimenez Garcia sustained an occupational disease of the lungs while working and residing on a chicken farm in Worcester County, Maryland, owned by Dai K. Nguyen, Ind. t/a TN, LLC. The chickens on the farm were raised for, and owned by, Tyson Farms, Inc., Petitioner. Pursuant to the Maryland Workers' Compensation Act, Md. Code Ann., Lab. & Empl. (1991, 2016 Repl. Vol.) ("LE") §§ 9-101 to 9-1201, Garcia filed a claim with the Workers' Compensation Commission against Nguyen. Because Nguyen did not have workers' compensation insurance, the Uninsured Employers' Fund ("UEF"), Respondent, became involved in the claim. Subsequently, Garcia and UEF impleaded Tyson into the claim. Following a hearing, the Commission issued an award of compensation, determining that Garcia was a covered employee who sustained an occupational disease arising out of and in the course of his employment and that Nguyen and Tyson were co-employers of Garcia.

Tyson sought judicial review in the Circuit Court for Worcester County and requested a jury trial. The circuit court conducted a two-day jury trial, at which the sole issue was whether Tyson was a co-employer of Garcia. After the conclusion of the evidence in the case, both UEF and Tyson moved for judgment. The circuit court denied the motions. The jury returned a verdict in favor of Tyson, finding that Tyson was not Garcia's co-employer.

UEF noted an appeal, raising a single question for review—whether the circuit court erred in denying its motion for judgment. In a reported opinion, a majority of a panel of the Court of Special Appeals reversed the circuit court's judgment, determining that no reasonable inference could be drawn from the evidence other than that Tyson was Garcia's co-employer. *See Uninsured Employers' Fund v. Tyson Farms, Inc*., 243 Md. App. 406, 422, 220 A.3d 429, 438-39 (2019). The Court of Special Appeals concluded that "Tyson's control over [] Garcia's work was more than sufficient to establish an employment relationship as a matter of law[,]" reasoning that "Tyson's extensive involvement in, and control over, [] Garcia's day-to-day operation of the farm gave rise to an employment relationship as a matter of law." *Id*. at 416, 417, 220 A.3d at 435, 436. The Honorable Steven B. Gould dissented and stated that, "[i]n [his] view, there are sufficient facts in the record to allow a reasonable jury to determine, as it in fact did here, that Tyson was not [] Garcia's co-employer." *Id*. at 422, 220 A.3d at 439 (Gould, J., dissenting).

Held: Reversed.

The Court of Appeals held that the Court of Special Appeals erred in concluding that the evidence was sufficient to establish that Tyson was Garcia's co-employer as a matter of law and in reversing the circuit court's judgment. The Court concluded that there was sufficient evidence from which a reasonable jury could find—as it did—that Tyson was not a co-employer of Garcia. The circuit court properly denied UEF's motion for judgment, as the evidence adduced at trial was susceptible to differing reasonable inferences, including the inference that Tyson did not exercise the control over Garcia necessary to be deemed a co-employer.

The Court of Appeals determined that the evidence adduced at trial plainly demonstrated that Tyson regulated the operation of the workplace (a chicken farm) and the growth and handling of its product (the chickens). But Tyson's regulation of the workplace and the product did not equate to, or automatically mean, that it had the power to control Garcia's conduct necessary for it to be determined to be Garcia's co-employer as a matter of law. The Court stated that the Court of Special Appeals erred in deciding the factor of control as a matter of law where the evidence of control of the worker was susceptible to two equally reasonable inferences, that Tyson was or was not a co-employer of Garcia, and other factors to be considered in ascertaining whether an employment relationship existed—such as the selection and hiring of Garcia, payment of wages, and the ability to fire Garcia—weighed in favor of finding that Tyson was not Garcia's co-employer. By concluding that "Tyson exercised extensive control over [] Garcia's work at the farm, such that [] Garcia was an employee of Tyson[,]" *Tyson Farms*, 243 Md. App. at 421, 220 A.3d at 438, the Court of Special Appeals did not allow for the possibility that there were reasonable inferences to be drawn from the evidence that supported both sides of the argument.

