

Amicus Curiarum

VOLUME 30
ISSUE 10

OCTOBER 2013

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

Constitutional Law

Ineffective Assistance of Counsel

Coleman v. State5

Right to Counsel Under Maryland Declaration of Rights, Article 24

DeWolfe v. Richmond7

Criminal Law

Confrontation Clause

Cooper v. State9

DNA Collection Act

King v. State11

Retroactivity of Supreme Court Decisions

Miller v. State13

Surrogate Testimony

Derr v. State15

Waiver of Jury Trial

Winters v. State18

Election Law

Referendum - Municipal Annexation Resolution

Town of La Plata v. Faison-Rosewick, LLC20

Family Law

Resources of Child in Need of Assistance

In re: Ryan W.22

Labor & Employment

Jones Act – Seaman Status

Dize v. Association of Maryland Pilots25

Labor & Employment (continued)	
Wage Payment and Collection Law	
Ocean City Chamber of Commerce v. Barufaldi.....	27
Torts	
Contributory Negligence	
Coleman v. Soccer Association of Columbia	29
General Acceptance Test	
Chesson v. Montgomery Mutual Insurance Co.	31
Negligence and Trespass	
Litz v. Maryland Department of the Environment.....	33
COURT OF SPECIAL APPEALS	
Administrative Law	
Health	
Roane v. Maryland Board of Physicians.....	36
Civil Procedure	
Bad Faith or Meritless Defense	
Old Frederick Rd. v. Wiseman	39
Cross-Jurisdictional Tolling	
Adedje v. Westat, Inc.....	41
Denial of a Motion to Alter or Amend	
Llanten v. Cedar Ridge Counseling Center	43
Constitutional Law	
Right to Intimate Association	
Cross v. Baltimore City Police Department.....	45
Contract Law	
Liquidated Damages Provisions	
CAS Severn, Inc. v. Awalt.....	47
Courts & Judicial Proceedings	
Bank Accounts	
O'Brien v. Bank of America.....	49
Criminal Law	
Bad Checks	
Albertson v. State.....	51
Consciousness of Guilt	
Wagner v. State.....	52

Criminal Law (continued)	
Disclosure of Recorded Statements	
Thomas v. State.....	54
Duty to Deliberate	
Hall v. State.....	56
Intent to Frighten	
Jones v. State.....	58
Peremptory Jury Strikes	
Khan v. State.....	60
Prior Testimony	
Marshall v. State	61
Reasonable Articulate Suspicion	
Smith v. State	63
Resisting Arrest	
Banks v. State.....	65
Right to Silence	
Simpson v. State.....	66
Rule of Lenity	
Johnson v. State	69
Search Incident to Arrest	
Sinclair v. State	70
Trial Postponement	
Choate v. State	72
Voluntariness of Consent Obtained by Ruse	
Redmond v. State	73
Family Law	
Social Security Disability	
Hiltz v. Hiltz.....	75
Termination of Alimony	
Bradley v. Bradley	78
Real Property	
Agreement to Reconvey	
Prime Venturers v. OneWest Bank Group.....	80
Doctrine of Implied Negative Restrictive Covenants	
Point’s Reach Condominium v. The Point Homeowners Association	82

Real Property (continued)	
Title Insurance – Scope of Coverage	
Back Creek Partners v. First American Title Insurance	84
Statutory Law	
Health	
Williams v. Peninsula Regional Medical Care Center.....	86
Taxation	
Tax Sales – Surplus Proceed Payments	
Allstate Mortgage v. Baltimore City.....	88
Torts	
Defamation	
Shirley v. Heckman.....	89
Sovereign Immunity	
Rounds v. Maryland-National Capitol Park & Planning Commission	91
Summary Judgment	
Hamilton v. Dackman	94
ATTORNEY DISCIPLINE	96
JUDICIAL APPOINTMENTS	99

COURT OF APPEALS

Ogden Coleman, II v. State of Maryland, No. 90, September Term 2012, filed September 24, 2013. Opinion by Greene, J.

<http://www.mdcourts.gov/opinions/coa/2013/90a12.pdf>

CONSTITUTIONAL LAW – INEFFECTIVE ASSISTANCE OF COUNSEL

Facts:

In 2005, Petitioner was tried by a jury and convicted of first degree murder and conspiracy to commit first degree murder. During the trial, the State introduced evidence of Petitioner’s interrogation by Detective Gary Childs of the Baltimore County Police Department. Detective Childs read the interrogation statement into the record, and noted in his testimony approximately thirty instances where Petitioner had remained silent during the interrogation after having been advised twice of his Miranda rights. In addition, Detective Childs made comments related to Petitioner’s silence, such as by stating that Petitioner remained “very silent.” Petitioner’s counsel did not object to any of this testimony at trial, nor did he file a motion in limine prior to the trial.

After an unsuccessful appeal, Petitioner filed a petition for post-conviction relief in the Circuit Court for Baltimore County, alleging ineffective assistance of counsel regarding trial counsel’s failure to cross-examine a State’s witness and failure to object at trial to the numerous references, in Detective Childs’s testimony, to Petitioner’s post-Miranda silence. Petitioner’s trial counsel testified during the post-conviction hearing that he did not remember why he did not object to the references to Coleman’s silence and that, as he understood the law, a defendant could not invoke his right to remain silent on a question by question basis. The Circuit Court denied post-conviction relief, determining on the merits that trial counsel’s failure to cross-examine the State’s witness did not rise to the level of ineffective assistance of counsel. With regard to counsel’s failure to object and whether that action can be attributed to ineffective assistance of counsel, the Circuit Court did not address the claim on the merits, determining instead that Coleman had waived that claim by not raising it at trial or on appeal. On appeal, the Court of Special Appeals found that the Circuit Court incorrectly determined that the ineffective assistance of counsel claim was waived. The court concluded, however, that Petitioner’s claims lacked merit because he was not prejudiced by the alleged errors.

Held: Reversed.

The benchmark for judging an ineffective assistance of counsel claim is “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692-93 (1984). To establish an ineffective assistance of counsel claim, the defendant must show that counsel’s performance was deficient and not a trial tactic, and that there is a substantial or significant possibility that the verdict of the trier of fact would have been affected. In the present case, defense counsel’s failure to object, during Petitioner’s criminal trial, to the State’s approximately thirty references to Petitioner’s silence during police questioning because counsel was unaware of the law shows deficient performance. Additionally, given the fact that Petitioner’s credibility was essential to the defense, the number and frequency of references to Petitioner’s silence, the content of the questions posed to Petitioner, and the editorializing of Petitioner’s silence by Detective Childs, in light of the other evidence presented at trial, there is a substantial possibility that the outcome would have been different absent counsel’s errors. Therefore, the Court held that Petitioner received ineffective assistance of counsel and is therefore entitled to a new trial.

Paul DeWolfe, et al. v. Quinton Richmond, et al., No. 34, September Term 2011, filed September 25, 2013. Opinion by Eldridge, J.

Barbera, C.J., Harrell and Adkins, JJ., dissent.

<http://www.mdcourts.gov/opinions/coa/2013/34a11.pdf>

MARYLAND CONSTITUTIONAL LAW – RIGHT TO COUNSEL UNDER DECLARATION OF RIGHTS, ARTICLE 24

Facts:

Plaintiffs, who were defendants in several criminal cases, brought a civil action complaining that their rights had been violated in the criminal cases when they had requested state-furnished counsel at their initial appearances before a District Court Commissioner, and their requests had been denied. The plaintiffs pointed out that, as a direct result of their initial appearances, they could be incarcerated. If incarcerated, they were not given the opportunity to consult with counsel until a judge reviewed their bail. Maryland law provides that a judge's bail review hearing will occur immediately after a defendant's initial appearance before a District Court Commissioner, if the court is in session. If the District Court is not in session, an indigent individual could potentially be incarcerated for an extended period of time before having an opportunity to consult with state-furnished counsel.

The plaintiffs sought a declaratory judgment that the Public Defender Act entitled them to representation, as well as the Sixth and Fourteenth Amendments to the United States Constitution and Articles 21 and 24 of the Maryland Declaration of Rights.

When the Court of Appeals first heard these arguments, the case was remanded to the Circuit Court for Baltimore City because of the plaintiffs' failure to join the State Public Defender as a party. After the Public Defender was joined and this case again arrived in the Court of Appeals, the Court held that the Public Defender Act entitled the defendants to representation in their initial appearances before District Court Commissioners. The Court did not decide the constitutional issues raised by the plaintiffs. Due to pending motions for reconsideration, the Court's opinion was not published.

While the motions for reconsideration were still pending in this Court, the General Assembly passed and the Governor signed into law "emergency measures" which amended the Public Defender Act to provide that representation is "not required to be provided to an indigent individual at an initial appearance before a District Court Commissioner." The Court ordered the parties to file supplemental briefs, and present supplemental oral arguments, on whether indigent criminal defendants have a constitutional right to state-furnished counsel at initial appearances before District Court Commissioners.

Held:

The single broad legal issue presented in this case is whether an indigent criminal defendant is entitled to state-furnished counsel at the defendant's initial appearance before a District Court Commissioner. This Court held that, under the Due Process component of Article 24 of the Maryland Declaration of Rights, an indigent defendant has a right to state-furnished counsel at an initial appearance before a District Court Commissioner.

The Court pointed out that in *Rutherford v. Rutherford*, 296 Md. 347, 464 A.2d 228 (1983), this Court had previously held that indigent defendants have a due process right to state-furnished counsel in any proceeding involving incarceration. This due process right to counsel is broader than the right to counsel under Article 21 or the Sixth Amendment, and it has been reaffirmed by the Court of Appeals on numerous occasions.

Even though the Public Defender Act provided state-furnished counsel to indigent defendants during their bail review hearings before a judge, this review did not cure the initial violation of a defendant's constitutional rights.

Orville Cooper v. State of Maryland, No. 37, September Term 2012, filed August 26, 2013. Opinion by Greene, J.

Bell, C.J. (ret.), dissents.

McDonald, J., concurs.

<http://www.mdcourts.gov/opinions/coa/2013/37a12.pdf>

CRIMINAL LAW – CHAIN OF CUSTODY

CRIMINAL LAW – BASIS FOR EXPERT TESTIMONY AND CONFRONTATION CLAUSE

CRIMINAL LAW – EXCITED UTTERANCE

Facts:

In 2010, Petitioner Orville Cooper (“Cooper”) was convicted of second degree rape, multiple counts of sexual offenses, and assault stemming from a 2006 attack on a woman victim (“Victim”) in Baltimore City. Much of the State’s case-in-chief was related to a match found between Cooper’s DNA and the DNA found on a napkin into which the victim testified she spit her attacker’s semen. The napkin was sent from the Baltimore City Police Department (“BPD”) to a private laboratory, Bode Technology Group (“Bode”), where it was analyzed by Sarah Shields and reviewed by her supervisor, Ashley Fulmer. At trial, Sarah Shields did not testify, but Ashley Fulmer testified about the analysis performed by Shields. Among other things, Fulmer testified about the procedures generally used at Bode, her supervision of Shields in the present case, and over objection, the results of Shields’s analysis. Cooper also objected to the testimony because he asserted that a chain of custody had not been established. Following Fulmer’s reading and explanation of the report’s contents, it was admitted into evidence, again, over objection.

Cooper also objected to testimony from Victim’s roommate (“Roommate”) and Detective Grubb (“Grubb”), alleging that the testimony was inadmissible hearsay. Cooper asserted that the testimony qualified under two hearsay exceptions; namely, as prompt reports of sexual assault victims and as excited utterances. Roommate was awoken by a frantic Victim coming back into their shared home soon after the attack, and Victim told roommate about the rape that had just occurred. Grubb was a detective with the Sexual Assault Unit, who arrived at the hospital and spoke with Victim approximately one hour after the attack. The trial court ruled that both Roommate’s and Grubb’s testimony were admissible as a hearsay exception.

Held: Affirmed.

When determining whether a proper chain of custody has been established, courts examine whether there is a “reasonable probability that no tampering occurred.” Here, the Circuit Court correctly admitted the results of the DNA testing of the napkin because there was sufficient evidence in the record for the conclusion that no tampering occurred. The same case number appears in both Shields’s report and the sealed envelopes that came from the BPD, and therefore, the chance of the napkin being different from the one supplied by Victim is unlikely.

Further, Cooper asserted that Shields’s report was inadmissible hearsay. To be admissible, a document must be (1) trustworthy, (2) unprivileged, (3) reasonably relied upon by an expert in forming his or her opinion, and (4) necessary to illuminate that expert’s testimony. This Court concluded that Fulmer adopted the results in Shields’s report, and the trial court did not abuse its discretion in determining that Fulmer relied upon Shields’s report, nor did it abuse its discretion when admitting the report into evidence.

We next applied our interpretation of *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) as detailed in our recently issued opinion *Derr v. State*, __ Md. __, __ A.3d __ (2013) (“*Derr II*”). In general, the right of confrontation is implicated only when two conditions are met: the challenged out-of-court statement or evidence must be presented for its truth and the challenged out-of-court statement or evidence must be “testimonial.” In *Williams*, we determined that “the narrowest holding . . . is that a statement, at a minimum, must be formalized to be testimonial.” Just as Justice Thomas concluded in *Williams*, this Court holds that the challenged forensic evidence is nontestimonial because nowhere on either page of the report is there an indication that the results are sworn to or certified or that any person attests to the accuracy of the results, which speaks to its informal nature.

Finally, we need not decide the scope of Maryland’s hearsay exception that calls for the admission of prompt reports of sexual assault victims because we hold that the testimony of Roommate and Grubb both fall under the excited utterance exception. The foundation for admissibility under the excited utterance exception is establishing both personal knowledge and spontaneity. Clearly, Victim has personal knowledge of the contents of her statements because she was the victim of the attack. Moreover, Victim’s statements to Roommate and Grubb were spontaneous; both involved statements made shortly after the attack when Victim was still hysterical or emotional. Therefore, Roommate’s and Grubb’s testimony relaying Victim’s statements concerning the attack was not inadmissible hearsay.

Alonzo Jay King, Jr., v. State of Maryland, No. 68, September Term 2011, filed September 25, 2013. Opinion by Harrell, J.

Bell, C.J. (ret.), dissents.

<http://www.mdcourts.gov/opinions/coa/2013/68a11.pdf>

CRIMINAL LAW – MD. DECLARATION OF RIGHTS, ART. 26 – DNA COLLECTION ACT
– REASONABLE SEARCH

CRIMINAL LAW – DNA COLLECTION ACT – STATUTORY VIOLATION – BURDEN OF
PROOF

Facts:

In 2009, Alonzo Jay King, Jr. (“King”), was arrested and charged with first- and second-degree assault, which are qualifying criminal charges for collection from King of a DNA sample under the Maryland DNA Collection Act (the “Act”), see Md. Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501 et seq. King’s DNA was collected, analyzed, and entered into Maryland’s DNA database. Prior to the disposition of the assault charges, his DNA profile generated a match to a DNA sample collected from a sexual assault forensic examination in an unsolved 2003 rape. This database match provided the sole probable cause for a subsequent grand jury indictment of King for the rape. A later-obtained search warrant ordered collection from King of an additional DNA sample, which, after processing and analysis, produced also a database match to the 2003 rape. On that evidence, King was convicted in the Circuit Court for Wicomico County of first-degree rape.

King appealed his conviction for the 2003 rape. He argued for its reversal on the grounds that the Act violated his constitutional rights as provided by the Fourth Amendment, as well as by Article 26 of the Maryland Declaration of Rights. Alternatively, King argued that, by presuming that his DNA was collected in accordance with the process and procedures of the Act, the Circuit Court shifted impermissibly the burden of proof to the defense regarding his statutory violation argument, thus mandating reversal of his conviction. The technical violations of the Act asserted were: (1) the alleged collector was not authorized pursuant to § 2-504(c) to collect King’s DNA sample; and (2) King did not receive notice pursuant to § 2-504(a)(3)(ii) regarding potential expungement of the DNA record. Prior to a decision of King’s appeal in the Court of Special Appeals, the Court of Appeals granted certiorari. In *King v. State*, 425 Md. 550, 42 A.3d 549 (2012) (“*King I*”), the Court held that the Maryland DNA Collection Act violated the Fourth Amendment to the United States Constitution as applied to King. In so holding, the Court declined to reach the remaining issues presented for review.

On the State’s petition, the Supreme Court of the United States granted certiorari. In *Maryland v. King*, U.S. , 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013), the Supreme Court held that the “DNA identification of arrestees is a reasonable search” and, therefore, concluded that the DNA search of King did not violate his Fourth Amendment rights. *Id.* at , 133 S. Ct. at 1980, 186 L. Ed. 2d at 28. Accordingly, the Court reversed the Court of Appeals’s decision and upheld King’s conviction for the 2003 rape. *Id.* On remand from the Supreme Court, King asked the Court of Appeals to reverse his conviction on the unaddressed bases presented for review originally in *King I*.

Held: Affirmed.

The Court addressed first the State’s challenge that King failed to raise his Article 26 argument before the trial court. It concluded that, indeed, King failed to raise Article 26 before the Circuit Court. The Court emphasized that ordinarily it does not consider unpreserved issues. In this case, however, the Court exercised its discretion to consider the Article 26 argument because doing so would not result in unfair prejudice to either party or the lower court, but instead would promote the orderly administration of justice.

Turning to the merits, the Court noted that Article 26 of the Maryland Declaration of Rights has been interpreted historically in *pari materia* with the Fourth Amendment of the United States Constitution. The Court refused to depart here from this traditional approach and, therefore, held that the DNA search of King did not violate his Article 26 rights. The Court noted further that, even if it were to depart from this tradition, the Court has not held that the exclusionary rule serves as a remedy for violations of state constitutional law. The Court did not decide ultimately the issue of whether the exclusionary rule should apply, though, because it found no violation of Article 26.

Next, the Court explained that the *prima facie* burden of production remains on the defendant to advance evidence of how the State failed to comply with the Act in its collection of his initial DNA sample. Because King failed to point to any relevant evidence supporting his claims of statutory violations, the Court concluded he failed to meet his burden. The trial court denied properly the motion to suppress the evidence. Lastly, the Court noted that, even assuming a violation of the Act had been advanced properly, there was no reversible error because an exclusionary rule was not available for the alleged technical violations of the DNA Collection Act.

Lincoln Miller v. State of Maryland, No. 94, September Term 2012, filed September 25, 2013. Opinion by Battaglia, J.

McDonald, J., concurs.

Barbera, C.J., Greene, J., and Bell, C.J. (ret.), dissent.

<http://www.mdcourts.gov/opinions/coa/2013/94a12.pdf>

CRIMINAL PROCEDURE – WRIT OF ERROR CORAM NOBIS – RETROACTIVITY OF SUPREME COURT DECISIONS

Facts:

Lincoln Miller, a native of Belize and permanent resident in the United States, pled guilty in 1999 to possession of cocaine with intent to distribute. During Miller's guilty plea colloquy he was informed of his right to file an application for leave to appeal his conviction to the Court of Special Appeals, but he did not file an application. After the United States Department of Immigration and Customs Enforcement began deportation proceedings against Miller in 2008, because of his 1999 conviction, Miller filed a Petition for a Writ of Error Coram Nobis arguing that his guilty plea was involuntary and his counsel was ineffective for failing to inform him that his plea would entail adverse immigration consequences. The circuit court denied Miller's Petition and while his appeal was pending before the Court of Special Appeals, the Supreme Court of the United States decided *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 147, 176 L.Ed.2d 284 (2010), in which the Court held that, under the Sixth Amendment, an attorney's performance was deficient under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for failing to inform a client that his guilty plea would subject him to automatic deportation. The Court of Special Appeals, however, held that *Padilla* did not apply retroactively to Miller's conviction and affirmed the denial of his Petition for a Writ of Error Coram Nobis.