The Court of Appeals concluded that, under the standard of review applicable to motions for judgment, viewing the evidence and the reasonable inferences to be drawn from it in the light most favorable to the non-moving party (here, Tyson), the circuit court properly denied UEF's motion for judgment because the facts and circumstances did not permit only one inference as to the issue of whether Tyson was a co-employer of Garcia. What could be reasonably inferred from the testimony and the other evidence adduced at trial was that, although Tyson may have had certain contractual requirements concerning the operation of a chicken farm—including practices and procedures for producing chickens and maintaining the chicken houses—taking the evidence in the light most favorable to Tyson, there were conflicting inferences to be drawn as to whether Tyson had sufficient control over Garcia's work performance to be deemed a co-employer.

The Court of Appeals concluded that, in short, because the evidence supported differing inferences about whether Tyson or Nguyen or both controlled Garcia's conduct as an employee and other factors to be considered weighed in favor of finding that Nguyen was Garcia's only employer, the circuit court properly denied UEF's motion for judgment and allowed the jury to determine as a question of fact whether an employer-employee relationship existed between

Tyson and Garcia. At bottom, there were disputed inferences about control and the circuit court properly denied motions for judgment because it could not be determined as a matter of law that Garcia was an employee of Tyson.

The Court of Appeals stated that, although there may be a concern that different juries could reach different results based on similar facts, each case will necessarily involve its own set of circumstances and trial courts (and appellate courts) must take a case-by-case approach. The Court refrained from announcing a blanket rule that under the standard Tyson contract, any on-site manager for an absentee owner either is or is not Tyson's employee. In other words, the Court did not endorse the idea that Tyson can never be found to be an employer or co-employer of a farm worker. The trier of fact will need to examine the circumstances of the case to determine whether an employer-employee relationship exists between Tyson and a chicken farm worker.

Montgomery County, Maryland v. Anthony G. Cochran and Andrew Bowen, No. 69, September Term 2019, filed October 26, 2020. Opinion by Watts, J.

McDonald and Getty, JJ., concur.

https://www.mdcourts.gov/data/opinions/coa/2020/69a19.pdf

WORKERS' COMPENSATION ACT – OCCUPATIONAL DEAFNESS – MD. CODE ANN., LAB. & EMPL. (1991, 2016 REPL. VOL.) § 9-650(b)(3) —CALCULATION OF DEDUCTION FOR "EACH YEAR OF THE COVERED EMPLOYEE'S AGE OVER 50 AT THE TIME OF THE LAST EXPOSURE TO INDUSTRIAL NOISE" – COMPENSABLE DISABLEMENT – TINNITUS

Facts:

The Maryland Workers' Compensation Act, Md. Code Ann., Lab. & Empl. (1991, 2016 Repl. Vol.) ("LE") §§ 9-101 to 9-1201, expressly recognizes that loss of hearing may occur on the job due to industrial noise and makes such hearing loss compensable under certain circumstances. The Workers' Compensation Act states that an employer shall provide compensation to a covered employee for loss of hearing due to industrial noise in specified frequencies, also known as occupational deafness, or for a disability resulting from an occupational disease. *See* LE §§ 9-505(a), 9-502(c)(1). Specifically, LE § 9-505(a) states that, "[e]xcept as otherwise provided, an employer shall provide compensation in accordance with this title to a covered employee for loss of hearing by the covered employee due to industrial noise in" four specified frequencies. LE § 9-650 sets forth the formula for calculating total average hearing loss and LE § 9-650(b)(3) provides for a deduction of the average decibel loss, stating:

> To allow for the average amount of hearing loss from nonoccupational causes found in the population at any given age, there shall be deducted from the total average decibel loss determined under paragraphs (1) and (2) of this subsection one-half of a decibel for each year of the covered employee's age over 50 at the time of the last exposure to industrial noise.

In this case, Anthony G. Cochran, Respondent, and Andrew Bowen, Respondent/Cross-Petitioner, were firefighters for Montgomery County, Maryland ("the County"), Petitioner/Cross-Respondent, for over thirty years. Both Cochran and Bowen developed hearing loss from exposure to loud noises they repeatedly encountered on the job as firefighters. Bowen also developed tinnitus, or ringing in the ears. After retiring, Cochran and Bowen each underwent audiograms, which showed hearing loss in both ears, and each filed a claim under LE § 9-505 with the Workers' Compensation Commission ("the Commission") seeking compensation for hearing loss and, in Bowen's case, compensation for tinnitus, too.