Thereafter, the Court of Appeals, in *Denisyuk v. State*, 422 Md. 462, 30 A.3d 914 (2011), held that *Padilla* would apply retroactively to Sixth Amendment claims arising after the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which made deportation virtually inevitable upon conviction for certain crimes, including trafficking in narcotics. In light of *Denisyuk*, the Court of Appeals granted certiorari and remanded Miller's case to the Court of Special Appeals for reconsideration. The Court of Special Appeals again affirmed the denial of Miller's Petition. After again granting certiorari in Miller's case and while the case was pending before the Court of Appeals, the Supreme Court of the United States held in *Chaidez v. United States*, ___ U.S. ___, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013), that *Padilla* would not apply retroactively to convictions that were final before *Padilla* was decided.

Held:

The Court of Appeals affirmed the judgment of the Court of Special Appeals. The Court held that Miller, pursuant to Section 7-106(b), of the Criminal Procedure Article, Maryland Code (2001, 2008 Repl. Vol., 2012 Supp.), waived his right to file a Petition for a Writ of Error Coram Nobis by failing to file an application for leave to appeal from his 1999 guilty plea. The Court, nonetheless, held that Padilla did not apply retroactively to Miller's conviction in light of Chaidez because the Court had consistently recognized, prior to 1999, that ineffective assistance of counsel claims were governed by the Sixth Amendment, not Article 21 of the Maryland Declaration of Rights, therefore, there was no independent state basis for holding Miller, in 1999, was denied the right to effective assistance of counsel based upon a failure to advise of adverse immigration consequences. Likewise, there was no independent state basis, in 1999, for concluding that Miller's plea was involuntary based upon the failure to advise of adverse immigration consequences.

Norman Bruce Derr v. State of Maryland, No. 6, September Term 2010, filed August 22, 2013. Opinion by Greene, J.

Harrell, Adkins and McDonald, JJ., concur

Bell, C.J. (ret.), and Eldridge, J., dissent

<http://www.mdcourts.gov/opinions/coa/2013/6a10.pdf>

CRIMINAL LAW – CONFRONTATION CLAUSE – SURROGATE TESTIMONY

CRIMINAL LAW – DISCOVERY – BRADY AND MARYLAND RULE 4-263

CRIMINAL LAW – SUFFICIENCY OF EVIDENCE

CRIMINAL LAW – JURY INSTRUCTION

Facts:

In 2006, Appellant was convicted of multiple sexual offenses relating to the rape of the victim, which occurred in 1984. Shortly after the time of the offenses, physical evidence was collected from the victim and taken to an FBI crime laboratory for serological testing. The serological examiner identified sperm and semen from the samples and detailed the conclusions in a report. The case became inactive until 2002 when a detective submitted the physical evidence taken from the victim to the FBI crime laboratory for forensic analysis. An FBI DNA analyst then generated a DNA profile of the suspect using the physical evidence obtained from the victim. This profile was entered into the Federal Bureau of Investigation’s Combined DNA Index System (“CODIS”), and in 2004, a match was discovered between Appellant’s existing profile in CODIS and the profile generated in 2002. Additional DNA was then obtained from Appellant to create a reference DNA sample in order to ensure the accuracy of the profile in CODIS. The testing of the sample obtained from Appellant in 2004 was performed by a team of biologists who were supervised by FBI DNA analyst Dr. Jennifer Luttman. After Dr. Luttman’s team of biologists performed the tests and documented their results, Dr. Luttman determined that the reference sample matched Appellant’s profile in CODIS. Dr. Luttman did not perform the actual testing of the reference sample, nor is it apparent that she observed the performance of the testing by the biologists on her team. She also had no involvement in the serological testing performed in 1985 or the DNA analysis performed in 2002.

At trial, Appellant objected to Dr. Luttman’s surrogate testimony, claiming that it violated the Confrontation Clause. The trial court denied Appellant’s motion, and allowed admission of the serological report and the 2002 DNA analysis under the business records exception to the hearsay rule and as the basis of Dr. Luttman’s expert opinion under Maryland Rule 5-703. Dr. Luttman

then testified regarding the testing procedures and results of the 1985 serological testing, the 2002 DNA analysis, and the 2004 DNA analysis, and she ultimately concluded that Appellant's DNA profile matched that of the suspect. The analysts who performed the testing of the physical evidence did not testify. Following his conviction in 2006, Appellant appealed to the Court of Special Appeals, but the Court of Appeals granted certiorari on its own motion prior to the Court of Special Appeals rendering a decision. On September 29, 2011, the Court of Appeals concluded that Derr's Sixth Amendment right to confrontation was violated, reversed the Circuit Court's judgment, and ordered a new trial. *Derr v. State*, 422 Md. 211, 29 A.3d 533 (2011). On December 6, 2011, the State filed a petition for certiorari in the United States Supreme Court and requested that the petition be held pending that Court's decision in *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). On June 18, 2012, the Supreme Court decided *Williams*, altering the analysis of an alleged Confrontation Clause violation. On June 29, 2012, the Supreme Court granted certiorari in *Derr*, vacated this Court's earlier judgment, and remanded for further consideration in light of *Williams*. Thereafter, the Court of Appeals ordered supplemental briefing and oral argument.

Held: Affirmed.

A testimonial statement may not be introduced into evidence without the in-court testimony of the declarant, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witness. The narrowest holding of *Illinois v. Williams*, or in other words, the common point of agreement between the plurality opinion and Justice Thomas's concurring opinion in that case, is that statements must, at least, be formalized, or have "indicia of solemnity" to be considered testimonial. The serological exam results, the 2002 DNA test results, and the 2004 DNA test results are not sufficiently formalized to be testimonial. The exhibit in the record pertaining to the serological examination appears to be the notes from the bench work of the serological examiner. There are no signed statements or any other indication that the results or the procedures used to reach those results were affirmed by any analyst, examiner, supervisor, or other party participating in its development. Similarly, no statements appear anywhere on the 2002 or 2004 DNA test results attesting to their accuracy or that the analysts who prepared them followed any prescribed procedures. Therefore, the Court held that the statements are not testimonial, could be relied on by the expert witness as a basis for her in court testimony and conclusions, and Defendant's right to confrontation was not violated.

A *Brady* violation occurs when the State suppresses evidence that is favorable to the defense. Derr requested the State to produce statistics on matching and near-matching profiles maintained in the CODIS database, basically in order to search the database himself. Derr failed, however, to show that the State suppressed evidence, and provided no authority that would require the FBI to give him access to all of the data in CODIS to run his own search. While Rule 4-263 requires the disclosure of relevant material in the State's possession, it does not give Derr the right to search CODIS for potentially helpful information. Therefore, Derr's statutory and constitutional rights

to discovery were not violated by the trial judge's refusal to order the State to conduct a search for coincidental matches in the CODIS DNA database.

The standard for sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the facts in a light most favorable to the prosecution. The testimony given by Luttmann connecting Derr to the DNA extracted from the biological materials on the vaginal, anal, and genital swabs, along with, to a lesser degree, the relative match between the composite sketch and his pictures from 1982 and 1986, serve as sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that Derr was the victim's attacker. Thus, the Court held that the evidence presented during trial was legally sufficient to sustain Derr's conviction.

Lastly, the Court held that the trial judge did not err when she refused to include Derr's proposed jury instruction on the definition of "reasonable degree of scientific certainty." Taken together, the instructions informed jurors that they should consider the evidence, including the test results, and all of the testimony, including Luttmann's, and decide for themselves whether to accept Luttmann's conclusion. The fact that Luttmann stated that her conclusion was to a "reasonable degree of scientific certainty" does not change the fact that each juror was instructed to decide for himself or herself if the juror trusted the validity of the test results, agreed that Derr's semen was found on the victim, and if so, whether it was sufficient to convince the juror that Derr was guilty of the charged crimes. Therefore, the instructions given sufficiently protected Derr's right to have the jury judge the credibility of all the evidence including Luttmann's testimony.

David C. Winters v. State of Maryland, No. 85, September Term 2012, filed September 25, 2013. Opinion by Greene, J.

McDonald, J., concurs.

Barbera, C.J., Harrell and Adkins, JJ., dissent.

<http://www.mdcourts.gov/opinions/coa/2013/85a12.pdf>

CRIMINAL LAW – WAIVER OF JURY TRIAL

Facts:

Petitioner David Winters (“Winters” or “Petitioner”) was charged with the murder of his father. In January 2009, Petitioner was tried in the Circuit Court for Montgomery County during a bench trial, after entering pleas of not guilty and not criminally responsible. After learning of Winters’s desire to have a bench trial, the trial judge examined the Petitioner in open court and announced, on the record, that Winters was knowingly and voluntarily waiving his right to a jury trial. During the waiver colloquy, the trial judge provided the Petitioner with some knowledge of his right to a jury trial. The trial judge also provided the defendant with erroneous information regarding the standard of proof he would be required to meet at a jury trial. He stated: “And do you understand that for such a jury to convict you or to find you either criminally responsible or not criminally responsible, they must unanimously, all together, vote to convict you or find you criminally responsible or not criminally responsible upon which the evidence they feel proves same by a reason – beyond a reasonable doubt? Do you understand that?” No one corrected the trial judge’s misstatement. Satisfied that Petitioner understood the waiver, the case proceeded as a bench trial. Upon hearing the evidence, the trial judge concluded that the evidence was in equipoise as to Winters’s criminal responsibility and therefore Petitioner had failed to demonstrate, by a preponderance of evidence, that he was not criminally responsible. Petitioner was subsequently convicted of first degree murder and sentenced to life imprisonment.

Petitioner appealed his conviction to the Court of Special Appeals. In that court, Petitioner asserted that his waiver of the right to a jury trial was not knowing and voluntary. As a basis for that contention, Petitioner stated that he was misinformed by the trial judge about the standard of proof for entering a not criminally responsible plea and that the trial judge failed to distinguish between a trial on the issue of guilt and not criminally responsible. The Court of Special Appeals held, that under the totality of the circumstances, Petitioner made a knowing and voluntary waiver because the trial judge had no obligation to inform him about the standard of proof or to distinguish between guilt or innocence or acquittal for the trial and the not criminally responsible determination.

Held: Reversed and remanded.

A trial judge has an obligation to ensure that a defendant has sufficient understanding of the nature of a jury trial in order to obtain a valid waiver. Where a trial judge provides erroneous advice that is not corrected, that may have misled a defendant to believe a jury trial would be a less attractive option than it is under Maryland law, and thereby, may have influenced his or her decision to waive a jury trial, the waiver is not knowing.

Here, the trial judge erroneously advised Petitioner that when proving to a jury that he was not criminally responsible, he would have to do so beyond a reasonable doubt. Under Maryland law, once the State has proven that a defendant is guilty of the offenses charged, the defendant has the burden of proving by a preponderance of the evidence that he or she is not criminally responsible for the crime. Additionally, the trial judge also informed Petitioner during the colloquy that a jury trial is a trial by a jury of twelve persons. Thus, Petitioner was presented with the prospect of being required to prove to all twelve jurors that he was not criminally responsible beyond a reasonable doubt. By giving Petitioner erroneous information, which made exercising Petitioner's constitutional right to a jury trial less attractive, the trial judge may have misled Petitioner and influenced his decision to waive his right to a jury trial. Although Winters was represented, there is no indication on the record that the trial judge, defense counsel, or anyone else corrected the misleading advice. Therefore, this Court held that the trial judge failed to ensure that Petitioner's waiver of his jury trial was knowing. Reversal ordered.

The Town of La Plata, et al. v. Faison-Rosewick LLC, FCD Development LLC, Johel Limited Partnership, John D. Mitchell, III, John Latimer and Sandra Latimer, No. 68, September Term, 2012, filed September 25, 2013. Opinion by Greene, J.

<http://www.mdcourts.gov/opinions/coa/2013/68a12.pdf>

STATUTORY CONSTRUCTION – ELECTION LAW – REFERENDUM – MUNICIPAL ANNEXATION RESOLUTION

Facts:

On September 27, 2011, the La Plata Town Council passed four resolutions, one of which was an annexation resolution acquiring a 14.1 acre tract of land. On November 10, 2011, several citizens of La Plata and other interested persons (“the Referendum Supporters”), Appellants in this case, published and circulated a petition to refer the Town Council’s annexation resolution to referendum pursuant to Maryland Code (1957, 2011 Repl. Vol.), Article 23A, § 19. The petition for referendum included all four resolutions passed on September 27, 2011, relating to the annexation. On March 13, 2012, the Town, through its chief executive and administrative officer, Town Manager Daniel Mears (“Mears”), issued a proclamation stating that sufficient signatures had been submitted on the petition. As such, the annexation resolution was suspended, and all four resolutions were referred to referendum. The Town then drafted a referendum ballot for an election to be held on April 18, 2012, asking the citizens of La Plata to approve or reject “all four Resolutions.”

On November 8, 2011, several days before the petition signature pages were due for filing, Town Manager Mears published on the Town’s website an eight-page document entitled “Procedures for Validation and Verification of Signatures on Annexation Referendum Petition Signatures Submitted Pursuant to Maryland Annotated Code, Article 23A, Section 19(g)” (“procedures”). The procedures established the process and criteria to guide the Town Manager in validation and verification of signatures on a petition for the purpose of submitting the annexation question to the voters.

Appellees, a group consisting of voters and taxpayers of the Town, and some selling landowners and out-of-state contract purchasers and developers (“the Referendum Opponents”), filed in the Circuit Court for Charles County a “Petition or Complaint for Judicial Review,” of the report validating the signatures and advancing the referendum to a vote. The trial court found that Mears did not have the power to determine his own verification process under the statute and therefore his promulgation of the “procedures” was invalid. Moreover, the trial judge found that the procedures were filed too late in the referendum process and thus violated due process, which it found to taint the whole process. Accordingly, the trial judge concluded that the petition for referendum had to fail. Thereafter, the Town and Referendum Supporters appealed to the Court

of Special Appeals, and Referendum Opponents cross-appealed. The Referendum Opponents filed a petition for certiorari to this Court, and the Town and Referendum Supporters filed cross-petitions, all of which were granted prior to any proceedings in the intermediate appellate court.

Held: Vacated and remanded.

The General Assembly made it clear in Article 23A, § 19(g) that the petition presented to voters shall be for a “referendum on the [annexation] resolution.” The statutory scheme clarifies that the resolution refers to a decision that adds to the corporate boundaries of the municipal corporation. Section 19(g), however, does not expressly prohibit the inclusion of additional or collateral information in the petition. Based on precedent relating to sufficiency of ballot language for amendment and referendum provisions, which requires a “clear, unambiguous and understandable statement of the full and complete nature of the issues[.]” *Anne Arundel Cnty. v. McDonough*, 277 Md. 271, 300, 354 A.2d 788, 805 (1976), the Court noted that the instant case presents no real danger of confusion or ambiguity as to the subject of the petition. Although non-referable, the additional resolutions included in the petition serve only to further inform the voters on the nature of the annexation resolution that is the heart of the referendum. The Court held, therefore, that where the petition for referendum contained legislative enactments that were collateral to the land annexation resolution but did not obfuscate the subject matter of the petition for referendum, such additions did not invalidate the petition.

Additionally, § 19(g) unambiguously provides the chief executive and administrative officer of the municipal corporation, here the Town Manager, the power to “cause to be made a verification” of the signatures on the petition and ascertain that the requisite number of qualified signatures are present. Under the basic definition of “verification,” Mears’s responsibility was to “cause to be made” an authentication of the signatures presented to him on the petition and confirm that the signatures represented enough qualified voters for a referendum election to take place. In furtherance of this duty, Mears preemptively created and published procedures for petition validation and verification. These guidelines outlined in writing, for the benefit of the public, the “reasonable means” by which he was exercising his duty to verify signatures and validate the petition. Although he did not have the express statutory authority to promulgate these procedures, the Court held that the publication of them fell within his implied authority, incident to his duty of verification and validation of the petition. Lastly, the Court held that there was no violation of due process when the procedures were published several days prior to the petition deadline, because there was no fundamental liberty or property interest at issue in the matter for due process to apply.

In Re Ryan W., Nos. 95 & 101, September Term 2012, filed September 26, 2013.
Opinion by Harrell, J.

Adkins, J., and Bell, C.J. (ret.), dissent.

<http://www.mdcourts.gov/opinions/coa/2013/95a12.pdf>

FAMILY LAW – JUVENILE COURT JURISDICTION – CHILDREN IN NEED OF ASSISTANCE (CINA) – RESOURCES OF CINA – FEDERAL OLD-AGE AND SURVIVOR’S DISABILITY INSURANCE (OASDI) BENEFITS

FAMILY LAW – CHILDREN IN NEED OF ASSISTANCE – DUE PROCESS – NOTICE OF APPLICATION TO BE REPRESENTATIVE PAYEE FOR CINA’S OASDI BENEFITS AND AMOUNT OF BENEFITS RECEIVED

Facts:

On 4 June 2002, after he and his siblings had been removed from their parents’ custody, Ryan W. was found to be a Child In Need of Assistance (“CINA”) by the Circuit Court for Baltimore City, sitting as the juvenile court, and committed to the custody of the Baltimore City Department of Social Services (“the Department”). Ryan was nine years old at the time. Over the next several years, Ryan was placed in group homes, therapeutic homes, and non-relative foster homes. The Department paid the cost of his care.

Ryan’s mother died in August 2006, and his father died in November 2008. In November 2009, without notifying Ryan or his CINA counsel, the Department applied to the Social Security Administration (“SSA”) to seek appointment as Ryan’s representative payee for federal Old-Age and Survivor’s Disability Insurance (“OASDI”) benefits, to which he was entitled based on his deceased parents’ earnings over the years. The application was approved shortly thereafter. The Commissioner of Social Security notified Ryan’s legal guardian (the Department) as prescribed by the Social Security Act and regulations.

Between November 2009, when the first OASDI benefit payment was certified to the Department on Ryan’s behalf as his representative payee, until February 2011, when Ryan turned 18 years old, the Department received a total of \$31,693.50 in OASDI benefit payments from the SSA. The Department used the money to reimburse itself partially for the costs it incurred in providing Ryan’s care.

Ryan, through counsel, filed, on 5 April 2011, a “motion to control conduct” in the juvenile court, alleging that the Department violated its statutory and fiduciary duties by allocating the OASDI benefit payments toward reimbursement for the current cost of care. He argued further that the

lack of notice to Ryan or his CINA counsel that the Department applied for and received his OASDI benefit payments on his behalf as his representative payee violated due process. The juvenile court agreed, and ordered that the Department conserve all OASDI benefits it had received on Ryan's behalf in a constructive trust. On appeal, the Court of Special Appeals reversed, in a reported opinion (*In Re Ryan W.*, 207 Md.App. 698, 56 A.3d 250 (2012)), the juvenile court's decision, holding that the juvenile court lacked authority under Maryland law to direct a local department of social services, acting as representative payee for a foster child in its care, to conserve OASDI benefits for the beneficiary's future use. The Court of Special Appeals also ordered, upon reconsideration of its initial opinion, the Department to reimburse Ryan in the amount of \$660, representing an amount in excess of the cost of care for a particular month. The intermediate appellate court rejected Ryan W.'s due process-notice argument and declined (as moot) to decide the Department's sovereign immunity defense.

The Court of Appeals granted both parties' petitions for writs of certiorari to consider the following questions presented:

1. Did COSA err in holding that a local department of social services has plenary authority to apply for and use a foster child's OASDI benefits without seeking an express grant of authority from the juvenile court to exercise control over the benefits and without providing the foster child with notice and the opportunity to be heard?
2. Did the COSA err in rejecting the juvenile court's exercise of its authority in determining that a total of \$31,693.50 was to be conserved in Ryan's best interests?
3. Did the COSA err in upholding state practice and regulations that require automatic, non-discretionary application of all of a foster child's OASDI benefits and that are inconsistent with federal regulations requiring the proper exercise of discretion as a representative payee?
4. Did the COSA err in directing the juvenile court, on remand, to revise its monetary award against the State by requiring the Department to deposit funds into a foster child's trust account because, as the COSA had already concluded, the juvenile court lacks jurisdiction to enter such an order and because such an order is barred by the doctrine of sovereign immunity?

Held: Affirmed in part and reversed in part.