The Commission awarded compensation to both Cochran and Bowen and calculated the deduction under LE § 9-650(b)(3) by counting the number of years between each man's 50th birthday and the date of his retirement. The Commission found that Cochran and Bowen had sustained hearing loss arising in and out of the course of their employment as firefighters, and that Bowen had also sustained tinnitus arising in and out of the course of his employment as a firefighter. As to Bowen, later, the Commission awarded Bowen compensation for a permanent partial disability for bilateral hearing loss and an additional permanent partial disability of 2% industrial loss of use of the body as a result of tinnitus.

The County filed separate petitions for judicial review in the Circuit Court for Montgomery County, which affirmed the Commission's decisions. The County appealed each case to the Court of Special Appeals, which consolidated the cases. In a reported opinion, addressing how the deduction set forth in LE § 9-650(b)(3) should be calculated, the Court of Special Appeals held that the Commission correctly calculated "the deduction by counting the number of years between each firefighter's 50th birthday and the dates they retired from service." *Montgomery Cty. v. Cochran*, 243 Md. App. 102, 126, 219 A.3d 122, 136-37 (2019). The Court of Special Appeals held, though, that the Commission erred in awarding permanent partial disability benefits to Bowen for tinnitus. *See id.* at 129, 219 A.3d at 138. Although not a question raised by the County, the Court of Special Appeals determined that compensation for tinnitus must be determined under LE § 9-502 as an ordinary occupational disease, not under LE § 9-505 as part of occupational deafness. *See id.* at 129, 219 A.3d at 138-39. The Court of Special Appeals concluded that, because Bowen did not establish disablement under LE § 9-502, the Commission erred in awarding him benefits for tinnitus. *See id.* at 129-30, 219 A.3d at 139. The Court of Special Appeals affirmed the circuit court's judgment in Cochran's case and affirmed in part and reversed in part the circuit court's judgment in Bowen's case. *See id.* at 107, 133, 219 A.3d at 125, 141. We granted *certiorari* to consider the proper date for the calculation of the deduction under LE § 9-650(b)(3) and whether the Court of Special Appeals erred in reversing the Commission's award of permanent partial disability to Bowen for tinnitus. *See Montgomery Cty. v. Cochran*, 467 Md. 263, 224 A.3d 601 (2020).

Held: Affirmed in part and reversed in part.

The Court of Appeals held that the Commission did not err in calculating the deduction of decibels from Cochran's and Bowen's total average hearing losses under LE § 9-650(b)(3) by counting the number of years between each firefighter's 50th birthday and the dates that they each retired from employment with the County. The Court concluded that the plain and ordinary meaning of the term "industrial noise" as used in LE § 9-650(b)(3) is occupational noise or noise encountered in the workplace in the employment of the employer. Thus, the phrase "time of the last exposure to industrial noise" means the date that an employee is last exposed to occupational noise, *i.e.*, the date of the employee's retirement, and not the date of a hearing test measuring hearing loss.

The Court of Appeals determined that, although neither LE § 9-650 nor any other statute in the Workers' Compensation Act defines "last exposure to industrial noise" or "industrial noise," it was clear that the plain meaning of the term "industrial noise" is occupational noise or noise encountered on the job. Indisputably, what could be gleaned from the plain language of LE § 9-650(b)(3) was that the General Assembly intended the deduction to be calculated by using the date of the "last exposure to industrial noise." The plain meaning of that phrase was that the last exposure to industrial noise is the last date that an employee encounters occupational noise on the job, *i.e.*, the employee's retirement date. On its face, the plain language of the statute suggested nothing else. A reading of the phrase "last exposure to industrial noise" in no way denoted that the language meant the date of a hearing test, *i.e.*, the words "exposure to industrial noise" clearly did not mean or even suggest a reference to the date a person takes a diagnostic hearing test. The Court stated that it would strain logic to conclude that "last exposure to industrial noise" somehow means the date of a hearing test when LE § 9-650(b)(3) does not reference or mention the date that a hearing test is performed or otherwise give any indication that the date of the hearing test is relevant to the calculation of the deduction. Nor did the plain language of the statute lead to the conclusion that "industrial noise" means loud noises generally encountered in everyday life, such as vacuuming or driving by a construction site.