The Court of Appeals agreed with the Court of Special Appeals's holding that the juvenile court lacks jurisdiction to direct the allocation of a child beneficiary's OASDI benefits by a duly appointed representative payee. Because the Social Security Act and regulations provide a remedy for a representative payee's misuse of OASDI benefits, the Court ruled that beneficiaries who seek a different allocation of OASDI benefits by their representative payees should pursue those claims within the federal administrative process, which is subject to further judicial review in

the federal courts. The Court reversed, however, the COSA decision to the extent that it ordered any money to be reimbursed to Ryan.

Disagreeing with the COSA, the Court also held that a local department of social services must notify a child and/or his or her CINA counsel upon applying for appointment as representative payee for the child's OASDI benefits. The Department should notify also the child and/or his or her CINA counsel upon receipt of OASDI benefit payments. Notice is required to comport with due process; without notifying a child and/or his or her CINA counsel that an appointment has been sought or that benefits have been received, the child may be unaware that there was any conduct for which the child may seek a remedy in the federal venues.

Jennifer Evans Dize, Personal Representative of the Estate of William Smith Dize v. Association of Maryland Pilots., No. 56, September Term 2012, filed September 23, 2013. Opinion by McDonald, J.

<http://www.mdcourts.gov/opinions/coa/2013/56a12.pdf>

MARITIME LAW – JONES ACT – DETERMINATION OF SEAMAN STATUS

Facts:

William S. Dize filed a lawsuit, under the federal Jones Act, against his former employer, the Association of Maryland Pilots (“Association”), in the Circuit Court for Baltimore City, alleging negligence in regard to injuries he suffered from exposure to free silica during a sandblasting project. He was diagnosed with silicosis in January 2008. (In September 2012, Mr. Dize died from his illness, and his wife, Jennifer Dize, has been substituted as Petitioner.)

The Association filed a Motion for Summary Judgment, alleging that Mr. Dize did not qualify as a seaman under the Jones Act. The circuit court granted the motion, holding that Mr. Dize had not spent 30 percent of his work time in service of vessels in navigation, as required by a “rule of thumb” adopted by the Supreme Court to decide seaman status for Jones Act cases. In calculating the time Mr. Dize spent in service of vessels in navigation, the circuit court counted only the time he spent aboard a vessel at sea and not the time he spent maintaining vessels that were moored, dockside or ashore. The Court of Special Appeals affirmed the circuit court’s ruling.

Held: Affirmed.

In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Supreme Court articulated a two-part test— in order to be a “seaman,” the employee must (1) contribute to the function of a vessel or to the accomplishment of its mission, and (2) have a connection to a vessel in navigation that is substantial in both duration and nature. To assess whether the connection is substantial in duration, the Court adopted a “rule of thumb” that the employee must spend at least 30 percent of work time “aboard ship.”

In light of the *Chandris* Court’s decision to remand the case for a jury determination whether the ship in question was “in navigation” during a six-month stay in dry dock, and subsequent federal and state court decisions rejecting the interpretation that time “aboard ship” must be “at sea,” the Court rejected the circuit court’s bright-line rule that only time aboard a ship in transit over the water counts for the purpose of the duration test. Instead, it held that “sea based” duties that count for the purposes of the duration analysis are those that regularly expose the worker to seagoing perils.

The Court held that time that an employee spends maintaining vessels that are dockside or ashore ordinarily should not be counted towards the requirement that the employee spend at least 30 percent of work time “aboard ship” to qualify as a seaman under the Jones Act, as these duties are not “sea-based duties” that expose the employee to the perils of the sea. Accordingly, Mr. Dize did not satisfy the substantial duration test.

Ocean City, Maryland, Chamber of Commerce, Inc. v. Daniel J. Barufaldi, No. 77, September Term 2012, filed September 24, 2013. Opinion by McDonald, J.

<http://www.mdcourts.gov/opinions/coa/2013/77a12.pdf>

LABOR & EMPLOYMENT – WAGE PAYMENT AND COLLECTION LAW – AWARD OF ATTORNEYS’ FEES AND COSTS

Facts:

The dispute in this case centered around a three-year employment agreement that Daniel Barufaldi signed with the Ocean City Chamber of Commerce, Inc. (the “Chamber”) before he began his employment as its executive director in 2005. Pursuant to the agreement, he was to receive an annual base salary of \$52,000 supplemented by incentive compensation. In 2006, the Chamber proposed a new employment agreement that did not include incentive-based compensation, but it was never executed. Mr. Barufaldi never received incentive-based compensation from the Chamber, and he resigned as its executive director in January 2007.

Mr. Barufaldi filed a lawsuit against the Chamber and its board members in the Circuit Court for Worcester County, alleging breach of contract, negligent misrepresentation, and violation of the Wage Payment and Collection Law. His negligent misrepresentation claim and claims against the individual board members were subsequently dismissed either voluntarily by Mr. Barufaldi or by the circuit court.

The jury found in Mr. Barufaldi’s favor on both his breach of contract claim and claim under the State Wage Payment and Collection Law, awarding \$60,000 in damages. It also found that there was no “bona fide dispute” regarding the unpaid compensation, but did not award treble damages. The trial court subsequently denied Mr. Barufaldi’s motion for attorneys’ fees without elaborating on the basis for its decision.

The Court of Special Appeals affirmed the judgment, but vacated the denial of the motion for attorneys’ fees and costs. It held that a trial court must articulate the particular circumstances that justify denying such a motion when a jury makes the predicate finding of wilfulness. It remanded the case to the circuit court for further proceedings.

On remand, the circuit court adopted the analysis applied by federal courts in deciding whether to award attorneys’ fees in actions under the federal Employee Retirement Income Security Act of 1974 (“ERISA”). Specifically, it applied the five-factor test developed by the federal courts under the fee-shifting provision of ERISA and denied Mr. Barufaldi’s motion for attorneys’ fees for a second time.

The Court of Special Appeals once again reversed the circuit court's denial of Mr. Barufaldi's motion for attorneys' fees, holding that the circuit court erred in applying the ERISA factors. The Court of Appeals granted certiorari to decide whether the ERISA fee-shifting factors may be employed to evaluate a plaintiff's request for attorneys' fees and costs under the Wage Payment and Collection Law.

Held: Affirmed.

The Court examined the purpose of the Wage Payment and Collection Law and its fee-shifting provision. It noted that the provision, which only benefits employees who have had wages withheld by an employer in bad faith, was designed to ensure that an employee will have the assistance of competent counsel in pursuing what is likely to be a relatively small claim. It also recognized that the legislative purpose of the statute supported the court's exercise of discretion in favor of awarding fees.

The Court noted that the ERISA fee-shifting provision, in contrast, was developed from the principles of trust law and that it allows two-way shifting and benefits both the funds and their beneficiaries. Recognizing the differences between the two statutes, the Court analyzed the relevance of each ERISA factor in the context of the Wage Payment and Collection Law and concluded that reference to some of the ERISA factors in a State wage claim can lead to redundant or contradictory findings by the trial court.

The Court held that, because ERISA and the Wage Payment and Collection Law serve distinct purposes and their fee-shifting provisions are based on different principles, a trial court should not employ the five-factor ERISA fee-shifting test in deciding whether to award attorneys' fees and costs under the State statute.

James Coleman v. Soccer Association of Columbia, No. 9, September Term 2012, filed July 9, 2013. Opinion by Eldridge, J.

Bell, C.J. (ret.), and Harrell, J., dissent.

Battaglia, Greene, McDonald, and Raker, JJ., concur.

<http://www.mdcourts.gov/opinions/coa/2013/9a12.pdf>

TORTS – CONTRIBUTORY NEGLIGENCE

Facts:

James Coleman, a 20 year old soccer player who was helping coach a group of young soccer players in a program run by the Soccer Association of Columbia, was severely injured when he jumped up and grabbed the top bar of a soccer goal, which tipped over and crushed several bones in his face.

Coleman filed suit alleging that he was injured due to the Soccer Association's negligence. He claimed that the Soccer Association was liable because it had failed to inspect or to properly anchor the soccer goal which fell on him. The Soccer Association asserted the defense of contributory negligence, alleging that the accident was caused solely by Coleman's negligence. At the close of the trial, Coleman's attorney requested that the judge instruct the jury on comparative negligence. The judge refused and instead instructed the jurors on contributory negligence. The jury found that the Soccer Association was negligent, but Coleman was not awarded any damages because the jury found that he was contributorily negligent. The circuit court entered judgment in favor of the Soccer Association.

On appeal, the sole issue raised was whether this Court should retain the standard of contributory negligence as the common law standard governing negligence cases in the State of Maryland.

Held: Affirmed.

The Court declined to abrogate Maryland's common law rule of contributory negligence even though it recognized that it has the authority to change the common law.

The Court began by reviewing *Harrison v. Montgomery County Bd. of Education*, 295 Md. 442, 456 A.2d 894 (1983), the most recent case in which the Court had upheld the doctrine of contributory negligence and refused to adopt comparative negligence.

The Court pointed out that, since Harrison, the Maryland General Assembly has continually considered and failed to pass bills that would abolish or modify the contributory negligence standard. The Court reiterated that when the General Assembly has, as a matter of public policy, expressly refused to change a particular common law principle, this Court will not override the legislative policy determination and change the common law principle, even if the Court has the authority to do so. The Court pointed out that the repeated failure to enact legislation is persuasive evidence of legislative policy. The Court considered the General Assembly's repeated failure to pass legislation abrogating the defense of contributory negligence as strong evidence indicating that legislative policy in Maryland is to retain the principle of contributory negligence. As such, the Court refused to change the common law of contributory negligence in the face of the General Assembly's repeated refusal to do so.

Josephine Chesson, et al. v. Montgomery Mutual Insurance Company, No. 97, September Term 2012, filed September 24, 2013. Opinion by Battaglia, J.

<http://www.mdcourts.gov/opinions/coa/2013/97a12.pdf>

EVIDENCE – ADMISSIBILITY OF SCIENTIFIC EVIDENCE – GENERAL ACCEPTANCE TEST

Facts:

After mold was found in the office of the Baltimore Washington Conference of the United Methodist Church, six employees, Petitioners, alleged that they suffered non-respiratory neurocognitive and musculoskeletal symptoms. To prove causation, the employees introduced Dr. Ritchie Shoemaker, who proffered that his “differential diagnosis” demonstrated that exposure to mold in a water-damaged office building caused their symptoms. The Baltimore Washington Conference’s insurer, Montgomery Mutual Insurance Company, Respondent, moved in limine to exclude Dr. Shoemaker’s testimony under *Frye-Reed* and contended that his theories and methodologies were novel and not generally accepted in the relevant scientific community. The Circuit Court for Howard County denied Montgomery Mutual’s motion, and Dr. Shoemaker testified at trial. On appeal, the Court of Special Appeals affirmed the denial of Montgomery Mutual’s motion. The Court of Appeals reversed and remanded, holding that Dr. Shoemaker’s “differential diagnosis” was novel and therefore subject to a *Frye-Reed* hearing to determine whether his theories and methodologies were generally accepted in the relevant scientific community.

At the *Frye-Reed* hearing on remand, Dr. Shoemaker testified that his conclusion, that the indoor air of a water-damaged building known to contain mold caused neurocognitive and musculoskeletal symptoms, was based on his application of a “differential diagnosis” that he referred to as “Repetitive Exposure Protocol.” Dr. Shoemaker explained that the “Repetitive Exposure Protocol” involved a study of 101 individuals who complained of neurocognitive and musculoskeletal symptoms and worked or resided in forty buildings known to contain mold. To conclude that mold was the cause of their symptoms, Dr. Shoemaker would remove the individuals from the water-damaged building and administer a dosage of Cholestyramine for two weeks and during this period, Dr. Shoemaker testified, their symptoms subsided. When the individual returned to the subject building, Dr. Shoemaker further testified, the symptoms would redevelop. On cross examination, Dr. Shoemaker acknowledged that his technique did not test the level of mold exposure in any of the buildings. During his testimony, a number of journal articles were admitted, including two authored by Dr. Shoemaker, two that supported his theory about neurocognitive and musculoskeletal symptoms, and others that explored respiratory symptoms purportedly linked to mold exposure.

Montgomery Mutual countered by calling Dr. Hung Cheung, who testified that a fundamental flaw in Dr. Shoemaker's "Repetitive Exposure Protocol" was the failure to account for the level of mold exposure. Dr. Cheung acknowledged that at very high levels of mold exposure illness can occur, but testified that such high levels are not present in water-damaged buildings. He also cited scientific journal articles that concluded that an association or causal connection between mold exposure and illness was not supported by the current data and that studies researching such a relationship should account for the level of mold exposure in a water-damaged building.

The Circuit Court concluded that Dr. Shoemaker's technique was a "differential diagnosis," which itself was reliable and generally accepted. The Court of Special Appeals reversed, concluding that a continued division existed in the relevant scientific community relative to any causal connection between inhalation of mold in a water-damaged building and neurocognitive and musculoskeletal symptoms.

Held:

The Court of Appeals affirmed the judgment of the Court of Special Appeals. The Court reasoned that a key component to *Frye-Reed* and general acceptance in the relevant scientific community is methodology, and Dr. Shoemaker's failure to account for the level of mold exposure in his "Repetitive Exposure Protocol" was a study limitation that even he had acknowledged in a prior scientific journal article. Scientific journal articles discussed by both Dr. Shoemaker and Dr. Cheung indicated that the relevant scientific community remained uncertain, both about the potential for mold exposure in a water-damaged building to cause neurocognitive and musculoskeletal symptoms, as well as Dr. Shoemaker's technique. The Court also noted that other courts had excluded Dr. Shoemaker's testimony, on the basis that his "Repetitive Exposure Protocol" and causal theory were not generally accepted.

Gail B. Litz v. Maryland Department of the Environment, et al., No. 75, September Term 2012, filed September 24, 2013. Opinion by Greene, J.

<http://www.mdcourts.gov/opinions/coa/2013/75a12.pdf>

TORT LAW – NUISANCE – STATUTE OF LIMITATIONS

TORT LAW – NEGLIGENCE AND TRESPASS – STATUTE OF LIMITATIONS

INVERSE CONDEMNATION – STATUTE OF LIMITATIONS

Facts:

In approximately 1948, Litz’s parents purchased the Litz Property outside of Goldsboro, Maryland. Litz’s parents added a dam in the mid-1950s to form a lake (“Lake Bonnie”), which primarily receives its water from two local streams, the Oldtown Branch and the Broadway Branch, and discharges a constant overflow of water directly into the Choptank River. In the 1960s, Litz’s parents opened a public campsite business known as the Lake Bonnie Campsites, which turned a profit for Litz’s parents for many years. Litz became owner of the property and Campsite in 2001.

Goldsboro does not have a public water or sewer system available, and instead relies on private wells and septic systems. Over time, the private septic systems in the Town contaminated the ground and surface water, which, in turn, contaminated Oldtown Branch and Broadway Branch, which, in turn, contaminated Lake Bonnie. Litz was notified of the lake’s contamination on June 12, 1996, and was informed that the pollution was “a health threat for water contact recreation in the lake.” Two months later, representatives from the Maryland Department of the Environment and Goldsboro signed a Consent Order, which imposed mandatory obligations on Goldsboro to correct the pollution problem. No material terms of the Consent Order were followed. Because of the lack of income generated by the Campsites due to the pollution of Lake Bonnie, Litz lost her property to foreclosure in 2010.

Litz filed a Complaint against the Town, County, and State, alleging causes of action for, among other things, nuisance, negligence, trespass, and inverse condemnation. The trial court dismissed all causes of action for various reasons, and the intermediate appellate court affirmed the trial court’s judgment on the more limited grounds that all claims were barred by the statute of limitations.

Held: Affirmed in part and reversed in part.

Counts for permanent nuisance, negligence, trespass, and inverse condemnation are subject to the statute of limitations articulated in Section 5-101 of the Courts and Judicial Proceedings Article of the Maryland Code which requires that a claim must be filed within three years from the date the action accrues. In determining when the actions accrue, Maryland courts apply the discovery rule, which tolls the accrual of an action until the plaintiff knows or should have known of the injury giving rise to his or her claim.

The distinction between a temporary and a permanent nuisance is relevant to the application of the statute of limitations to a nuisance claim. A cause of action for permanent nuisance must be brought within three years of the nuisance becoming stabilized, but for a temporary nuisance, successive actions may be brought each time a plaintiff's land is invaded because "every repetition of the wrong creates further liability and . . . a new cause of action." *Jones v. Speed*, 320 Md. 249, 260 n.4, 577 A.2d 64, 69 n.4 (1990). Whether a nuisance is permanent or temporary depends on the likelihood of abatement. Here, the town of Goldsboro entered into a Consent Order in 1997 to remedy the pollution problem in Lake Bonnie. Since that time, no material terms of the Consent Order were followed, and it is unlikely that the nuisance would be abated. Therefore, no reasonable trier of fact could conclude that Litz alleged anything less than a permanent nuisance, which, under the circumstances, was time-barred.

The viability of Litz's causes of action for negligence and trespass hinge on whether the statute of limitations was tolled by the "continuing harm" doctrine. The statute of limitations may be tolled for "continuing unlawful acts," but is not tolled for the continuing effects of a single act occurring earlier in time. While an action for a continuing tort may not be time-barred, damages are limited to the harm occurring within the three years prior to filing the cause of action. Here, Litz alleges that the town of Goldsboro "had and has a duty to use reasonable care to control the discharge of ground and surface water onto Litz's property," and continually breached this duty by improperly allowing the contaminated water to enter her property. Drawing reasonable inferences in the light most favorable to Litz, a trier of fact could conclude that the Town's duties were ongoing and continuous. Litz's claim that Goldsboro "had and has" a duty to control the discharge of contaminated ground and surface water could be read as an ongoing duty, and the allegation that the Town has "breached" its duties could be read to mean that the Town has continuously breached this duty. It is therefore reasonable to conclude that Litz's causes of action for negligence and trespass, as a matter of law, were not time-barred.

Inverse condemnation is a taking without just compensation. An inquiry into what constitutes a taking and when this taking occurred is important to the analysis of when Litz's cause of action for inverse condemnation accrued. "The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed." *Md. Port Admin. v. QC Corp.*, 310 Md. 379, 387, 529 A.2d 829, 832 (1987). Also, a taking can be partial or complete, which may be crucial to Litz's cause of action. As the Respondents allege, Litz's cause of action for inverse condemnation may have

accrued in 1996 when it was known that there was a partial taking of her property due to the contaminated groundwater continuously entering her land. Based on the face of the Complaint and reasonable inferences drawn therefrom, however, a complete taking of Litz's property may not have occurred until her property was foreclosed on in 2010. Because a trier of fact may reasonably conclude that Litz's cause of action for inverse condemnation did not accrue until a complete taking occurred; namely, the foreclosure on her property, the motion to dismiss should have been denied because, as a matter of law, this count would not be time-barred.

COURT OF SPECIAL APPEALS

Donald C. Roane v. Maryland Board of Physicians, et al., Nos. 271 & 542, September Term 2012, filed September 5, 2013. Opinion by Nazarian, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0271s12.pdf>

SCOPE OF DISCIPLINARY ACTION – ADMINISTRATIVE AGENCY

WAIVER OF RIGHT TO CHALLENGE ALJ FINDINGS OR RAISE LEGAL ARGUMENTS –
REVOCATION OF LICENSE – ADMINISTRATIVE AGENCY

SCOPE OF REVIEW – ORDER OF SUSPENSION – ADMINISTRATIVE AGENCY

Facts:

Donald C. Roane was a licensed physician in Maryland who, based on allegations from two patients that he provided them with medication in exchange for sex, was charged by the Maryland Board of Physicians with violations of the Maryland Medical Practice Act. One patient alleged that Dr. Roane began sexually assaulting her when she went to him at the age of fourteen for treatment of insulin-dependent diabetes. Although Dr. Roane claimed the physician-patient relationship had terminated, an administrative law judge (“ALJ”) found otherwise based in part on Dr. Roane’s request, made to a pharmaceutical company more than twenty-five years after he first began treating her, for free medication for the patient. Dr. Roane admitted to at least two sexual encounters with this patient. He denied any relationship with the second patient, but the ALJ concluded that Dr. Roane had taken advantage of both young women at a time when they were vulnerable and subject to easy manipulation.

The charges against Dr. Roane resulted in two separate proceedings before the Board, one for the suspension of his license and one for its revocation. In the former proceeding, the ALJ affirmed the Board’s decision to suspend his license, and he appealed to the circuit court. In the latter proceeding before a different ALJ, the parties incorporated into the record the testimony and evidence from the suspension proceeding, and the ALJ there also affirmed the Board’s decision to revoke his license. Dr. Roane appealed this decision to the circuit court as well.

By the time the circuit court in the suspension proceeding heard the petition, Dr. Roane’s license had been revoked so the circuit court dismissed the suspension petition as moot. The judge in the

petition regarding revocation of Dr. Roane's license dismissed that petition, reasoning that he had waived the right to attack the Board's findings.

Dr. Roane appealed both decisions and the cases were consolidated. He argued preliminarily that the Board was not entitled to pursue both a suspension proceeding and a revocation proceeding simultaneously. He also attacked the conclusions in each case as arbitrary and capricious, and not supported by substantial evidence.

Held: Affirmed.

The Court of Special Appeals held first that the Board was authorized by statute to pursue a summary suspension and the revocation of Dr. Roane's license at the same time. Citing the Administrative Procedure Act, Md. Code (1974, 2009 Repl. Vol) § 10-226 of the State Government Article, the Court explained that neither that statute nor the case relied upon by Dr. Roane, *Board of Physician Quality Assurance v. Mullan*, 381 Md. 157 (2004), required that the Board choose only one of the two paths available to it. The procedures for a suspension proceeding on the one hand and a revocation proceeding on the other are different (likely due to the urgency of a suspension proceeding), as are the effects (suspension stopping a practice immediately, and revocation ending it permanently), and nothing in the statutory language or *Mullan* suggests the procedures are mutually exclusive.

The Court also determined that the decision to revoke Dr. Roane's license was proper because he had waived both his argument that the Board's findings of fact were unsupported by substantial evidence and his argument that the Board acted arbitrarily and capriciously by delaying in going forward with the revocation. The Court held that when Dr. Roane filed exceptions with the Board in the revocation proceeding, he did not challenge the ALJ's factual conclusions and therefore waived the right to challenge them later. (The first time he actually challenged these factual conclusions was in a reply brief in the circuit court.) Although Dr. Roane claimed that the incorporation of testimony and exhibits from the suspension proceeding into the revocation proceeding served to "incorporate" the legal arguments from one proceeding into the next, the Court of Special Appeals disagreed and pointed out that it was his duty—not that of the ALJ—to ensure that any issues he wished to raise were specifically brought out, rather than expecting the ALJ to parse through the "incorporated" documents to find all the arguments he wished to make. Moreover, contrary to Dr. Roane's claim, his ardent denial that the alleged acts of malfeasance took place was different from, and did not constitute a formal exception to, the ALJ's findings of fact. The Court noted that its review of the issue, being not from a direct ruling of the circuit court but only from Dr. Roane's Motion to Alter or Amend (due to the timing of his filing of an appeal), led on that deferential standard of review inexorably to the conclusion that the Board's decision was based on far more than substantial evidence.

Finally, the Court of Special Appeals dismissed Dr. Roane's appeal of the suspension proceeding, reasoning that because it affirmed the revocation of Dr. Roane's license, there was nothing left to suspend.

Old Frederick Rd., LLC, et al. v. John H. Wiseman, No. 2356, September Term 2011, filed September 4, 2013. Opinion by, Zarnoch, J.

<http://www.mdcourts.gov/opinions/cosa/2013/2356s11.pdf>

ATTORNEY'S FEES – BAD FAITH OR MERITLESS DEFENSE – APPLICABILITY OF MD. RULE 1-341 TO AN *IN REM* ACTION TO CREATE A MECHANIC'S LIEN

Facts:

Vincent S. Serio created Old Frederick Rd., LLC to construct a house on Old Frederick Road in Ellicott City. The LLC, through Serio, entered into a contract with John H. Wiseman, where Wiseman would manage the construction of the house for a fee. After completing the project without being paid, Wiseman filed a complaint in the Circuit Court for Howard County against the LLC and Serio for a mechanic's lien and breach of contract. Wiseman argued he was still owed money under the contract.

Serio defended against Wiseman's claims with a competing contract and argued that Wiseman had already been paid under that agreement. Wiseman added claims for attorney's fees, arguing that Serio's defense was in bad faith. The circuit court found in Wiseman's favor on all claims. The court found that Serio was responsible for attorney's fees personally, in part, because he had created a fake contract to defend against Wiseman's action and, therefore, his defense was in bad faith and without substantial justification sanctionable under Md. Rule 1-341. Serio appealed and contended that Md. Rule 1-341 could not reach him personally because the mechanic's lien action is an *in rem* proceeding. He also argued that the court's finding of bad faith was based on an inadmissible copy of Wiseman's version of the contract.

Held: Affirmed.

Md. Rule 1-341 provides that “[i]n any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.” The Court of Special Appeals determined that Md. Rule 1-341 was correctly applied to Serio because as owner of the property he was a proper party to the action, and a mechanic's lien action is a civil action.

The appellate court also concluded that the circuit court did not abuse its discretion in admitting a copy of Wiseman's contract for two reasons. The copy was properly admitted because Serio offered an alternative contract and the question of which contract was authentic was a factual issue

for the trier of fact under Md. Rule 5-1008(b). Additionally, under Md. Rule 5-1003, “[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” The Court of Special Appeals concluded that the circuit court did not abuse its discretion in finding that Serio’s questioning of authenticity—he and a handwriting expert testified that the signature on the copy was likely a simulation—was not genuine because other evidence suggested that the copy was authentic, Serio lacked credibility, and he was found to have created fake contract.

Judith Adedje v. Westat, Inc., et al., No. 620, September Term 2012, filed September 6, 2013. Opinion by Hotten, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0620s12.pdf>

CIVIL PROCEDURE – CLASS ACTIONS – STATUTES OF LIMITATIONS – TOLLING
DOCTRINES – CROSS-JURISDICTIONAL TOLLING

Facts:

The procedural history of appellant’s, Judith Adedje, efforts to obtain her alleged overtime wages originated with *Syrja v. Westat, Inc.*, 756 F.Supp.2d 682 (D.Md. 2010). On July 27, 2009, the plaintiff–employee, Steven Syrja (“Mr. Syrja”), filed a complaint in the United States District Court for the District of Maryland (“Maryland U.S. District Court”), maintaining that Westat, Inc. (“Westat”) failed to compensate him for applicable overtime pay. *Id.* at 683. On August 13, 2009, Mr. Syrja filed an amended complaint, on behalf of himself and all other similarly situated individuals, and further claimed a violation of the Fair Labor Standards Act and Maryland’s Wage Payment and Collection Law. *Id.*

Appellant, an Alabama resident, was employed as a Westat field interviewer from April 2003 to May 2007. After this position ended, appellant alleged that she too was entitled to overtime wages for working in excess of forty hours per week. On September 15, 2009, in addition to other Westat employees, appellant filed written consent to join the Syrja case, relating to the Fair Labor Standards Act claim. Thereafter, Mr. Syrja filed a motion for conditional class certification, but the Maryland U.S. District Court denied the certification on November 2, 2010.

On December 2, 2010, appellant and nineteen other Syrja plaintiffs filed a new complaint in the Maryland U.S. District Court, alleging violations of the Fair Labor Standards Act and Maryland’s Wage Payment and Collection Law. In response, Westat filed a motion to sever and dismiss. Following a motions hearing, the Maryland U.S. District Court granted Westat’s motion, and indicated that appellant had twenty days to file an amended complaint.

Thereafter, on September 30, 2011, appellant filed a complaint in the Circuit Court for Montgomery County, pursuant to Maryland’s Wage and Hour Law and Wage Payment and Collection Law. On December 9, 2011, Westat filed a motion to dismiss, asserting that (1) appellant’s claims were time-barred because her employment ended in May 2007, and equitable tolling pursuant to 28 U.S.C. § 1367(d) did not apply; (2) appellant failed to allege a violation of the Wage and Hour Law in the Syrja action; and (3) appellant failed to state a claim upon which relief could be granted regarding the Wage Payment and Collection Law.

Following a motions hearing, the court issued an opinion and order, agreeing with Westat’s contentions, and granted its motion to dismiss.

Held: Affirmed.

The Court of Special Appeals held that the trial court was legally correct. Although the Maryland U.S. District Court provided appellant with the opportunity to continue with her action at the federal level, for reasons not apparent, she elected to file a complaint in the Circuit Court for Montgomery County.

Immediately after the Maryland U.S. District Court denied Mr. Syrja's motion for conditional class certification, appellant could have filed a complaint in Montgomery County, and would have received a thirty day period pursuant to both 28 U.S.C. § 1367(d) and Md. Rule 2-101(b), as the filing deadline, based on three years from her Westat employment's end date, would have been tolled. However, as indicated previously, appellant purposely disobeyed the Court's opinion and order, and was neither persuaded nor deceived by appellees for equitable tolling to apply.

Additionally, the Court of Special Appeals determined that appellant's claims were not the same as the claim she opted-in, and therefore, appellees were not placed on notice. Furthermore, there were no persuasive authority or policy considerations that existed, as recognition of an equitable tolling and cross-jurisdictional class action tolling exception neither harmonized with the purpose of 28 U.S.C. § 1367(d) nor Cts. & Jud. Proc. § 5-101. Accordingly, appellant's claim for overtime wages under Maryland's Wage Payment and Collection Law was barred by the statute of limitations.

Tonia Bravo Llanten v. Cedar Ridge Counseling Centers, LLC, No. 1006, September Term 2012, filed September 9, 2013. Opinion by Kehoe, J.

<http://www.mdcourts.gov/opinions/cosa/2013/1006s12.pdf>

COMMENCEMENT OF AN ACTION – MARYLAND RULE 2-404

STATUTE OF LIMITATIONS – MARYLAND RULE 2-404

DENIAL OF A MOTION TO ALTER OR AMEND – REQUIREMENT FOR A HEARING

Facts:

Llanten, a licensed psychotherapist and certified hypnotherapist, became affiliated with Cedar Ridge, an association of mental health professionals that provides outpatient mental health services to children and adults in January, 2006. As part of its agreement with Llanten, Cedar Ridge undertook to process her patients' claims with their respective health insurers and to remit payments by the insurers to her. In January, 2008, Llanten became concerned that Cedar Ridge had failed to disburse all monies that were due to her from insurance companies for her services. She notified Cedar Ridge that she wished to terminate their relationship. The termination became effective in May, 2008.

On August 1, 2008, Llanten filed in the circuit court a notice of deposition for the perpetuation of evidence pursuant to Maryland Rule 2-404 (the "Rule 2-404 Notice"). The circuit court issued a subpoena the same day, August 1, 2008. Following the issuance of the subpoena, counsel for Llanten and Cedar Ridge engaged in settlement negotiations but to no avail.

On January 17, 2012, Llanten filed a complaint against Cedar Ridge, asserting claims for: (1) breach of contract; (2) unjust enrichment; (3) conversion; and (4) violation of the Maryland Wage Payment and Collection Act. Llanten sought \$50,000 per claim, attorney's fees, and interest. Cedar Ridge filed a motion to dismiss the complaint, contending that it was barred by limitations. It asserted that Llanten's claims accrued no later than January, 2008, which was four years prior to the date the complaint was filed. In response, Llanten argued that the filing of her Rule 2-404 Notice either had commenced a civil action or tolled the statute of limitations. The circuit court held a hearing on the motion and, on June 25, 2012, granted Cedar Ridge's motion to dismiss.

Thereafter, Llanten filed a motion to revise the judgment pursuant to Maryland Rule 2-535. Attached to the motion was an amended complaint that asserted, for the first time, that the parties' agreement included a mandatory arbitration clause. The amended complaint alleged that Llanten had demanded arbitration on May 28, 2010 but that Cedar Ridge refused to participate. She requested a hearing on the motion. The circuit court subsequently denied Llanten's motion without a hearing. Llanten appealed.

Held: Affirmed.

The Court concluded that a request to perpetuate evidence pursuant to Rule 2-404 does not commence a civil action, but is, instead, a limited and specific form of relief available to preserve evidence in advance of litigation. The Court then concluded that the filing of a request to perpetuate evidence pursuant to Maryland Rule 2-404 does not toll the running of the applicable statute of limitations.

Additionally, the Court concluded that the circuit court did not err by denying Llantén's motion to alter or amend the judgment without holding a hearing because the circuit court resolved Llantén's claims when it granted Cedar Ridge's motion to dismiss and the denial of a motion to alter or amend is not a dispositive motion and, therefore, requires no hearing even if one was requested. See *Lowman v. Consol. Rail Corp.*, 68 Md. App. 64, 76 (1986)

Meredith Cross v. Baltimore City Police Department, No. 1290, September Term 2011, filed September 3, 2013. Opinion by Zarnoch, J.

<http://www.mdcourts.gov/opinions/cosa/2013/1290s11.pdf>

CONSTITUTIONAL RIGHTS – RIGHT TO MARRIAGE / INTIMATE ASSOCIATION – RATIONAL BASIS

Facts:

In 2002, Meredith Cross (“Cross”) began a relationship with Carlito Cabana (“Cabana”), a prison inmate serving a 30-year sentence for second-degree murder. In 2004, she began working as a police officer with the Baltimore City Police Department (“the Department”). Although Cross and Cabana did not legally marry until April 2009, Cross identified herself as Cabana’s wife when she visited him in prison as early as 2004. In addition to visiting Cabana, Cross sent him money orders and spoke with him on the phone, including when she was on duty. On June 7, 2009, Cross received a “Notification of Complaint to Accused” alleging she had “been making personal contacts with person(s) of questionable character,” in violation of the Department’s General Order C-2, Rule 1. (“Members of the department shall refrain from making personal contacts with persons of questionable character, or visiting places where suspected violations of the law may be occurring, unless necessary to do so in the performance of their duty.”) After receiving this notice, Cross notified her superior officers about her change in marital status. On March 9, 2010, the Department officially charged Cross with four counts of violating its General Orders, all relating to her marriage to Cabana. On November 30, 2010, Cross presented her case before a three-person administrative panel (“Hearing Board”). She pled guilty to charges that she failed to notify superiors about the marriage within 24 hours. The Hearing Board found her guilty on the remaining charges and recommended her termination. On December 9, 2010, the police commissioner terminated Cross’s employment. Cross appealed the decision to the Circuit Court for Baltimore City, which upheld her termination.

On appeal from the circuit court’s decision, Cross raised four questions. She argued that the General Order limits her federal constitutional right to intimate association and to marry. She also argued that the Hearing Board’s decision to recommend her for termination was unsupported by substantial evidence. In addition, Cross raised for the first time the questions of whether the General Order is unconstitutionally vague and overbroad, and whether the circuit court erred in finding that her termination did not violate Md. Code (2003, 2011 Repl. Vol.) Public Safety Article §3-103(d)(2).

Held: Affirmed.

The Court of Special Appeals held that Cross's right to intimate association was not directly violated because she married and remains married to Cabana. The Court concluded that the Department's decision to terminate Cross's employment was rationally related to the Department's legitimate interest of furthering public trust of the police, maintaining discipline, and ensuring the safety of its employees.

The Court also held that the Hearing Board's findings were supported by substantial evidence that Cabana is a person of questionable character. Cabana was confirmed as a member of a prison gang and the Department produced a letter referring to Cabana as a high-ranking member of that gang.

Finally, the Court held that the remaining two issues were not raised before the Hearing Board and therefore not preserved for review.

CAS Severn, Inc. v. Andrew Awalt, No. 431, September Term 2012, filed September 6, 2013. Opinion by Hotten, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0431s12.pdf>

CONTRACTS LAW – FORMATION OF CONTRACTS – VOLUNTARILY BARGAINED FOR EXCHANGE

CONTRACTS LAW – DAMAGES – TYPES OF DAMAGES – LIQUIDATED DAMAGES – ENFORCEABILITY OF LIQUIDATED DAMAGES PROVISIONS

EVIDENCE – BURDENS OF PROOF – ALLOCATIONS

Facts:

Cas Severn, Inc. (“CAS”) became acquainted with Andrew Awalt (“Awalt”) in the late 1990’s. As CAS began building its computer engineering department, it offered Awalt an employment opportunity in October 2002. Thereafter, Awalt worked for CAS as a systems engineer, spending the majority of his time working with the company’s customers to implement solutions to CAS’ computer-based technological services.

After four years of employment with CAS, Awalt resigned as a full-time employee, but continued working as an independent contractor for the company. He entered into a four-page Professional Service Agreement (“PSA”) with CAS on November 1, 2006. The PSA governed his retention with the company, and additionally contained a covenant not to compete. The covenant provided that during the term of Awalt’s contract with CAS, and one year thereafter, he would not hire, solicit, or attempt to solicit the services of an employee or contractor of CAS or seek or accept employment from a client without the prior written consent of CAS. The covenant additionally provided that violation of the provision would entitle CAS to assert liquidated damages against Awalt equal to one hundred fifty percent of the solicited person’s annual compensation.

Believing that Awalt had violated the covenant not to compete on at least two occasions, CAS instituted a breach of contract claim against him in September of 2010, seeking, among other things, a judgment in the amount of \$313,999.50, attorney’s fees and court costs, and injunctive relief designed to prohibit Awalt from further solicitation. On the last business day before trial, Awalt moved in limine and asked the court to find the liquidated damages clause of the contract void and unenforceable. The court reserved ruling on the matter, and permitted the parties to proceed to trial on the merits.

The jury was unable to unanimously reach a verdict regarding whether Awalt had breached the terms of his agreement with CAS, and a mistrial was declared. Thereafter, the court entertained post-trial supplemental briefing on the validity of the liquidated damages clause. Ultimately, the

circuit court declared the liquidated damages clause void and unenforceable, finding the liquidated damages provision was punitive and not compensatory in nature because CAS had failed to meet the burden of demonstrating actual damages. CAS subsequently noted an appeal to the Court of Special Appeals.

Held: Reversed.

At the outset, the Court of Special Appeals acknowledged that under the well-settled principles of freedom of contract, parties have a broad right to construct the terms of the contracts they enter into as they wish, providing the contract is neither illegal nor contrary to public policy. Additionally, the Court noted that the law of compensatory damages applies to most actions brought in contract and provides a standard measure of compensation limited to the amount of injury incurred by a party's breach. The Court observed, however, that, in some instances, liquidated damages provisions to a contract allow private parties to reform a fixed concept of injury that provides relief in excess, or in lieu, of the compensatory damages.

The Court recognized that the fundamental purpose of liquidated damages is to provide a reasonable measure of compensation in the event of a breach where, at the time the provision is agreed to the damages are indeterminable or will be otherwise difficult to prove. Therefore, when a reviewing court is called to determine the validity of a liquidated damages provision, the court must conduct a more searching inquiry into the propriety and reasonableness of the agreement itself, the court must examine the reasonableness of the amount fixed as liquidated damages from the standpoint of the parties at the time the contract was made. The Court observed that the validity of a liquidated damages clause is contingent upon three essential elements: (1) the clause must provide in clear and unambiguous terms for a certain sum; (2) the sum must reasonably be compensation for the damages anticipated by the breach; (3) the clause must be a mandatory binding agreement which may not later be altered to correspond to actual damages determined after the fact.

The parties agreed that both the first and third elements of the analysis were satisfied. Therefore, the Court focused the remainder of its validity inquiry on the second element. Relying on *Barrie School v. Patch*, 401 Md. 497 (2007), and *Willard Packing Co., Inc. v. Javier*, 169 Md. App. 109 (2006), the Court of Special Appeals emphasized that unless a court encounters circumstances where the damages provision was neither freely negotiated nor made between two parties of equal sophistication, it is the challenger of the liquidated damages clause that bears the burden of proving the clause is unenforceable. Further, it concluded that once a reviewing court has completed its inquiry and determined that the liquidated damages clause is valid and enforceable, it need not make further inquiries as to actual damages. Accordingly, there was no requirement to demonstrate an amount of actual damages to uphold a valid liquidated damages clause.