The Court of Appeals concluded that what could be ascertained from the legislative history was that the General Assembly intended for the Commission to calculate the deduction set forth in LE § 9-650(b)(3) by counting the number of years between a claimant's 50th birthday (originally 40th birthday) and the time of the last exposure to industrial noise. There was no mention or hint of last exposure to industrial noise meaning a hearing test in any version of the statute. The Court stated that the plain meaning of LE § 9-650(b)(3) was clear and the legislative history did not lead to the conclusion that industrial noise means anything other than occupational noise. Applying the plain language of LE § 9-650(b)(3) to the circumstances of the case, the Court was convinced that the Commission properly concluded that Cochran's and Bowen's last exposure to industrial noise was the date that each firefighter retired and correctly calculated the deduction set forth in LE § 9-650(b)(3) by counting the number of years between each man's 50th birthday and the date of retirement.

The Court of Appeals held that any issue as to whether Bowen sustained a compensable disablement due to tinnitus, *i.e.*, whether tinnitus is compensable under LE § 9-502 as an occupational disease upon establishment of disablement and not under LE § 9-505 as part of an occupational deafness claim, was not before the Court of Special Appeals. The Court stated that the record demonstrated that only the nature and extent of permanent partial disability due to hearing loss and tinnitus were at issue before the Commission, as well as the circuit court and the Court of Special Appeals, and not whether Bowen had sustained a compensable disablement due to tinnitus. The Court concluded that the Court of Special Appeals erred in considering the matter and in reversing the Commission's award of permanent partial disability benefits to Bowen for tinnitus.

COURT OF SPECIAL APPEALS

GenOn Mid-Atlantic, LLC, et al. v. Maryland Department of the Environment, et al., Nos. 883, 884, & 885, September Term 2019, filed October 28, 2020. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2020/0883s19.pdf

ADMINISTRATIVE LAW – QUASI-JUDICIAL AGENCY DISCRETION

Facts:

GenOn Mid-Atlantic ("GenOn") operates three coal-powered power plants in Charles, Montgomery, and Prince George's Counties in Maryland. GenOn's plants create pollutants as a byproduct. The Clean Water Act forbids businesses like GenOn's from discharging pollutants into our waters unless they apply for and obtain a permit from the Environmental Protection Agency. In Maryland, the EPA has delegated its permitting authority to the Maryland Department of the Environment (the "Department"). The permits, in turn, contain restrictions on the type and quantity of pollutants that the discharger may release as outlined by EPA's federal regulations. At the time the permits were issued, EPA's most recent guidance regarding coal-powered plants like GenOn's was published in 2015 (the "2015 Final Rule"), 80 Fed. Reg. 67,838 (Nov. 3, 2015), although the restrictions regarding certain waste streams were postponed slightly in 2017 (the "2017 Postponement Rule"), 82 Fed. Reg. 43,494 (Sept. 18, 2017). GenOn applied for and received renewed permits for its three plants in 2018, and those permits contained restrictions outlined in the 2015 Final Rule under the timeframe set forth in the 2017 Postponement Rule. In other words, the permits tracked the federal regulations in place at the time.

GenOn sought judicial review of the permitting decisions in the three circuit courts and argued that its plants should not be bound by the limits set forth in the 2015 Final Rule. It contended that the EPA had evinced an intent to modify the 2015 Final Rule, and therefore the Department's decision to issue permits that tracked the regulation was arbitrary and capricious. It argued further that the Department's decision was not supported by substantial evidence in the administrative record because GenOn had not submitted data regarding its ability to meet the restrictions to the Department. The circuit courts affirmed the Department's permitting decisions, GenOn appealed in the three respective cases, and this Court consolidated the appeals.

Held: Affirmed.

The Court of Special Appeals affirmed. First, the Court held that the Department's permitting decision was not arbitrary and capricious. The Court reviewed the 2015 Final Rule and found it set forth, in clear and unambiguous terms, the restrictions that govern coal-powered steam electric plants like GenOn's and set a definitive compliance deadline of November 1, 2020. Although GenOn argued preamble language from the 2015 Final Rule and 2017 Postponement Rule indicated the EPA's intent to amend the rules in the future, the Court held that preamble language is not controlling over the language of the regulation itself. The Court noted that if EPA did not want the rules in place to be enforced, it could have taken action to amend the rules. EPA had not yet done so, and as such the Court held that to render the rules preemptively ineffective would ignore the plain, unambiguous language of the regulations. Further, the Court held that even if we were to look to the preamble language, it did not include an express intent to indefinitely postpone compliance under the rules.