Michael Robert O'Brien, Sr., et al. v. Bank of America, N.A., et al., No. 824, September Term 2012, filed September 9, 2013. Opinion by Hotten, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0824s12.pdf>

BANKING LAW – BANKING ACTIVITIES – BANK ACCOUNTS – DEPOSIT ACCOUNTS – JOINT ACCOUNTS – JOINT TENANCIES

Facts:

Citi Financial, Inc. (“Citi Financial”) obtained a judgment against Dorothy O’Brien (“Dorothy”) in the District Court of Maryland for Prince George’s County (“District Court”). Citi Financial filed a request for a writ of garnishment, seeking garnishment of Dorothy’s Bank of America accounts. The District Court issued service of a writ of garnishment on Bank of America, which directed it “to seize and hold all of Dorothy’s property that was in the bank’s possession.” Bank of America indicated that Dorothy and her husband–appellant, Michael O’Brien (“Michael”), jointly owned three bank accounts, and Dorothy and Michael were authorized to use and withdraw funds from a fourth account, which belonged to Michael’s mother–appellant, Lavelle O’Brien (“Lavelle”).

Appellants filed a complaint in the Circuit Court for Baltimore City against appellees, Bank of America and the Attorney General of Maryland, Douglas Gansler (“Attorney General”), in his official capacity, alleging conversion and/or trespass to chattel, breach of contract, and a violation of the Expedited Funds Availability Act. Moreover, appellants averred that Bank of America and the Attorney General violated Md. Code (1974, 2013 Repl. Vol.), § 11-603(c) of the Courts and Judicial Proceedings Article [hereinafter Cts. & Jud. Proc. Art. § 11-603(c)], which governed garnishment of joint bank accounts, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Article 19 of the Maryland Declaration of Rights, and Article 3, Section 43 of the Maryland Constitution. Appellants contended that the garnishment laws neither applied to the joint marital accounts nor Lavelle’s account. Thereafter, Bank of America and the Attorney General filed their respective motions to dismiss.

Following a motions hearing, the court treated Bank of America’s and the Attorney General’s motions to dismiss as motions for summary judgment. The court issued a memorandum opinion, final declaratory judgment, and order, granting the motions for summary judgment, concluding that Cts. & Jud. Proc. Art. § 11-603(c) permitted Bank of America to attach Dorothy’s funds in the joint bank accounts to comply with Citi Financial’s garnishment summons, to satisfy Dorothy’s debt.

Held: Affirmed.

The Court of Special Appeals held that the trial court was legally correct. The Court considered legislative history, and determined that the General Assembly examined and balanced a citizen's due process rights with a creditor's interest. The General Assembly did not exercise its police power arbitrarily, but presented a thoughtful enactment of the garnishment statute. Furthermore, the Court determined that appellants failed to establish a violation of due process of law because Bank of America was not a state actor. Because Bank of America was complying with judicial process, there was no wrongdoing on its part that would create a remedy for an injury to appellants' property. Accordingly, the Court concluded that the trial court did not commit a legal error by finding and declaring that Cts. & Jud. Proc. § 11-603(c) did not violate the Due Process Clause of the U.S. Constitution, Article 19 of the Maryland Declaration of Rights, and Article 3, Section 43 of the Maryland Constitution.

Kirk Albertson v. State of Maryland, No. 2583, September Term 2011, filed June 27, 2013. Opinion by Eyler, James R.

<http://www.mdcourts.gov/opinions/cosa/2013/2334s11.pdf>

CRIMINAL LAW – BAD CHECKS

Facts:

Kirk Albertson, appellant, was convicted by the Circuit Court for Talbot County of seven counts of passing bad checks in violation of § 8-103 of the Criminal Law Article of the Maryland Code. The charges arose out of a business relationship between appellant, who operated a used car dealership and Ed Scherl, an auto-broker. Scherl provided cars to appellant for sale. When the car was sold, appellant would arrange for payment to Scherl, and Scherl would deliver title to the car. Four checks issued by appellant to Scherl were dishonored by the drawee for insufficient funds. Three checks were dishonored because of stop payment orders. Appellant testified that he had an arrangement with Scherl whereby Scherl was to hold the checks until there was sufficient funds to cover them.

Appellant contended that the circuit court erred in not instructing the jury that the existence of a hold-check agreement could have negated the intent required to convict appellant of obtaining property or services by passing a bad check and that the evidence was legally insufficient to support the convictions.

Held:

The court erred in not giving the requested instruction with respect to the four checks that were issued with insufficient funds. Section 8-103(a) of the Criminal Law Article. One element of the charge is that the person issuing the check must intend that payment will be refused by the drawee on presentment. The existence of a hold-check agreement is relevant to that element.

The evidence was legally insufficient to convict appellant with respect to the four checks returned for insufficient funds. Appellant testified that there was a hold-check agreement, and there was no evidence to the contrary. The question of sufficiency with respect to the other three checks was not preserved for appellate review.

John Wagner v. State of Maryland, No. 2129, September Term 2011, filed September 4, 2013. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2013/2129s11.pdf>

VOIR DIRE – OTHER CRIMES EVIDENCE – CONSCIOUSNESS OF GUILT EVIDENCE – CROSS-EXAMINATION – HEARSAY – JURY INSTRUCTIONS – SHACKLING OF DEFENDANT

Facts:

Stephen Pitcairn was robbed and fatally stabbed by appellant while Mr. Pitcairn was walking home from Penn Station in Baltimore City. A jury convicted appellant of first degree felony murder, armed robbery, and conspiracy to commit armed robbery.

Held: Affirmed.

Though the circuit court abused its discretion in ordering appellant to wear shackles during the rendition of the verdict, reversal of appellant's convictions was not required, because the shackling was not inherently prejudicial for two reasons: (1) the shackling occurred after the jury had reached its verdict, albeit before it was announced; and (2) the record does not reflect that the shackles were visible to the jury. Because there is no indication that the shackling prejudiced appellant, the error was harmless.

The circuit court did not abuse its discretion when, after asking potential jurors if they had been victims of a violent crime, it declined to broaden the question to include family members or close friends. The question appellant requested regarding the past victimization of family and friends has not been held to be a mandatory question, and other questions asked of the panel created a reasonable assurance that any bias related to the victimization of family members or friends would be discovered if present.

Contrary to appellant's contention, the court did not admit inadmissible other crimes evidence. A picture of appellant in a photo array admitted into evidence was not obviously a mug shot. Evidence that appellant shared in drugs after the robbery was part of the criminal episode, and it was admissible to show the motive for the robbery, i.e. to obtain cash and drugs. Finally, testimony that appellant had been "locked up" did not require a mistrial.

The circuit court properly admitted evidence that appellant shouted his girlfriend's name from his holding cell, as a reasonable fact finder could infer that, when appellant saw his girlfriend return to the interview room for the second time, he yelled her name in an effort to stop her from making

further statements to the police. This desire to conceal evidence is consistent with consciousness of guilt regarding his actions, as well as actual guilt.

The court properly exercised its discretion in limiting the scope of appellant's cross-examination where counsel's question regarding a witness's understanding of her potential eligibility for parole in accordance with a plea agreement was a collateral issue that could have caused confusion to the jury.

The circuit court did not admit inadmissible hearsay. An out-of-court statement is not inadmissible hearsay if it is not offered for the truth of the matter asserted. A detective's testimony that a witness could not read or write was offered, not for its truth, but to explain why there were no comments on the photograph of appellant selected by the witness.

The circuit court acted within its discretion in declining appellant's request to modify the jury instructions for flight or concealment to include factual inferences the jury could make relating to one of the State's witnesses. As the jury is determining the guilt or innocence of the defendant, not a witness, the instructions apply only to the defendant's conduct, i.e., whether there was proof beyond a reasonable doubt that appellant committed the crimes. Appellant received more than that to which he was entitled when the trial court modified the jury instructions to reference the conduct of "some other person."

Charles Thomas v. State of Maryland, No. 2071, September Term 2011, filed September 4, 2013. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2013/2071s11.pdf>

DISCLOSURE OF RECORDED STATEMENTS – WORK PRODUCT DOCTRINE – PRIOR INCONSISTENT STATEMENT – OTHER CRIMES EVIDENCE – OUT-OF-COURT IDENTIFICATIONS

Facts:

A jury convicted appellant of first degree murder, use of a handgun in the commission of a felony or crime of violence, and wearing, carrying, or transporting a handgun in connection with the killing of Alvin Alston. The victim previously had been arrested, with appellant and another individual, for conspiracy to distribute heroin and related charges that carried a potential sentence of 40 years incarceration. The State's theory of the case was that appellant killed Mr. Alston in order to secure a better deal for himself with respect to the heroin distribution charges. Prior to trial, two eyewitnesses identified appellant as the shooter.

Held: Affirmed.

The circuit court properly admitted recordings of two State's witnesses to a defense investigator. The court properly determined that the defense violated Rule 4-263(e)(6) by refusing to provide the State with the recorded statements the defense obtained from the two State's witnesses. Contrary to appellant's claims on appeal, the record shows that appellant intended to use the statements of the two witnesses if they testified to something different from what was stated in the recordings. Disclosure of a defense investigator's recorded statement of the State's witness, which contains only the verbatim statements of the witness, did not violate the work product doctrine.

The trial court properly admitted evidence that appellant was involved in prior narcotics activity with the victim where this evidence was: (1) relevant to establish motive, as the State's theory of the case was that appellant killed the victim in order to obtain a benefit for himself with respect to the charges stemming from the narcotics activity; (2) clear and convincing; and (3) the probative value outweighed any unfair prejudice because, absent the challenged evidence, there was little explanation as to why the victim was murdered.

The motions court did not err in denying appellant's motion to suppress the pre-trial identifications made by two State's witnesses from photographic arrays. The court properly determined that the

identification procedure was not impermissibly suggestive based on its weighing of conflicting testimony.

Rickey Hall v. State of Maryland, No. 1306, September Term 2012, filed September 10, 2013. Opinion by Matricciani, J.

<http://www.mdcourts.gov/opinions/cosa/2013/1306s12.pdf>

JURY INSTRUCTIONS – DUTY TO DELIBERATE – ALLEN CHARGE – EVIDENCE – RELEVANCE

Facts:

Appellant was the lone rear passenger in a car lacking a license plate on its front end, as required by Maryland motor vehicle law. After a brief pursuit, Baltimore City Police stopped the car, and they then saw appellant reach into his waistband, pull his arm out, and lean forward as if to put something on the floor. One officer then walked around to appellant’s door and observed him kicking something under the passenger seat in front of him, which turned out to be a handgun.

Appellant was indicted on various charges involving firearm possession, and brought to trial in the Circuit Court for Baltimore City. At trial, defense counsel attempted to ask a testifying officer about criminal charges against the other two passengers. Counsel was successful in asking whether the driver had been charged, but the court precluded further questioning on the matter.

After approximately two hours of deliberations, the jury submitted a note to the court, which read: “We have a juror who is holding out & it will be impossible [underlined twice] to come to a unanimous verdict.” The court then gave Maryland Pattern Jury Instructions § 2:01 on the duty to deliberate, adding that the jury had a “duty to decide the case” and emphasizing the portion of the pattern instruction that encourages jurors to “deliberate with a view to reaching an agreement.” Appellant was found guilty of possessing a regulated firearm after having been previously convicted of a disqualifying crime.

Held: Affirmed.

First, the trial court did not err when it added to MPJI § 2:01 that the jury had a “duty to decide the case” and emphasized the portion of the pattern instruction that encourages jurors to “deliberate with a view to reaching an agreement.” Although the trial court referred to a duty to “decide,” the court repeatedly emphasized the importance of individual judgment, and advised that individual convictions should not be ceded for the purpose of reaching a verdict. The judge’s instruction, read in context, was not that the jury had a duty to reach a collective decision or verdict, but it was rather an instruction that each juror must reach a decision individually, based on their own convictions and their deliberations with other jurors. And although the judge advised that deliberating “with a view to reaching an agreement” is an “important element” of the deliberation

process, this statement was followed by the qualification contained in the model instruction: “. . . if you can do so without violence to your own individual judgment.” The instruction was not directed at any particular juror, but at the jury as a whole, which had collectively informed the court of its deadlock.

Second, evidence of charges against other potential possessors of the weapon in question was irrelevant. Although facts such as the location of the gun and the presence of other individuals in the vehicle were relevant to appellant's case, the State's decision whether to charge other vehicle occupants with possession of the gun based on those facts was an independent act; it did not make those determinative facts more or less likely to have occurred. Evidence of the charges—or lack thereof—was therefore inadmissible at trial.

Kevin E. Jones v. State of Maryland, No. 660, September Term 2011, filed August 30, 2013. Opinion by Graeff, J.

<http://mdcourts.gov/opinions/cosa/2013/660s11.pdf>

SUFFICIENCY OF THE EVIDENCE OF SPECIFIC INTENT – SECOND DEGREE ASSAULT
– INTENT TO FRIGHTEN

Facts:

On the evening of September 17, 2010, Nikita Tindley, her mother Christine Johnson, and her seven-year-old nephew Devonte Bowen were at home in Ms. Johnson’s apartment when Ms. Tindley heard a knock at the door. When she opened the door, she saw appellant standing with a gun. He demanded to know if two men with whom he had fought earlier that day were in the house, and after Ms. Tindley responded that she did not know what he was talking about and shut the door, appellant fired three shots into the residence. A jury convicted appellant of two counts of second degree assault, of Ms. Johnson and Ms. Tindley, and three counts of reckless endangerment, of Ms. Johnson, Ms. Tindley, and Mr. Bowen.

Held: Affirmed.

The evidence was sufficient for a rational trier of fact to find appellant guilty of the intent to frighten variety of second degree assault with respect to Ms. Johnson, where appellant fired three gunshots into an occupied residence, even if appellant was not aware specifically that Ms. Johnson was an occupant at the time.

In order to establish appellant’s intent, the evidence needed to show only that appellant believed that other occupants in general were in the apartment, not that Ms. Johnson, in particular, was there. From the testimony that appellant went to the apartment intending to shoot at two men with whom he had fought earlier that day, the jury could infer that, when appellant fired the gun, he did so with the intent to frighten them. Moreover, there was testimony that, prior to appellant shooting, there was yelling inside the apartment between Ms. Johnson and her daughter, whom appellant knew was in the apartment. A reasonable jury could infer that this yelling put appellant on notice that there was more than one person in the apartment.

Even if the evidence was not sufficient for a jury to infer that appellant was aware that there were occupants other than Ms. Johnson’s daughter in the apartment, the evidence was still sufficient to support the assault conviction. When a defendant fires shots into an occupied residence, the evidence is sufficient to support a conviction of the intent to frighten variety of assault with respect

to each occupant who reasonably was frightened, regardless whether the shooter was aware of the presence of that occupant.

Khaliq Khan v. State of Maryland, No. 2715, September Term 2011, filed September 4, 2013. Opinion by Matricciani, J.

<http://www.mdcourts.gov/opinions/cosa/2013/2715s11.pdf>

DUE PROCESS – PEREMPTORY JURY STRIKES – BATSON CHALLENGE – PRIOR BAD ACTS – CHARACTER EVIDENCE – “OPEN DOOR” DOCTRINE – VOIRE DIRE – JUROR BIAS

Facts:

Khaliq Khan was charged with two counts of sex offense in the third degree and two counts of second degree assault. These charges stemmed from the alleged assault of two girls at a cosmetics store where appellant worked as a security guard. During *voir dire*, the trial court asked potential jurors whether the nature of the charges would prevent them from listening fairly and impartially, but did not ask whether this bias resulted from “strong feelings” about the alleged crimes. During jury selection, the trial court reseated one of five white male jurors against whom defense counsel had exercised five of seven peremptory strikes. The court found defense counsel’s race- and gender-neutral explanation for this particular strike to be pretextual. At trial, the State was allowed to present evidence of a prior customer complaint against appellant, over appellant’s objection that this was evidence of prior bad acts. The court ruled that the contested testimony was admissible under the “open door” doctrine and in response to character evidence presented by appellant. The State also questioned appellant about possible racial prejudice in attempting to clarify earlier testimony from appellant concerning “discrimination.” Khan was convicted of one count of second degree assault and acquitted of all other charges. He timely appealed.

Held: Affirmed.

The Court of Special Appeals affirmed. First, the trial court did not err when it found defense counsel’s race- and gender-neutral explanation for one of its peremptory strikes to be pretext for racial discrimination despite stating that the court believed the explanations were “candid.” Second, testimony concerning appellant’s general work history and character for truthfulness opened the door for the prosecution to inquire about a prior customer complaint without exploring the complaint’s details. Third, questions about appellant’s possible racial prejudice were relevant and admissible to clarify ambiguous testimony appellant had given concerning “discrimination.” Fourth, the trial court did not err when it asked potential jurors whether they would be biased by the nature of the charges against appellant, without specifying that the potential bias must come from “strong feelings.”

Dajuan Marshall v. State of Maryland, No. 2500, September Term 2011, filed September 4, 2013. Opinion by Wright, J.

<http://www.mdcourts.gov/opinions/cosa/2013/2500s11.pdf>

EVIDENCE – PRIOR TESTIMONY

EVIDENCE – OTHER CRIMES EVIDENCE

CRIMINAL PROCEDURE – WAIVER OF PRETRIAL MOTION TO DISMISS

Facts:

Dajuan Marshall, leader of the Spider Gang, was first tried by jury in the Circuit Court for Baltimore City in July and August 2010, and convicted of first degree murder, conspiracy to murder, conspiracy to kidnap, and a handgun violation. The charges stemmed from the June 9, 2008, abduction and murder of Kenneth Jones, leader of the rival Pasadena Denver Lanes Bloods gang. Prior to his first trial, Marshall moved to have the charges under Md. Code (2002, 2007 Supp.), § 9-804 of the Criminal Law Article (“CL”), dismissed as void for vagueness. During his first trial, Marshall testified in his own defense that the Spider Gang was a community improvement organization rather than a criminal gang. On cross-examination, Marshall testified that other members of the gang could corroborate his testimony but that none had appeared at the trial. Following his conviction, Marshall filed a motion for a new trial, based on juror misconduct, which was granted. Marshall’s retrial was held in October 2011. Marshall’s prior testimony regarding the nature of the Spider Gang was admitted into evidence during the retrial as was testimony regarding Marshall’s involvement in the robbery of a bar one month after the murder of Jones. Marshall was convicted and sentenced to life imprisonment plus twenty years to be served consecutively.

Held: Affirmed.

The circuit court did not err in admitting Marshall’s testimony regarding a lack of corroborating witnesses from his first trial in his subsequent retrial. The evidence was admissible during the first trial because Marshall testified in his own defense and raised a factual issue as to the nature of the Spider Gang. Cross-examination including questions about a lack of corroborating witnesses to support Marshall’s testimony was proper and therefore the prior testimony was admissible during the retrial regardless of whether Marshall testified in his retrial.

The Maryland criminal gang statute, CL § 9-801 et seq., makes evidence, otherwise impermissible under Md. Rule 5-404(b), of other crimes or bad acts admissible to prove a pattern of behavior as

participation in a criminal gang. Under the statute, other crimes evidence is specially relevant as direct evidence of a statutory violation against arbitrary enforcement.

Marshall's failure to specify that he was renewing a motion to dismiss on the ground that CL § 9-804 was void for vagueness in his Md. Rule 4-252 pretrial motions following the grant of a new trial resulted in a waiver of the motion to dismiss. The circuit court's unsolicited comments as to the constitutionality of the statute, in ruling on the admissibility of other crimes evidence, was insufficient to demonstrate that appellant had raised the constitutional issue before the court.

Marlon Smith v. State of Maryland, No. 1295, September Term 2012, filed September 10, 2013. Opinion by Raker, J.