Second, the Court held that the Department's permits were supported by substantial evidence in the record. GenOn argued that because it had not submitted its own feasibility information to the Department, the record before the Department was incomplete and therefore the matter must be remanded to the agency. However, the Court held that the record contained enough support, including feasibility information submitted by other organizations. Additionally, the Court noted that appellate review "shall be on the administrative record" and is "limited to objections raised during the public comment period." *See Potomac Riverkeeper v. Md. Dep't of the Env't*, 238 Md. App. 174, 203 (2018). GenOn failed to object about its capacity to meet the permit requirements during the comment window or demonstrate before the Court that its feasibility argument constituted a genuinely new objection. Accordingly, the Court held that the Department's permitting decision was supported by the record and remand to the Department was unnecessary.

Heather Myers v. State of Maryland, No. 297, September Term 2019, filed November 18, 2020. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2020/0297s19.pdf

CRIMINAL LAW – NEGLECT OF A MINOR – CONSTITUTIONAL LAW – VOID FOR VAGUENESS – PRECEDENTIAL SIGNIFICANCE – SPLIT DECISIONS

Facts:

On January 19, 2018, S.N. left her two-year-old daughter with Heather Myers, appellant, an in-home daycare provider. Appellant fell asleep on her living room couch, and she woke up when she heard a thud. She found the child unconscious in a bedroom. Appellant was unable to wake the child and called S.N. several times. Appellant did not call 911 until after she reached S.N. The child was transported to the hospital. It was determined that she had suffered a catastrophic brain injury that left her blind and functioning at the level of a 3-to-4-month-old child. After doctors concluded that the child's injuries were inconsistent with appellant's original story, appellant was re-interviewed, and she admitted that she had used heroin the night before the accident, and that she had fallen asleep because she was suffering from withdrawal.

Appellant was charged in the Circuit Court for Baltimore County with neglect of a minor, in violation of Md. Code Ann., Criminal Law Article ("CR") § 3-602.1 (2012 Repl. Vol.). She filed a motion to dismiss, arguing that the statute was unconstitutionally vague. After the circuit court denied the motion, appellant entered a conditional guilty plea, preserving her right to appeal the constitutionality of the statute.

Held: Judgment affirmed.

The Court of Special Appeals is not bound by the conclusion of five judges, in concurring and dissenting opinions in *Hall v. State*, 448 Md. 318 (2016), that CR § 3-602.1 was not unconstitutionally vague as applied to the facts of that case.

The holding of a plurality decision of the Supreme Court is "that position taken by those Members who concurred in the judgments on the narrowest grounds." *State v. Falcon*, 451 Md. 138, 161 (2017) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). In determining the precedential significance of a Court of Appeals decision without a majority opinion, the Court of Appeals follows a "somewhat similar approach." *Id*., at 162. This approach analyzes whether there is a position adopted by a majority of the judges, whether or not they concurred in the judgment, including those set forth in dissenting opinions.

Where there is a majority opinion on one issue that resolves the case, statements of law set forth in concurring and dissenting opinions on a separate issue, even if joined by a majority of the judges, do not have precedential authority. The views expressed, however, are persuasive.

CR § 3-602.1(b) provides that "[a] parent, family member, household member, or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not neglect the minor." "'Neglect' means the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor." CR § 3-602.1(a)(5)(i).

CR § 3-602.1, on its face and as applied to the facts of appellant's case, is not unconstitutionally vague. It provides fair notice of the conduct that is prohibited, and it does not lead to arbitrary enforcement. Here, appellant, an unlicensed daycare provider, fell asleep and failed to supervise the two-year old in her care because she consumed heroin the night before and was suffering from withdrawal, and she failed to seek prompt medical care after the child fell and was unconscious. A person of ordinary intelligence and experience in appellant's circumstances would have understood that CR § 3-602.1 prohibited her conduct.

Nathan Joseph Johnson v. State of Maryland, No. 109, September Term 2018.
Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2020/0109s18rem.pdf

REMAND FROM COURT OF APPEALS – MOTION TO RECONSIDER OR REMAND FOR RESENTENCING

Facts:

In *Johnson v. State*, 245 Md. App. 46 (2020), the Court of Special Appeals affirmed the judgments in all respects except one: the Court reversed Mr. Johnson's conviction for involuntary manslaughter. On February 18, 2020, the State filed a timely Motion to Reconsider and Remand for Resentencing on Reckless Endangerment and Possession [with Intent to] Distribute Heroin and Fentanyl. The Court ordered Mr. Johnson to respond, and at its Conference on March 31, 2020, the Court denied the motion by order.