<http://www.mdcourts.gov/opinions/cosa/2013/1295s12.pdf>

TRANSPORTATION ARTICLE – MOVING VIOLATIONS – VEHICLES’ EQUIPMENT – CRIMINAL PROCEDURE – REASONABLE ARTICULABLE SUSPICION – TRAFFIC STOPS

Facts:

Marlon Smith was convicted in the Circuit Court for Baltimore City of possession of a regulated firearm after being convicted of a disqualifying crime, wearing, carrying, or transporting a handgun and wearing, carrying, or transporting a handgun in a vehicle. In November 2011, Smith was a passenger in a vehicle observed by law enforcement to have a malfunctioning rear deck brake light. The vehicle’s other two rear brake lights were functioning properly. The officers initiated a traffic stop based upon the malfunctioning brake light. Detective Ramberg observed a handgun lying in open view on the passenger floorboard. The officers arrested the driver and Smith.

Following a jury trial, Smith was convicted of possession of a regulated firearm after being convicted of a disqualifying crime, wearing, carrying, or transporting a handgun and wearing, carrying, or transporting a handgun in a vehicle.

Held: Affirmed.

Maryland Code (2002, 2012 Repl. Vol.) § 23-105 of the Transportation Article provides that vehicles not meeting the equipment standards established under that subtitle shall be stopped and the driver shall be issued a safety equipment repair order. Promulgated under the same subtitle as § 23-105, § 23-104(a) requires every vehicle driven in this State to have lights that meet or exceed the standards established jointly by the Motor Vehicle Administration (“MVA”) and the Automotive Safety Enforcement Division of the Department of State Police. The MVA requires at least three functioning brake lights, including a rear deck brake light. Thus, to meet or exceed the standards established by the MVA, a vehicle must have at least three functioning brake lights, including a rear deck brake light. Failure to do so warrants a traffic stop and the issuance of a safety equipment repair order pursuant to § 23-105.

Moreover, § 22-101(a)(1)(i) of the Transportation Article prohibits driving a vehicle that is in “such unsafe condition as to endanger any person.” The Federal Safety Standards and the National Highway Traffic Safety Administration of the Department of Transportation make clear

that the requirement of a functioning rear deck brake light is paramount for safety reasons. The specific purpose for the rear deck brake light is to “prevent[] crashes by reducing the reaction time for drivers to notice that the vehicle in front of them is braking.” The rear deck brake light further improves upon the safety standards of vehicles because of its specific position where a following driver is most likely to glance. The rear deck brake light carries specific safety advantages over the other two rear brake lights and is required also to illuminate upon an application of the brakes.

The amalgam of the relevant statutory and regulatory provisions is that it is reasonable for an officer to stop a vehicle with a malfunctioning rear deck brake. That two of the three brake lights on a vehicle are functioning does not absolve a driver from violating the Motor Vehicle Laws of this State. The Court of Special Appeals held that the trial court did not err in denying appellant’s motion to suppress evidence recovered from the search of a vehicle stopped for a malfunctioning rear deck brake light.

Kelvin Banks v. State of Maryland, No. 659, September Term 2011, filed August 30, 2013. Opinion by Kehoe, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0659s11.pdf>

JURY TRIAL WAIVER – MD. RULE 4–246(B)

RESISTING ARREST – IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME – MD. RULE 5–609

Facts:

Defendant waived his right to a trial by jury at a hearing held before the circuit court. The circuit court judge did not announce, on the record in open court, that this waiver was made knowingly and voluntarily. In a subsequent bench trial, the defendant was convicted of various offenses. During trial, the court prohibited the defendant from impeaching a witness with the fact that she had been previously convicted of resisting arrest.

On appeal, the defendant asserted that the trial court erred by failing to comply with Md. Rule 4-246(b), which requires the judge to announce, on the record in open court, that the defendant’s jury trial waiver was made knowingly and voluntarily. The defendant also asserted that a witness’s prior conviction for resisting arrest was admissible as impeachment evidence.

Held: Reversed.

The Court held that the trial court must expressly announce on the record its findings as to whether the defendant has knowingly and voluntarily waived his or her right to a jury trial. *Valonis and Tyler v. State*, 431 Md. 551 (2013). A defendant’s failure to do so does not foreclose the right to raise the matter on appeal. *Id.*, at 569. A trial court’s failure to announce its findings on the record is not subject to a harmless error analysis. *Id.*

There are two categories of crimes that are admissible as impeachment evidence: “(1) infamous crimes, and (2) other crimes relevant to the witness’s credibility.” *State v. Westpoint*, 404 Md. 455, 478 (2008). Resisting arrest is not an infamous crime. Evidence of a conviction of resisting arrest is not relevant to a witness’s credibility. There is nothing in the elements of this offense that identifies conduct “that tends to show that [one guilty of it] is unworthy of belief.” *Westpoint*, 404 Md. at 484.

William Siam Simpson, III v. State of Maryland, No. 2833, September Term 2011, Filed September 25, 2013. Opinion by Hotten, J.

<http://www.mdcourts.gov/opinions/cosa/2013/2833s11.pdf>

CONSTITUTIONAL LAW – FUNDAMENTAL RIGHTS – PROCEDURAL DUE PROCESS – CRIMINAL PROCESS – TRIALS – DEFENDANT’S RIGHTS – SELF-INCRIMINATION PRIVILEGE – RIGHT TO SILENCE – PROSECUTOR’S COMMENTS ON DEFENDANT’S SILENCE

CRIMINAL LAW & PROCEDURE – TRIALS – DISCOVERY & INSPECTION – DISCOVERY BY DEFENDANT – EVIDENCE – TESTIMONY – LAY & EXPERT WITNESSES – OPINION TESTIMONY – SPECIALIZED KNOWLEDGE – QUALIFICATIONS

Facts:

William Siam Simpson, III, appellant, was indicted in connection with three incidents of arson occurring on November 15, 2009, April 4, 2010, and May 16, 2010. Those offenses included the following counts: (a) two counts of first-degree arson; (b) one count of second degree arson; (c) one count of first-degree burglary; (d) one count of third-degree burglary; (e) one count of fourth-degree burglary; and (f) four counts of reckless endangerment. After a three-day trial concluding in January 2011, and one day of deliberation, the circuit court accepted a partial verdict, finding appellant not guilty of one count of reckless endangerment. Thereafter, the court declared a mistrial on the remaining nine counts.

A new trial commenced in July 2011. During the State’s opening statement, the prosecutor indicated that the appellant would tell the jury that he had committed the charged offenses. Appellant objected to the State’s remarks, arguing that the commentary had violated his privilege against self-incrimination. The circuit court overruled appellant’s objections. During his opening, appellant directly responded to the State’s opening, advising the jury that he bore no burden to prove his innocence and maintained an absolute right to silence, from which the jury was prohibited from drawing any inference. Following his opening remarks, appellant moved for a mistrial. The circuit court denied appellant’s motion, finding that the State’s remarks during the opening statement had not violated appellant’s privilege.

On the second day of trial, the State offered the testimony of a fire investigator, with collateral duties as an accelerant canine detection handler with the Office of the Fire Marshal, into evidence. During the investigator’s direct examination, the State questioned him about his ability to interpret his canine partner’s actions and the two’s communicative ability in identifying the presence of accelerants. Appellant objected to the admission of this testimony, arguing that the investigator

was testifying as an expert witness without having been properly qualified and without prior notification to the defense that this witness was an expert. The circuit court overruled appellant's objection, finding that the witness was neither offering opinion testimony nor expert testimony regarding his observations of the canine.

Ultimately, the court accepted a partial verdict—finding appellant guilty of attempted second degree arson— and declared a mistrial on the remaining counts. Appellant subsequently filed a motion for new trial on the basis of alleged prosecutorial misconduct in violation of appellant's rights under the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights, which the circuit court denied. On that same date, appellant was sentenced to ten years incarceration, with all but two years suspended, followed by a period of probation. Appellant noted a timely appeal.

Held: Affirmed.

The Court of Special Appeals first observed that comment upon a defendant's failure to testify in a criminal trial was prohibited in Maryland long before the United States Supreme Court's decision in *Griffin v. California*, 380 U.S. 609 (1965), which held that the federal constitutional right against compelled self-incrimination prohibits prosecutorial comment on the accused's silence or failure to testify. Notwithstanding Maryland's long history of protecting defendants' right not to testify, the Court recognized that it is well-settled that a prosecutor may summarize the evidence admitted at trial and additionally comment on its qualitative and quantitative significance. However, the Court additionally acknowledged that a prosecutor's comments to the jury are not unfettered, particularly when the comments run afoul of the criminal defendant's exercise of his or her privilege against self-incrimination.

Therefore, the Court observed that when the prosecutor's remarks are fairly and reasonably susceptible of the inference by the jury that they were to adversely consider the silence of the defendant as indicative of the defendant's guilt, the prosecutor's commentary is improper and requires reversal unless proven harmless beyond a reasonable doubt. Thereafter, the Court explained the process by which a reviewing court determines the propriety of the challenged remarks, noting: (1) that it examines the context in which the contended remarks were made; (2) that it objectively considers whether the prosecutor's comments outwardly convey or clearly evince an intent to directly or indirectly reference the criminal defendant's silence; (3) that it evaluates whether the challenged remarks, viewed within the context of the entire argument presented in the case, are directed more at the general weakness of the defendant's defense rather than toward the defendant's own failure to testify; and (4) that it assesses whether a reasonable juror would have interpreted the prosecutor's remarks as an invitation to draw a negative inference from the defendant's silence. The Court concluded that unless the prosecutor's comments are such that a jury would naturally and necessarily construe them to be an invitation to draw an adverse inference from the defendant's failure to testify, the remarks are not prejudicially unfair.

After reviewing the Court of Appeals' decisions in *Smith v. State*, 367 Md. 348 (2001), and *Marshall v. State*, 415 Md. 248 (2010), the Court of Special Appeals conclude that appellant's case was inapposite the facts presented in both *Smith* and *Marshall*, noting that *Smith* and *Marshall* addressed the impropriety of remarks made during closing argument. Although the Court acknowledged that sufficient similarity exists between allegations regarding the impropriety of remarks at the beginning and close of trial to permit the application of common principles, it observed that opening statements in a jury trial cannot be equated to closing arguments made to the jury.

The Court evaluated decisions of other jurisdictions that have addressed the propriety of challenged prosecutorial remarks made during *voir dire* or opening statements for further guidance, gleaning from those cases one question that must be addressed in determining whether the challenged remarks were, in fact, improper: "Whether the prosecutor's remarks challenged the defendant to testify or to face the possible negative implications from remaining silent." Noting that such an evaluation is a case-by-case analysis, the Court imparted three factors to be balanced in conducting the fairly and reasonably susceptible of the inference inquiry. The Court also provided four additional factors to consider in evaluating whether the remarks were unduly prejudicial and harmful. Following an evaluation of appellant's record and consideration of the above-referenced inquiry, the court concluded that the prosecutor's statements were not fairly and reasonably susceptible of the inference by the jury that they were to adversely consider appellant's silence as demonstrative of his guilt.

Appellant additionally claimed that the circuit court erroneously admitted expert testimony regarding a fire investigator's observations of his canine partner's detection of accelerants without compliance with Md. Rules 4-263(d)(3), 4-263(8)(A), and 5-702. Following a review of the Court of Appeals' decisions in *Ragland v. State*, 385 Md. 706 (2005), and *State v. Blackwell*, 408 Md. 677 (2009), and the Court of Special Appeals' opinion in *Terrell v. State*, 3 Md. App. 340 (1968), the Court of Special Appeals determined that the fire investigator's testimony regarding his canine partner's detection of accelerants was expert testimony and that admission of the testimony was in error. Nonetheless, the Court ultimately determined that admission of the expert testimony was harmless beyond a reasonable doubt.

Mark Johnson v. State of Maryland, No. 2759, September Term, 2011, filed September 5, 2013. Opinion by Matricciani, J.

<http://www.mdcourts.gov/opinions/cosa/2013/2759s11.pdf>

SENTENCING – RULE OF LENITY – CONSECUTIVE SENTENCES – “ORPHANED” SENTENCES

Facts:

On September 11, 2007, appellant was tried on charges stemming from his high speed chase and apprehension by Baltimore City police, and he was later sentenced to a total of fifteen years' incarceration comprised of two major parts: three five-year sentences for illegal possession of a regulated firearm, with each term to be served consecutively; and three sentences of three years for wearing, carrying or transporting a handgun, with each to be served concurrently with the related charge for illegal possession of a regulated firearm. Each of these charges related to one of three different firearms found in appellant's possession: a .357 Magnum handgun, a .40 caliber handgun, and a .44 Special handgun.

On appeal, this Court reversed appellant's convictions for possession of a regulated firearm relating to the .40 caliber and .44 Special handguns. Appellant appealed from his resentencing, and on August 19, 2011, we again remanded the case for resentencing in accordance with our prior mandate.

On February 7, 2012, the circuit court held a second resentencing for the two concurrent sentences (for wearing, carrying or transporting a handgun) whose corresponding sentences were vacated. The court reimposed them as consecutive to each other, and to the remaining sentence for wearing, carrying or transporting a handgun (whose corresponding sentence for illegal possession had not been vacated). Appellant then noted his third appeal, from his second resentencing.

Held:

If the court imposes one set of consecutive sentences and another set of “parallel” sentences, each of which is concurrent to a corresponding member of the consecutive set, and if one sentence in the consecutive set is vacated, the rule of lenity does not require that each “parallel” sentence be reimposed to run concurrently with all other sentences. Instead, the court may reimpose the “parallel” sentences and make them consecutive to each other, so long as each sentence starts no later than it would have started, as originally imposed.

Ronald Sinclair v. State of Maryland, No. 1724, September Term 2011, filed September 25, 2013. Opinion by Kenney, J.

<http://www.mdcourts.gov/opinions/cosa/2013/1724s11.pdf>

CRIMINAL LAW – SEARCH INCIDENT TO ARREST

EVIDENCE – REBUTTAL – OTHER CRIMES EVIDENCE

Facts:

On April 29, 2010, Thomas Gaines' car was carjacked. The following day, Gaines saw his car in the parking lot of a shopping center and went to look for the person who took his car. Gaines spotted the appellant. Officer Kevin Stevenson, the officer investigating the case, arrived at the shopping center and saw appellant get into a car. He then pulled the car over. Officer Stevenson searched the car and found marijuana where the appellant had been sitting. Gaines identified appellant as the person who had taken his car. Appellant was arrested and a cell phone and a substance, later identified as cocaine, were seized from his person. Approximately five minutes after the arrest, the officer examined the cell phone found on appellant's person. The screen saver on the cell phone was a photograph of car rims confirmed to be identical to the rims on Gaines' stolen car. Officer Stevenson also located two other pictures of rims identical to the rims of the stolen car in the photo library of the cell phone.

Before trial, appellant moved to suppress the evidence seized from the search of the cell phone as well as an alibi statement appellant made to his probation officer. The trial court denied the motions finding that the search of the cell phone was a valid search incident to arrest and that the alibi statement was admissible as rebuttal evidence. During trial, the appellant offered an alibi through witness testimony that he was with a friend in a car borrowed from appellant's father during the night the carjacking occurred. The State then offered a recorded telephone call that appellant made to his probation officer from jail indicating that he had an alibi for the charges against him because he was his mother and girlfriend. The court admitted the recorded statement as rebuttal evidence.

Held:

The trial court did not err in admitting the evidence. The search of the cell phone found on the arrestee's person was a valid search incident to arrest. The officer conducted the search within minutes of the arrest. He did not explore the call history or text messages stored in the phone, but merely opened the phone and immediately saw that the screen saver photograph was evidence

relating to the case under investigation and then searched the phone's photo library and found two additional photographs.

The trial court properly admitted the appellant's statement to the probation officer which was offered in response to alibi evidence introduced by appellant's witnesses. At that point in the trial, alibi became a contested issue and the court found that the probative value of the inconsistent statement outweighed any danger of unfair prejudice caused by evidence that appellant was on probation. The jury was already aware of appellant's prior bad acts because he was also charged with illegal possession of a firearm due to his criminal history.

Ralph Sabert Choate v. State of Maryland, No. 922, September Term 2012, filed September 9, 2013. Opinion by Moylan, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0922s12.pdf>

CRIMINAL PROCEDURE – TRIAL POSTPONEMENT – *HICKS V. STATE* – RULE 4-271 – CP § 6-103 – GOOD CAUSE

EVIDENCE – HEARSAY – RULE 5-802.1(D) – PROMPT COMPLAINT OF SEXUAL ASSAULT

Facts:

The appellant was convicted by a jury of one count of first degree rape and two counts of first degree sexual offense and sentenced to three consecutive life terms. Before trial, the acting county administrative judge found good cause and postponed trial beyond the 180-day Hicks deadline on the ground that a DNA analyst was not available on the scheduled trial date and the prosecutor was scheduled to try another case on the same day that was also subject to a similar, looming 180-day trial deadline. The appellant objected to the postponement and unsuccessfully moved to dismiss the indictment on the ground that the prosecutor's involvement in another case was not good cause. During trial, the court admitted, over the appellant's objection, testimony by the victim's sister regarding the victim's prompt complaint of sexual assault. The appellant argued that a prompt complaint of sexual assault was not admissible unless and until the defense challenged the promptness of the complaint.

Held: Affirmed.

Where a prosecutor is scheduled to try two separate cases on the same day, both subject to similar looming 180-day trial deadlines, good cause exists for a county administrative judge to postpone trial beyond the Rule 4-271 deadline. The State is not obligated to reassign prosecutors to resolve scheduling conflicts. Barring a guilty plea in one of the cases, it is inevitable that one or both cases will have to be postponed. Neither a trial judge nor an appellate court is in a position to second guess the administrative judge's decision to postpone one case instead of the other.

A victim's prompt complaint of sexual assault is not rebuttal evidence and is admissible in the State's case-in-chief. There is no requirement that the defense first challenge the promptness of the complaint.

Kenneth Redmond v. State of Maryland, No. 2281, September Term 2010, filed August 29, 2013. Opinion by Eyler, Deborah S., J.

<http://www.mdcourts.gov/opinions/cosa/2013/2281s10.pdf>

FOURTH AMENDMENT SEARCH AND SEIZURE – POLICE ENTRY INTO HOME BY MEANS OF CONSENT OBTAINED BY RUSE – VOLUNTARINESS OF CONSENT OBTAINED BY RUSE – SCOPE OF CONSENT SEARCH.

Facts:

The victim, a high school student, was robbed at knife point of her cell phone, school bag, and wallet while on her way home from school. The next day, the Advanced Technology Team (“ATT”) of the Baltimore City Police Department used signal triangulation to determine that the stolen cell phone was located in one of two houses on Round Road in the Cherry Hill neighborhood. Kenneth Redmond, the appellant, stayed in one of these houses with his girlfriend and her two sons.

The ATT detectives devised a ruse to gain entry into the two houses. They obtained a photograph of a man (identity not known to them) and came up with a false story that the man in the photograph was named “Leroy Smalls” and was a dangerous pedophile on the loose. They went to the first target house on Round Road, showed the picture to an occupant, and asked whether the occupant knew “Leroy Smalls” and whether the police could enter the house to see if anyone else inside knew where “Leroy Smalls” might be. The occupant consented to their entering. The ATT detectives did not locate the stolen cell phone at that location, however.

The ATT detectives then went to the second target house next door, where the appellant stayed. He was not home at that time, however. The police knocked on the door and Devon Smith, one of the occupants, answered. The detectives showed him the picture of “Leroy Smalls” and asked if Smith knew him. Smith replied, “Leroy doesn’t live here.” The police then asked if Smith lived there, asked to see his ID, and asked if they could come inside to show the photograph to any other occupants. Smith said they could come in.

While Smith went upstairs to get his ID, the police encountered Smith’s mother, Linda Jones, who was on the first floor of the house in the kitchen. They showed her the photograph of “Leroy Smalls” and she told them she did not know him.

Meanwhile, an ATT detective dialed the number of the stolen cell phone and heard a phone ringing from upstairs. Detectives went upstairs and saw the phone ringing on a dresser in the front bedroom. They performed a “protective sweep” of the entire house and ordered Jones and Smith to stay in the living room. For approximately four hours, police stood watch over Jones and Smith. For most of that time, Smith was handcuffed. And during this time the appellant

returned home, let himself in with a key, and also was put in the living room and watched by the police.

An ATT detective called the Western District to advise that the stolen cell phone had been located. As a result of receiving this information, a detective with the Western District obtained a search and seizure warrant for the home. The warrant was executed and the stolen cell phone was seized along with other evidence. Jones told police that the cell phone had been a gift from the appellant.

The appellant was arrested and charged with crimes in connection with the robbery. In the Circuit Court for Baltimore City, he moved to suppress the evidence obtained by the police as a result of their entry into the house. The circuit court denied the motion and the appellant was convicted.

Held: Reversed.

Judgment reversed. The circuit court erred in denying the motion to suppress evidence. The consent given by Smith for the police to enter the house was not voluntary, as it was based on a ruse that was extreme in nature and was continued throughout the period in which the detectives were inside the house. The ruse was used to give the detectives the opportunity to surreptitiously search the house for the stolen cell phone, while the occupants of the house thought they were assisting the police in an investigation into the whereabouts of a dangerous pedophile. And, even if the consent to enter the house was voluntarily given, the police exceeded the scope of the consent by using their presence in the house not to investigate a dangerous pedophile, but to determine whether a stolen cell phone was inside the house. Accordingly, the consent exception to the warrant requirement did not apply. Exigent circumstances, an alternative basis for the suppression court's ruling, also did not apply, as there were no facts to support exigency. Finally, the warrant that was issued was based on the information the police obtained during their unconstitutional entry and search of the house and the independent source doctrine did not apply.

Gary Hiltz v. Melissa Hiltz, No. 1433, September Term 2011, filed September 3, 2013. Opinion by Hotten, J.

<http://www.mdcourts.gov/opinions/cosa/2013/1433s11.pdf>

PUBLIC HEALTH & WELFARE LAW – SOCIAL SECURITY ACT – SOCIAL SECURITY DISABILITY – ELIGIBILITY – DISABILITY DETERMINATIONS – SEQUENTIAL EVALUATION PROCESS – SUBSTANTIAL GAINFUL ACTIVITY

FAMILY LAW – MARITAL TERMINATION & SPOUSAL SUPPORT – SPOUSAL SUPPORT – OBLIGATIONS – COMPUTATION – DOCUMENTATION – SUITABLE DOCUMENTATION – WEIGHT & SUFFICIENCY

EVIDENCE – PROCEDURAL CONSIDERATIONS – BURDENS OF PROOF

Facts:

Melissa and Gary were married in 1990. The couple moved into a townhouse, purchased prior to their nuptials in Baltimore County, Maryland. Gary subsequently adopted Melissa’s son from a previous marriage, named Jonathan Hiltz (“Jonathan”). Jonathan was approximately three and one-half years-old when Melissa and Gary were wed.

At the inception of their marriage, Melissa was working for the American Neurological Association as a medical secretary. She was a high school graduate and had attended a few community college classes in medical terminology and typing. Nonetheless, both she and Gary decided that Melissa would resign from her full-time employment, and find part-time work closer to home in order for her to assume the role of primary caretaker and homemaker. Despite Melissa’s history of fibromyalgia, managed by medications, she lived a fairly active lifestyle.

Melissa, however, suffered a serious back injury in April of 2004, exacerbating her fibromyalgia. As a result, Melissa’s ability to engage in the everyday physical activities prior to her injury was severely limited. She left her part-time employment. Gary suggested that she apply for Social Security disability. Melissa slipped into a deep depression. Arguments between the parties worsened, and Melissa informed Gary that she was leaving in the spring of 2005.

In late 2007, however, Melissa and Gary agreed to reconcile. In June of 2008, Melissa left the marital home one final time. She moved back into the Dundalk residence, where she would remain for an additional two years before subsequently filing her complaint for absolute divorce on July 14, 2010.

Trial commenced on July 25, 2011. Melissa’s counsel argued that an award of Social Security Disability benefits to Melissa created a nearly irrebuttable presumption that Melissa was, in fact,

disabled, therefore lacking the capacity to work and earn any additional income. The circuit court requested authority supporting Melissa's assertion that no additional evidence of physical or mental impairment was required to support a finding that she was totally and mentally disabled.

Gary argued that Melissa had failed to present any medical evidence during trial and argued that a finding of disability by the Social Security Administration was not entitled to any presumption. Thus, he asserted, Melissa had failed to meet her burden of proving that she was, in fact, disabled. Melissa requested that the court take judicial notice of the Social Security Administration's determination that she was permanently and totally disabled. Further, she argued that Gary had failed to offer any evidence that contravened her assertion that she was permanently and totally disabled.

The circuit court granted the parties a judgment of absolute divorce, and the court concluded that Melissa's Social Security disability determination was prima facie evidence that she was, in fact, disabled. The court further found that Melissa's presumption of disability could only be refuted by clear and convincing evidence. Thus, the circuit court awarded Melissa indefinite alimony, finding that she was incapable of becoming partly or wholly self-supporting.

Thereafter, Gary filed a motion for new trial, arguing that the circuit court's finding of disability was erroneous because it contravened the weight of the evidence presented at trial. While Gary's motion was pending before the circuit court, he noted an appeal to this Court on September 2, 2011. Additionally, Gary filed an amended motion for new trial pursuant to Maryland Rule 2-533 on August 19, 2011. Concomitantly, Melissa filed a petition for contempt of court against Gary for failing to adhere to the circuit court's judgment of August 16, 2011. She additionally noted her cross-appeal to this Court on September 15, 2011.

Held:

Judgment affirmed in part, vacated in part, and remanded for proceedings consistent with the Court's opinion. Preliminarily, the Court of Special Appeals reviewed Title 24, Section 423 of the United States Code and concluded that the circuit court improperly created a higher burden of proof to rebut Melissa's assertions that she was disabled on the basis of her receipt of social security benefits. Specifically, the Court observed that the Social Security Administration's five-step sequential evaluation process for determining permanent and total disability does not preclude a beneficiary from earning wages under the monthly maximum financial threshold, pursuant to 20 C.F.R. § 404.1574(b)(2) (2012). Accordingly, the Court concluded that no rational basis exists to support an automatic finding in every case that every social security disability recipient completely lacks the capacity to work or earn any income in the absence of the opposing party's ability to produce clear and convincing evidence to the contrary. Therefore, the Court determined that the burden of proving such a disability logically remains with the party alleging said disability. Thus, Melissa was required to submit evidence corroborating a complete inability

to work, such as substantiating medical records and expert testimony— a requirement synonymous with the burden of proof required by the Social Security Administration.

The Court of Special Appeals next addressed whether the circuit court erred in granting Melissa a monetary award and whether it erred in denying Melissa's request for a finding of dissipation of marital property. Although the Court vacated the circuit court's judgment granting Melissa a monetary award because the factors underlying alimony and monetary awards are so interrelated that if one is found to be in error, the other must be remanded back for further consideration, the Court concluded that the circuit court committed no error in awarding Melissa a monetary award and in finding no dissipation of marital property. With regard to Gary's contentions pertaining to the circuit court's monetary award to Melissa, the Court concluded that Gary incorrectly framed the circuit court's judgment ordering the sale of the parties' one-third interest in their Delaware property as being an order for the sale of all the interest in the property, which would have divested the other tenants in common of their interests. The Court observed that the circuit court explicitly limited the sale to Melissa and Gary's one-third interest and concluded that such a sale was well within the authority of the circuit court so long as it did not prejudice the right to use and enjoyment of the other co-tenants.

Lastly, the Court of Special Appeals vacated the circuit court's award of attorney's fees because the factors underlying awards of alimony, monetary awards, and counsel fees are so interrelated that, when a trial court considers a claim for any one of them, it must weigh the award of any other. Therefore, the Court recommended that the circuit court reconsider whether Melissa was entitled to contribution toward her attorney's fees in light of the Court's other discussions of law.

John C. Bradley v. Sharon M. Bradley, No. 402, September Term 2012, filed September 6, 2013. Opinion by Raker, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0402s12.pdf>

FAMILY LAW – SEPARATION AGREEMENT – TERMINATION OF ALIMONY
NECESSARY TO AVOID A HARSH AND INEQUITABLE RESULT

Facts:

Mr. John Bradley and Ms. Sharon Bradley divorced and entered a separation agreement which the Circuit Court for Montgomery County incorporated, but did not merge, into the divorce decree. In 1998, John and Sharon Bradley amended the alimony provision of their separation agreement. In that amendment, they agreed that alimony would terminate if Ms. Bradley, the recipient spouse, remarried or upon the death of either party. Further, they waived their right to have “any court charge or make a different provision for the support and maintenance” of Ms. Bradley. The Circuit Court for Montgomery County incorporated, but did not merge, this amendment into the divorce decree.

In 2011, Mr. Bradley filed a petition to terminate alimony in the Circuit Court for Montgomery County. He argued that termination of alimony was necessary to avoid a harsh and inequitable result. Ms. Bradley, who had never remarried, moved to dismiss the petition and argued that Mr. Bradley had waived his right to seek termination of alimony unless she remarried or one of them died. The Circuit Court for Montgomery County dismissed the petition.

Held: Affirmed.

Maryland Code (1984, 2006 Repl. Vol.) § 11-108(3) of the Family Law Article states, “Unless the parties agree otherwise, alimony terminates if the court finds that termination is necessary to avoid a harsh and inequitable result.” Parties do not need to explicitly state that alimony is not terminable if a court finds that termination is necessary to avoid a harsh and inequitable result to agree otherwise for the purpose of § 11-108(3).

Maryland Code (1984, 2006 Repl. Vol.) § 11-108(3) of the Family Law Article states that, “unless the parties agree otherwise, alimony terminates upon the remarriage of a recipient party.” In *Moore v. Jacobsen*, 373 Md. 185, 817 A.2d 212 (2003), the Court of Appeals stated that for parties to agree otherwise within the meaning of § 11-108(2), they must state explicitly that alimony does not terminate upon remarriage of the recipient spouse because termination of alimony upon remarriage of the recipient spouse occurs as a matter of law. The Court stated that such a rule “fosters certainty, resolves ambiguity and reduces litigation.”

The Court of Special Appeals found this rationale inapplicable to when a party petitions to terminate alimony to avoid harsh and inequitable results. The Court of Special Appeals noted that, because the court's the inquiry under § 11-108(3) is fact intensive, an application of the rule the Court of Appeals announced in Moore would not foster certainty or reduce litigation because termination of alimony in such circumstances requires court action.

Prime Venturers v. OneWest Bank Group, LLC et al., No. 381, September Term 2011, filed August 29, 2013. Opinion by Graeff, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0381s11.pdf>

CONTRACTS – DEEDS – DOCTRINE OF MERGER – COLLATERAL AGREEMENTS – AGREEMENT TO RECONVEY – CONDITION SUBSEQUENT – INTENT OF THE PARTIES – SURVIVAL CLAUSE.

Facts:

Prime Venturers and David and Cheryl Leupens (the “Leupens”) executed two instruments relating to the conveyance of property in Sykesville (the “Property”), which consisted of 3.1477 acres of land improved by a residential dwelling. One instrument was a Repurchase Agreement (the “Agreement”). The other instrument was a deed of conveyance (the “Deed”).

The Agreement set forth the terms of the Leupens’ obligation to reconvey a portion of the Property. It provided that the parties had agreed that Prime Venturers would sell the entire 3.1477 tract to the Leupens, and that the Leupens would cooperate with Prime Venturers attempts to subdivide the Property. At such time that the Property was subdivided, the Leupens would reconvey to Prime Venturers a 1.6848 portion of the Property for the sum of \$1.00. The Leupens further agreed that they would make any lenders aware of the Agreement. The Agreement was to remain in full force and effect for ten years, and it provided that its provisions were not deemed merged in the Deed.

The second instrument, the Deed, was executed by the parties on the same date as the Agreement. It provided the Prime Venturers granted and conveyed to the Leupens in fee simple the entirety of the 3.1477 acres of property. Unlike the Agreement, which made specific reference to the Deed, the Deed contained no reference to the Agreement, nor did the Deed reserve any rights to Prime Venturers.

On August 21, 2003, at 9:30 a.m., The Sentinel Title Corporation recorded the Agreement in the land records for Carroll County at Book (Liber) 3593, Pages (Folio) 0556-0560. Sentinel recorded the Deed that same date, at 9:31 a.m., at Book (Liber) 3593, Pages (Folio) 0561-0565. Thus, as evidenced by the sequential pagination and the time/date stamps, the Agreement was recorded just prior to the Deed.

Of the original \$330,000 purchase price for the Property, \$264,000 was financed through a loan obtained by the Leupens from National City Mortgage. The mortgage loan was secured by a deed of trust against “lot number 6” of the Property, i.e., the 1.4629 acre portion of the Property containing the dwelling residence, not the Property as a whole.

Several years later, on January 11, 2007, the Leupens refinanced and borrowed \$414,200 from AmTrust Mortgage Corporation (“AmTrust”). As security for the loan, the Leupens used the entire 3.1477 acres of the Property conveyed to them by Prime Venturers in 2003. The Leupens executed a Refinance Deed of Trust, which was recorded in the land records. The Leupens notified their lender of the Agreement, but there was no specific reservation or exclusion in the Refinance Deed of Trust relating to the terms of the Agreement. The covenants in the Refinance Deed of Trust provided that the Property “is unencumbered, except for encumbrances of record.” OneWest subsequently took possession of the Refinance Deed of Trust and assumed the rights of AmTrust.

In 2009, Prime Venturers obtained subdivision approval. That same year, Prime Venturers recorded the subdivision plat in the land records for Carroll County, and it requested that the Leupens reconvey the portion of the Property specified in the Agreement.

The Leupens were willing to reconvey the portion of the Property pursuant to the Agreement, but OneWest’s Refinance Deed of Trust provided that, if any part of the Property is sold or transferred without OneWest’s consent, OneWest may require immediate payment of the entire loan. Prime Venturers requested that OneWest release its lien on the 1.6848 acres based on the terms of the Agreement. OneWest refused, and litigation ensued, with both parties filing Motions for Summary Judgment. After a hearing, the circuit court granted judgment in favor of OneWest. The court found that the Deed was unambiguous and conveyed all interests held by Prime Venturers to the Leupens, without any encumbrances; thus, it concluded that it was impermissible to consider extrinsic evidence to determine the intent of the parties.

Held:

There is a prima facie presumption that the acceptance of a deed is an execution of the entire agreement for the sale of realty, and the rights of the parties in relation to the agreement are to be determined by the deed. The purpose of the merger doctrine is to protect both the integrity of the deed and the integrity of the contracting process.

Where an agreement contains covenants collateral to the deed or where the deed is only a partial execution of the contract, however, the merger doctrine does not apply. Collateral agreements or conditions not incorporated in the deed or inconsistent therewith are not merged into the deed.

An agreement to reconvey property, which takes effect only upon the occurrence of a condition subsequent, is an agreement collateral to a deed, and there is no presumption that an agreement to reconvey property merges into a subsequently recorded deed. Instead, the intent of the parties should be considered to determine whether the agreement merges into a deed.

Point's Reach Condominium Council of Unit Owners, et al. v. The Point Homeowners Association, Inc., No. 1070, September Term 2011, filed August 30, 2013. Opinion by Eyles, Deborah S., J.

<http://www.mdcourts.gov/opinions/cosa/2013/1070s11.pdf>

REAL PROPERTY – SUBDIVISION/PLANNED UNIT DEVELOPMENT – LAND USE – HOMEOWNERS ASSOCIATION – DOCTRINE OF IMPLIED NEGATIVE RESTRICTIVE COVENANTS.

Facts:

A Planned Unit Development known as “The Point” in Ocean Pines was built in three phases. Phases 1 and 2 were single-family residences. Phase 3 was a three-building condominium known as Points Reach (“the Condominium”), the appellant. Prior to the beginning of Phase 3, a Declaration of Covenants was entered into by the developer and owners of lots in Phases 1 and 2 that, among other things, established The Point Homeowners Association (“HOA”), the appellee. Although the language was clear that Phases 1 and 2 were a part of The Point and that the Declaration pertained to Phases 1 and 2, the language establishing the HOA stated that all property owners in the entire subdivision would be required to belong to the HOA. The purchasers of single-family residences thus bought with the expectation that all owners in the subdivision, including future owners, would be required to belong to the HOA. Soon after the Declaration was recorded, the developer marketed the subdivision as planned to consist of single-family residential homes and bayfront condominium units. Once the Condominium was built, the individual units were sold to purchasers who took with notice that they were to belong to the HOA and pay the annual dues assessed by the HOA. In fact, at their closings, the Condominium unit purchasers each paid a pro rata share of the HOA dues for the year of purchase. For many years, they all continued to pay the annual HOA dues until they were advised by counsel that they did not have to belong to the HOA. At that point, some of them stopped paying.

In the Circuit Court for Worcester County, the Condominium brought suit against the HOA for a declaration that they were not required to belong to the HOA and for a refund of dues paid in the past. In a bench trial, the court found that the Declaration establishing the HOA was ambiguous; that the intent of the developer as the common grantor was that all property owners in the subdivision as completed were required to belong to the HOA; that, under the doctrine of implied negative restrictive covenants, the Condominium unit owners were required to belong to the HOA; and that the HOA had the authority to assess fees.

Held:

Judgment affirmed with directions to amend the final declaratory judgment order to state the rights of the parties as set forth in the opinion. Although various portions of the Declaration were clear, some of the provisions were inconsistent, thus creating an ambiguity, in particular with regard to the requirement that owners of property in the subdivision as completed all belong to the HOA. Under the doctrine of implied negative restrictive covenants, a property (or properties) that is not bound by deed or declaration to adhere to covenants that other properties in the same development are bound to adhere to will be found to be bound when there is a common grantor for all the properties; the common grantor intended to create a general scheme for the development as a whole; the vast majority of the properties in the development are bound by the covenants that create that common scheme; the common grantor intended that the property or properties not expressly bound by the covenants to be part of the general scheme; and the purchasers of the property or properties in question took title with notice of the covenant, even though not expressly bound by them. Here, the extrinsic evidence was sufficient to establish these elements and to strongly rebut the presumption that, because the Condominium was not expressly covered by the Declaration, the unit owners were not required to belong to the HOA. The evidence also supported the trial court's finding that the Declaration authorized the HOA to make assessments against its members.

Back Creek Partners, LLC v. First American Title Insurance Company, No. 492, September Term 2012, filed September 6, 2013. Opinion by Nazarian, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0492s12.pdf>

SCOPE OF COVERAGE – TITLE INSURANCE

Facts:

Back Creek Partners, LLC (“Back Creek”), a real estate development company, purchased a piece of waterfront property in Annapolis in 1998. The company planned to subdivide the property into individual residential parcels for resale, reserving an easement on the property to allow prospective residents walking access to individual boat slips and a community pier. At the time of its purchase, Back Creek also bought a title insurance policy from First American Title Insurance Company (“First American”) that insured its interest and estate in the land. The policy protected Back Creek “against loss or damage” sustained as a result of any defect in, lien, or encumbrance on the title to the covered property, unmarketability of the title, or a lack of a right of access to and from the land. Back Creek alleged that it purchased an additional title policy on the property from First American in 2000.

In 2001, Back Creek conveyed Lot 4, one of the individual residential lots subdivided from the original property purchase to Nancy Hassett, who in turn sold Lot 4 to Jeffrey C. Smith and Sandra Corry Smith (“the Smiths”) in 2002. The Smiths filed suit in the Circuit Court for Anne Arundel County against Back Creek on May 13, 2008, seeking definition to the scope of their riparian rights regarding Lot 4 and their ownership and access to the pier and boat slips. Back Creek successfully defended against the claims raised by the Smiths, but accumulated over \$200,000 in attorneys’ fees and expenses in the process.