The State filed a petition for writ of *certiorari* in the Court of Appeals, and the Court granted that petition on June 5, 2020. The Court held oral argument on November 5, 2020, and, by Order dated November 10, 2020, the Court of Appeals remanded this case to this Court, without affirming or reversing, in order that the Court of Special Appeals might "clarify the basis of its decision on April 14, 2020 denying Petitioner's motion for reconsideration."

Held:

The Court explained that after considering the motion to reconsider, the panel split 2-1. Judges Nazarian and Zarnoch voted to deny the motion. Judge Graeff voted to grant the motion because the reversal of the involuntary manslaughter conviction reduced Mr. Johnson's conviction from thirty years' incarceration, with all but twelve years suspended, to twenty years' incarceration, with all but five years suspended, and, in her view, the trial court should have the ability to reconsider its sentencing package in light of our holding.

Two considerations animated the panel's discussions and recommendation, and the Court's ultimate decision to deny the State's motion to reconsider. First, the relief the State sought in its motion—a remand for resentencing after *reversal* of Mr. Johnson's conviction for involuntary manslaughter—had not been sought until after the Court issued its opinion.

The second consideration was the application of Maryland Rule 8-604(d)(1) and the principles articulated in *Twigg v. State*, 447 Md. 1 (2016), as applied to the facts and circumstances of this case. Judge Nazarian voted to deny the motion for this reason as well. Judge Zarnoch voted against reaching this issue because it had not been raised in the briefing and argument on the merits.

The Court went on to explain that a mere statement of reasons left out the most important element of the panel majority's decision: its discretion as a Court to make it. No case, statute, or other authority *compelled* the outcome of this motion. The judges' differences as a panel represent differences only as to *how* the panel should exercise its discretion in addressing the State's motion, and specifically, whether this is an appropriate case to grant the discretionary relief the State seeks. To the extent, then, that the State contends that *Twigg* (or any other authority) requires an appellate court to remand under these (or any) circumstances, the Court disagreed.

As a matter of holding, the Court of Appeals stated that *Twigg* stands for the proposition that appellate courts have the *discretionary* authority to remand cases for resentencing in response to their decision when the trial court's sentencing package has been disrupted by mergers the trial court didn't anticipate or consider. As a matter of principle, nothing in *Twigg* appears to preclude an appellate court from ordering a *Twigg* remand in a case where the sentencing package was disturbed by a decision to reverse a conviction. But by the same token, *Twigg* can't reasonably be read to compel a remand under these circumstances, especially if a remand is *discretionary* in a merger case such as *Twigg*. The authority to order a remand for resentencing lies in the discretion of the appellate court that reviewed the conviction and decided to reverse it. And in this case, the three members of the panel reached different conclusions about whether this Court *should* exercise its discretion to order a remand. There is no debate among the panel about whether it could, only whether this is an appropriate case to exercise that discretion.

Michael Geoffrey Jamsa v. State of Maryland, No. 1012, September Term 2019, filed October 28, 2020. Opinion Salmon, J.

https://mdcourts.gov/data/opinions/cosa/2020/1012s19.pdf

CRIMINAL PROCEDURE – QUANTATATIVE TESTING – MARYLAND RULE 4-263(d)(9)

Facts:

Michael Geoffrey Jamsa ("Jamsa") was charged in the Circuit Court for Montgomery County with second-degree assault, altering evidence, and possession of a controlled substance (cocaine) with intent to distribute. After Jamsa's arrest, the Montgomery County Police laboratory examined 5.93 of a white powdery substance that had been found in Jamsa's possession when he was arrested. The laboratory concluded that the white powdery substance contained cocaine, however, the laboratory did not make a quantitative analysis to determine the percentage of cocaine in the white powdery substance.

Prior to trial, Jamsa's counsel filed a motion for appropriate relief asking the court to order the State to allow him, at his own expense, to have the white powdery substance analyzed at a Pennsylvania laboratory to determine the percentage of cocaine in the substance (quantitative testing) that was seized. Defense counsel asserted that his client had a good faith basis to believe that the majority of the substance in question was not cocaine. The judge who presided at the hearing held the view, based on *Collins v. State*, 89 Md.App. 273, 279 (1991), that in a possession with intent to distribute case, it did not matter what percentage of the white powdery substance was actually cocaine and therefore quantitative analysis would not benefit the defense. Defense counsel disagreed citing *Harris v. State*, 324 Md. 490, 492-93 (1991) and *Anaweck v. State*, 63 Md.App. 239 (1985) for the proposition that if the powdery substance was of high purity, this could help support an inference that the substance was held for purposes of distribution. According to defense counsel, by parity of reasoning, if the powdery substance had only trace amounts of cocaine, or a very small amount, the jury could legitimately infer that there was no intent to distribute.

The hearing judge also was concerned about what might happen if evidence in the case (the white powdery substance) was sent out of state. Defense counsel responded that previously the State had offered to allow the substance to be transferred out of state so long as the defense consented to a whole series of very strict safeguards. Although prior defense had originally not accepted those strict safeguards, present counsel announced that he was now willing to do so. Nevertheless, the hearing judge refused to allow defense counsel permission to take the State's evidence in order to have it quantitatively examined out of state.

Held: Reversed.

The Court of Special Appeals agreed with Jamsa's argument that if the quantitative analysis showed that the white powdery substance possessed by Jamsa contained only a trace amount, or a very small amount of cocaine, such a finding could be relevant to the jury's determination of whether appellant even knew that the white powdery substance contained cocaine. Moreover, even if the jury determined that Jamsa knew that the white powdery substance contained traces of cocaine, the small quantity could be a factor that the jury might consider in determining whether he possessed the white powdery substance for his own personal use or for sale or distribution. Quantitative testing should be allowed, however, only if the defendant can express a good faith belief that the powdery substance only contained a small amount of cocaine. If, as here, a defendant expresses such a good faith belief and agrees to reasonable safeguards that will assure the integrity of the substance to be examined, a defendant has a right to have the substance quantitatively analyzed. Because the parties stipulated that quantitative testing could not be done in Maryland, then such testing could be done in Pennsylvania where a lab existed that could do such testing.

Donegal Associates, LLC v. Christie-Scott LLC, No. 385, September Term 2019, filed November 19, 2020. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2020/0385s19.pdf

PROPERTY; LANDLORD-TENANT – TORTS – CONVERSION OF PERSONALTY – SELF-HELP EVICTION

Facts:

Christie-Scott, LLC ("Christie-Scott"), appellee, owned and operated Victoria & Albert Hair Studios and leased the salon space from Donegal Associates, LLC ("Donegal"), appellant. The commercial lease provided that, if Christie-Scott failed to pay rent, or additional rent, Donegal was entitled to "[p]erfect and otherwise enforce a lien" on "all personal property, fixtures, and trade fixtures" in the salon.

In October 2016, the commercial lease ended. Christie-Scott remained in the space, continued to pay rent, and the parties engaged in negotiations regarding a new lease. In June 2017, Christie-Scott notified Donegal that it did not intend to renew the lease because it was moving the business to another location. A few days later, Donegal sent Christie-Scott a letter stating that it considered the salon to be a holdover tenant in accordance with lease, and it demanded immediate payment of double rent dating back to the expiration of the lease. After that letter, until October 2017, Christie-Scott remained in the space and continued to pay only the normal rent amount.

On November 6, 2017, Donegal repossessed the property using non-judicial self-help. The following day, Christie-Scott filed a complaint in the Circuit Court for Howard County alleging, among other things, conversion of the property within the salon. The circuit court found Donegal liable on this count, and it awarded Christie-Scott compensatory and punitive damages.

Held: Reversed and remanded

Conversion is an intentional tort consisting of any distinct act of ownership or dominion exerted by one person over the personal property of another in denial of his or her right or inconsistent with it. Conversion may be either direct or constructive. In a direct conversion, the initial taking is unlawful. Constructive conversion occurs when the defendant's possession is initially lawful, but there is a wrongful detention. To establish a constructive conversion, the plaintiff must show that he or she demanded the return of the property, and the holder refused.

A commercial landlord is permitted, although it is not encouraged, to resort to self-help to repossess premises and property within the premises in the following circumstances: (1) the tenant is in breach of a lease; (2) that authorizes the remedy of repossession; and (3) the

repossession can be done peacefully. In this case, those circumstances were satisfied, and therefore, the initial taking was lawful and there was no direct conversion of the property seized. Constructive conversion was not shown where there was no demand made prior to filing suit for conversion. To establish a claim for constructive conversion, a pre-lawsuit demand and refusal is required. The court, therefore, erred in finding Donegal liable for conversion of Christie-Scott's property.

Willie James Barton, Jr., et al v. Advanced Radiology P.A., et al, No. 1336, September Term 2019, filed November 23, 2020. Opinion by Wells, J.

https://mdcourts.gov/data/opinions/cosa/2020/1336s19.pdf

CIVIL LAW – MEDICAL MALPRACTICE – "LOSS OF CHANCE" – CIVIL PROCEDURE – MOTION NOTWITHSTANDING THE VERDICT

Facts:

Appellants, Charles Burton, individually and as personal representative of his wife, Lana Burton's estate, Larae Burton McClurkin, Willie Barton, and the Estate of Melba Barton (collectively, "the Burtons") appeal from an order in which the Circuit Court for Baltimore County granted appellees, Advanced Radiology, P.A. and Dr. Sanford Minkin (the "healthcare providers"), judgment notwithstanding the verdict. A jury found that appellees breached the standard of care in the treatment of Lana Burton and that this breach was a cause of her death. The jury awarded $282,529.00 in non-economic damages to the Estate of Lana Burton, $300,000.00 to her husband, Charles Burton "for the loss of financial support as well as the replacement value of the services that she furnished or probably would have furnished," and $2 million in non-economic damages to Larae Burton McClurkin, her daughter.

The trial court granted the healthcare providers judgment notwithstanding the verdict ("JNOV"), finding that the Burtons failed to prove that Dr. Minkin's breach of the standard of care was the proximate cause of Lana Burton's death. Specifically, the court found that appellants' causation expert established that Ms. Burton had a greater than fifty percent probability of survival even if one assumed that Dr. Minkin failed to timely diagnose her with breast cancer.

Held: Reversed.

The Burtons contended that in granting healthcare providers' motion JNOV, the trial court employed the theory of "loss of chance." On review, the Court of Special Appeals discussed what the loss of chance theory entails and how it is different from the causation requirement in a standard medical malpractice negligence action. The Court acknowledged that Maryland has not recognized loss of chance as a tort recovery theory, nor can loss of chance be used as a shortcut to avoid proof of causation. The Court concluded that unless and until the Court of Appeals reverses course, loss of chance remains unavailable as a vehicle for tort recovery in Maryland.

Here, the Court determined that in granting the healthcare providers' JNOV the trial court did not engage in a loss of chance analysis but employed a causation analysis. However, the court's focus was misdirected. Rather than engage in a determination of whether the healthcare providers' negligence was a cause of Ms. Burton's untimely death, the court focused on the

likelihood that she died from cancer, rather than anything the healthcare providers did or did not do.

The Court held that in deciding a motion JNOV, a court is obliged to view the entirety of the evidence in the light most favorable to the non-moving party, the Burtons. Here, the evidence was sufficient to send the issue of the healthcare providers' alleged negligence to the jury. The evidence was "slight" enough for the jury to find in favor of either the healthcare providers or the Burtons. The jury resolved conflicts in the evidence in the Burtons' favor. Their verdict should be reinstated.

ATTORNEY DISCIPLINE

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This is to certify that the name of

JOSEPH C. CAPRISTO

has been replaced upon the register of attorneys in this Court as of November 6, 2020.

*

By a Per Curiam Order of the Court of Appeals dated November 20, 2020, the following attorney has been disbarred:

DARRYL RUSSEL ARMSTRONG

*

By a Per Curiam Order of the Court of Appeals dated November 20, 2020, the following attorney has been disbarred:

WORTHAM DAVID DAVENPORT

*

By an Opinion and Order of the Court of Appeals dated November 20, 2020, the following attorney has been indefinitely suspended:

FERDINAND UCHECHUKWU IBEBUCHI

*

By an Order of the Court of Appeals dated November 25, 2020, the following attorney has been place on inactive status by consent:

PAUL JOSEPH GONZALEZ

*

JUDICIAL APPOINTMENTS

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On October 1, 2020, the Governor announced the appointment of **Terrence Mark Ranko Zic** to the Court of Special Appeals (at large). Judge Zic was sworn in on November 10, 2020 and fills the vacancy created by the retirement of the Hon. Alexander Wright, Jr.

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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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Animashaun, Ayodeji Kayode v. State	1165 *	November 5, 2020
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Dept. of Health v. Myers	3168 **	November 9, 2020
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