At the conclusion of the Smiths’ suit, Back Creek sought reimbursement from First American for the expenses it incurred in defending against the Smiths, asserting that the suit fell within the scope of its title insurance policies. Back Creek initiated an action to pursue these claims in the Circuit Court for Montgomery County on December 2, 2011, to which First American responded with a Motion for Summary Judgment disputing coverage. The circuit court granted the motion for summary judgment on April 16, 2012, and Back Creek appealed the decision of the circuit court to the Court of Special Appeals.

Held: Affirmed.

The Court of Special Appeals analyzed the scope of coverage of the title insurance policies held by Back Creek, and thus whether the policies invoked in First American a duty to defend Back Creek

against the Smiths' claims. The Court examined the function of title insurance as protecting an insured property holder against defects in the title of its property or against attacks from third parties against the insured title. Title insurance protects title to property as it existed at a particular time; the policies held by Back Creek covered claims relating to the title it obtained when it bought the property and the titles it conveyed after it subdivided the property. Once Back Creek no longer held title to the property or owed a subsequent owner any warranties of title, coverage terminated, and the successor-in-interest would have to insure or assume the risks of defects in the title it took.

The claims raised by the Smiths fell outside the scope of coverage for multiple reasons. First, the claims raised by the Smiths concerned the scope of their riparian rights and their rights to the water access easement and did not fall within the scope of coverage language enumerated in the title insurance policies. None of the Smiths' claims related in any capacity to an alleged defect in the title obtained from Back Creek, to the existence of liens or encumbrances on the lots, or to the capacity of the Smiths to access the lot they purchased. Second, the Smiths initiated their claims in 2008, seven years after Back Creek conveyed its interest in Lot 4 and two years after Back Creek conveyed its last interest in any of the lots of the originally insured property. Even if the Smiths had raised claims relating to defects in title that Back Creek conveyed, those defects passed to the subsequent owners of the insured lots at the time of conveyance and would not be covered by the title insurance policies.

Gineene Williams, et al. v. Peninsula Regional Medical Center, et al., No. 284, September Term 2012, filed September 5, 2013. Opinion by Zarnoch, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0284s12.pdf>

STATUTES – CONSTRUCTION – MENTAL HYGIENE LAW – INVOLUNTARY ADMISSIONS – IMMUNITY FROM LIABILITY

Facts:

The mother of Charles Williams, Jr. took him to be evaluated for involuntary admission at Peninsula Regional Medical Center (“PRMC”). Dr. Michael P. Murphy and nursing assistant George Stroop evaluated Williams and decided not to admit him. Later the same day, after breaking into a house, obtaining a knife, and charging at police, Williams was shot and killed by police.

Several of Williams’ family members filed a complaint in the circuit court against PRMC, Dr. Murphy, and Stroop, alleging they were responsible for Williams’ death because they were negligent in failing to involuntarily admit him to PRMC. The defendants filed a motion to dismiss, arguing that Md. Code (1982, 2009 Repl. Vol.), Health-General Article (“H-G”), § 10-618, in conjunction with Md. Code (1974, 2006 Repl. Vol.), Courts and Judicial Proceedings Article (“CJP”), § 5-623(c)-(d), gave them immunity. The circuit court granted the motion to dismiss, finding that the immunity statute applied and that the family members had not alleged any facts to overcome the immunity. Williams’ family appealed and argued that the statute only applied to those who involuntarily admit a patient, not when the patient is evaluated and discharged. They also contended that the complaint overcame the immunity statute by alleging negligence.

Held: Affirmed.

Md. Code (1982, 2009 Repl. Vol.), Health-General Article (“H-G”), § 10-618, in conjunction with Md. Code (1974, 2006 Repl. Vol.), Courts and Judicial Proceedings Article (“CJP”), § 5-623(c)-(d), provides immunity to a mental health facility and its employees and agents that, in good faith and with reasonable grounds, “act in compliance with the provisions of Part III” of Subtitle 6 of Title 10 of the H-G Article. The Court of Special Appeals concluded that the immunity applied to the decision to involuntarily admit and also the decision not to involuntarily admit an individual to the facility. The Court reached this conclusion through discussion of the plain meaning of the statute and its purpose. The immunity applies when the mental health professional complies with Part III of the subtitle. The decision not to admit complies with Part III because H-G § 10-617, which is one provision in Part III, does not permit involuntary admittance of an individual who does not meet a set of specific and stringent criteria. Additionally, the

involuntary admission statute was enacted, in part, to protect citizens from unnecessary commitment. The steps for involuntarily admitting someone are strict. Thus, it would lead to an absurd result if the statute provided immunity only to those who involuntarily admit a patient: the immunity provision would give the evaluator an incentive to admit out of fear of liability and undercut the other provisions that are focused on carefully admitting only those who should be admitted.

The Court of Special Appeals also determined that the immunity provision must protect those it covers from at least negligence claims or it would be useless. Thus, if the statute does not protect against claims of negligence, it does not protect against any claims. Williams' family did not state sufficient facts to overcome the immunity statute because the complaint only alleged negligence.

Allstate Mortgage & Company v. Mayor & City Council of Baltimore City, No. 524, September Term 2012, filed September 25, 2013, Opinion by Berger, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0524s12.pdf>

TAX SALES – SURPLUS PROCEED PAYMENTS

Facts:

In 2011, appellant, Barbara Frank, t/a Allstate Mortgage & Company (“appellant”), filed a “Petition for Proper Payment of Surplus Proceeds and Statement of Claim” (“Petition”) regarding real property known as 2335-2355 West Franklin Street (“the Property”). The circuit court denied appellant’s petition.

Earlier in 2011, the Property had been sold subject to a tax sale, and the surplus of the proceeds had been disbursed to Asset Recovery Advisors, LLC, acting on behalf of Darryl Coleman (“Coleman”) pursuant to a claim filed with Baltimore City’s Finance Department (“the City”). In 1997, the mortgage on the Property was executed by “Opportunity Plus Investment Company, LLLP/By: Darryl M. Coleman, General Partner.” The mortgage had been purchased by Allstate Mortgage in 2007.

On appeal, appellant argued that the circuit court erred in denying its Petition because Coleman was not the person entitled to the balance under Md. Code Ann. (1986, 2012 Repl. Vol.), § 14-818(a)(4) of the Tax-Property Article (“TP”). Specifically, appellant contended that the city erred in paying the surplus to Coleman and claimed that the City had a duty to review the underlying tax sale and determine whether any other party to the action may have a right to the proceeds.

Held: Affirmed.

The Court of Special Appeals held that TP § 14-818 does not require the City to assess the priorities between the property owner and other potential lien holders. Rather, when the City complies with the terms of TP § 14-818, it need not perform an independent investigation into other potential claims. The City is entitled to rely upon the documentation and sworn statements that accompany the filed claims. Once the City determines that a claim complies with the City’s procedures, as well as TP § 14-818(a)(4), and there being no competing claims, the City properly processes the payment to the claimant. No additional investigation is required by the City.

Scott Shirley v. Eric Heckman, et al., No. 633, September Term 2012, filed September 6, 2013. Opinion by Nazarian, J.

<http://mdcourts.gov/opinions/cosa/2013/0633s12.pdf>

DEFAMATION – COMMON INTEREST QUALIFIED PRIVILEGE

DEFAMATION – ABUSE OF QUALIFIED PRIVILEGE

Facts:

Scott Shirley was a football coach in the Rockville Football League (the “League”) from 2000 through 2009, until he was suspended from coaching by the League’s Board of Directors (the “Board”) in November 2009 after a parent submitted a complaint about his conduct toward an official during a playoff game.

After receiving the complaint, the Board held a meeting to discuss Mr. Shirley’s past conduct and his conduct during the playoff game. At the conclusion of the meeting, the Board voted in favor of suspension. Shortly thereafter, Eric Heckman, the League President, sent notice of the suspension via e-mail to Mr. Shirley, Craig Brodsky (the League Commissioner), then members of the Board, and Mr. Shirley’s co-coaches. Mr. Shirley appealed the suspension and a hearing was held, at which only League-affiliated individuals were present. At the hearing, Mr. Heckman recounted the most recent allegation and a list of previous allegations underlying the suspension, and, after deliberations, the Board upheld the suspension.

Mr. Shirley filed suit in the Circuit Court for Montgomery County alleging, among other things, that Mr. Heckman (and thus the League as well) defamed him when he sent the notice of suspension and when he recounted the allegations underlying the suspension at the hearing. Mr. Heckman and the League moved for summary judgment, and the circuit court granted it, finding them entitled to judgment as a matter of law by virtue of the common interest privilege. In so holding, the circuit court also recognized that Mr. Shirley had failed to demonstrate that the privilege had been abused.

Held: Affirmed.

The issue on appeal concerned whether Mr. Heckman and the League abused the conditional common interest privilege that applied to Mr. Heckman’s statements, or in other words, whether Mr. Heckman published his statements with malice or for a purpose other than to further a social interest that the privilege protects. See *Gohari v. Darvish*, 363 Md. 42, 64 (2001).

In determining whether Mr. Heckman abused the conditional common interest privilege on the basis of malice, the Court of Special Appeals applied the malice standard created by the Court of Appeals in *Ellerin v. Fairfax Savings F.S.B.*, 337 Md. 216 (1995), requiring proof of “a person’s actual knowledge that his or her statement is false, coupled with his or her intent to deceive another by means of that statement.” The Court applied this standard after reviewing the history of the malice standard in the context of the abuse of conditional privileges. The Court first recognized that the same standard of malice defines both eligibility for punitive damages and whether a conditional privilege had been abused. *Marchesi v. Franchino*, 283 Md. 131, 138-39 (1978). In light of *Marchesi* and the application of the *Ellerin* malice standard in both *Le Marc’s Management Corp. v. Valentin*, 349 Md. 645, 651-54 (1998) (applying the *Ellerin* standard to a punitive damages analysis), and *Piscatelli v. Smith*, 424 Md. 294, 307-08 (2012) (applying the *Ellerin* standard to determining whether the fair reporting privilege had been abused), the Court of Special Appeals determined that the *Ellerin* malice standard also applies in the context of determining whether the common interest privilege had been abused.

In this case, Mr. Shirley failed to demonstrate that Mr. Heckman had actual knowledge of the falsity of his publications or that he had intended to deceive the recipients of his publications. In both publications, Mr. Heckman reported allegations that others had lodged with the Board and the evidence upon which the Board relied in deciding to suspend Mr. Shirley. He made no accusations of his own, offered no view on the truth of the allegations, and limited publication to a relevant group of people showing a common interest in the League and its processes. Moreover, Mr. Shirley produced no evidence from which a jury could find that Mr. Heckman knew that the reports of Mr. Shirley’s behavior were false or that his statements during the course of the suspension hearing were intended to deceive.

Nor did Mr. Shirley demonstrate that Mr. Heckman’s statements were made for a purpose outside the common interest for which the privilege is accorded. Mr. Heckman was acting in his capacity as League president when he sent the notification email and when he presided over the suspension hearing, which had been convened to consider Mr. Shirley’s suspension pursuant to League rules. The purpose of the common interest privilege is to promote and protect the free exchange of information, and to allow those sharing the common interest to speak freely and defend themselves. The League’s rule define the space for that discourse, and specifically created the requirement that the League, through Mr. Heckman, send the notification email and convene the suspension hearing. The Court held that so long as they are not speaking or acting with malice, the League and individuals within its sphere of common interest are immune as a matter of law from liability for defamation arising from statements published in connection with the League’s disciplinary process.

William Rounds, et al., v. Maryland National Capital Park and Planning Commission, et al., No. 889, September Term 2012, filed September 9, 2013.
Opinion by Watts, J.

<http://www.mdcourts.gov/opinions/cosa/2013/0889s12.pdf>

LOCAL GOVERNMENT TORT CLAIMS ACT – LGTCA – NOTICE – NOTICE REQUIREMENT – LGTCA NOTICE REQUIREMENT – 180 DAYS – COURTS AND JUDICIAL PROCEEDINGS ARTICLE SECTION 5-304 – GOOD CAUSE – DILIGENCE – MISLEADING REPRESENTATIONS – STATE CONSTITUTIONAL TORTS – SOVEREIGN IMMUNITY – WAIVER OF SOVEREIGN IMMUNITY – MARYLAND NATIONAL PARK AND PLANNING COMMISSION – MARYLAND TORT CLAIMS ACT – STATE GOVERNMENT ARTICLE SECTION § 12-104(A)(1) – JOINDER – JOINDER OF NECESSARY PARTIES – FAILURE TO JOIN NECESSARY PARTIES – DECLARATORY JUDGMENT – DECLARATORY JUDGMENT ACT – COURTS AND JUDICIAL PROCEEDINGS ARTICLE SECTION 3-405(A) – MARYLAND RULE 2-211 – EASEMENTS – MOTION TO DISMISS – FACTUAL ALLEGATIONS – BALD ASSERTIONS – CONCLUSORY STATEMENTS – MARYLAND RULE 3-22(B)(3) – MONTGOMERY COUNTY CODE SECTION 49-6(A) – STATUTE OF LIMITATIONS – TIME-BARRED – ACCRUAL – ACCRUAL DATE – COURTS AND JUDICIAL PROCEEDINGS ARTICLE SECTION 5-101 – COURTS AND JUDICIAL PROCEEDINGS ARTICLE SECTION 5-105 – WRONGFUL INTERFERENCE – SLANDER OF TITLE – DISCOVERY RULE – INQUIRY NOTICE – REASONABLE DILIGENCE

Facts:

A group of landowners (“appellants”) filed suit in the Circuit Court for Montgomery County, alleging that: (1) the Maryland National Capital Park and Planning Commission (“the Commission”), the surveying firm Macris, Hendricks, and Glascock, P.A. (“MHG”) and its employee, and a separate group of landowners (together, “appellees”) had taken steps to prevent access to and use of appellants’ properties adjacent to “Farm Road” in Sandy Spring, Montgomery County, Maryland; and (2) the Commission had refused to issue appellants addresses, and in some cases rescinded addresses, for appellants’ properties.

In the complaint’s latest version, appellants alleged that: (1) in or around 1994, Brown, a real estate developer, began developing the area around Farm Road; (2) as part of his development efforts, Brown eliminated the northern access to Farm Road from Goldmine Road; (3) Brown directed MHG’s employee to create survey documents for submission to the Commission that falsely depicted Brown’s development as being unencumbered by Farm Road; (4) the Commission accepted Brown’s and MHG’s submissions; (5) in or around 2003, two landowners purchased multiple acres of a fictional conservation easement from Brown for purposes of developing the

property; (6) the two landowners, even before their purchase of the property, worked behind the scenes with Brown to cut off the northern access to Farm Road; (7) on November 20, 2007, appellants learned that the Commission was refusing to issue addresses for appellants' properties; (8) since then, the Commission had taken different positions as to why it was refusing to issue addresses for appellants' properties; and (9) In a letter to the Commission dated February 28, 2008, the Montgomery County Executive stated: "I hope that you are able to recognize the Farm Road as the private right-of-way that it seems to be[.]"

In a letter to the Montgomery County Executive and the Commission dated June 10, 2008, appellants stated that they intended to file suit. In June 2008, appellants sued appellees in the United States District Court for the District of Maryland ("the federal court"). On July 15, 2011, the federal court dismissed the case for failure to exhaust state remedies.

In the circuit court, as to the Commission, the complaint's latest version included: Count One (substantive due process); Count Two (procedural due process); Count Three (regulatory taking); and Count Four (declaratory judgment that the Commission exceeded its authority). As to all appellees, the complaint's latest version included Count Five through Count Eleven (declaratory judgment that appellants had an easement to use Farm Road). As to the Commission, MHG and its employee, Brown, and the two landowners, the complaint's latest version included Count Twelve (wrongful interference) and Count Thirteen (slander of title).

The circuit court granted motions to dismiss all counts. Specifically, the circuit court dismissed with prejudice: (1) Count Five through Count Eleven as to MHG, its employee, and Brown, who did not own property adjacent to Farm Road and thus were not interested parties; (2) Count Twelve and Count Thirteen as time-barred as to MHG, its employee, and Brown; and (3) Count Twelve and Count Thirteen as to the MHG and its employee because they did not owe a duty to appellants. The circuit court dismissed: (1) Count One through Count Four, with prejudice, as to the Commission for lack of proper notice under the Local Government Tort Claims Act ("LGTC"); (2) Count Five through Count Eleven, without prejudice, as to the Commission and the group of landowners, for failure to join necessary parties; and (3) Count Twelve and Count Thirteen, with prejudice, as to the Commission and the group of landowners, as time-barred.

Held: Affirmed.

The Court of Special Appeals affirmed the circuit court's dismissal of all counts.

The Court of Special Appeals held that "a plaintiff may sue the Commission for a state constitutional tort only if the plaintiff complies with the LGTCA's conditions, including its [180-day] notice requirement." The Court so determined because: (1) "generally under common law, the State enjoys sovereign immunity and is thus protected from suit for both ordinary torts and State constitutional torts[.]" *Ford v. Balt. City Sheriff's Office*, 149 Md. App. 107, 119 (2002) (emphasis added) (citation omitted); (2) the Commission is properly characterized as a state

agency for the purpose of determining its right to invoke the doctrine of sovereign immunity[.]" *O & B, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 279 Md. 459, 466 (1977); and (3) the LGTCA—enacted in 1987, a decade after *O & B*, id.—constitutes a waiver of the Commission's sovereign immunity. See *Prince George's Cnty. v. Longtin*, 190 Md. App. 97, 124 (2010), *aff'd*, 419 Md. 450 (2011).

As to Count One through Count Four, the Court of Special Appeals held that the circuit court did not abuse its discretion in concluding that appellants did not show good cause to excuse compliance with the LGTCA notice requirement. The Court of Special Appeals rejected appellants' contentions that: (1) they prosecuted their claims with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances; and (2) they delayed because the Commission made misleading representations to them.

As to Count Five through Count Eleven, the Court of Special Appeals held that the circuit court did not err in granting the motions to dismiss for failure to join necessary parties. The Court of Special Appeals so determined because, in the complaint's latest version, appellants admitted that they had not joined everyone who owns property adjacent to Farm Road. The Court rejected appellants' contentions that the circuit court erred in granting the motions to dismiss because: (1) in the complaint's latest version, appellants alleged that the "other adjacent property owners have agreed not to contest the relief sought[;]" (2) under *Serv. Transp., Inc. v. Hurricane Exp., Inc.*, 185 Md. App. 25, 41 (2009), and *City of Bowie v. MIE Props., Inc.*, 398 Md. 657, 704-05 (2007), the circuit court should have accepted the allegation that the "other adjacent property owners" declined to join the case; and (3) the circuit court should have allowed the case to proceed to discovery—during or after which, presumably, the circuit court would revisit the issue of joinder of necessary parties.

As to Count Twelve and Count Thirteen, the Court of Special Appeals held that the circuit court did not err in dismissing as time-barred. The Court of Special Appeals so determined because: (1) according to the complaint's latest version, in or around 1994, Brown began developing the area around Farm Road; (2) as part of his development Brown eliminated the northern access to Farm Road from Goldmine Road; (3) the complaint's latest version informed that Brown's alleged elimination of northern access to Farm Road occurred sometime in or before 2003; (4) Brown's alleged elimination of northern access to Farm Road put appellants on inquiry notice that their ability to access Farm Road was in danger; and (5) in June 2008, appellants sued appellees in the federal court. Thus, appellants did not file within the required three years for wrongful interference with easement rights, or the required one year for slander of title.

Raymond V. Hamilton, Jr. v. Sandra B. Dackman, et al., No. 2871, September Term 2011, filed September 5, 2013. Opinion by Nazarian, J.

<http://www.mdcourts.gov/opinions/cosa/2013/2871s11.pdf>

EXPERT TESTIMONY – LEAD PAINT CASE

CAUSATION – LEAD PAINT CASE

SUMMARY JUDGMENT – LEAD PAINT CASE

Facts:

Raymond V. Hamilton, Jr. was born in 1992 and lived with his mother at several different houses in Baltimore City throughout his childhood. He also often visited (and stayed at) his father’s residence, a brick row home on Appleton Street (“Appleton”). Hamilton experienced elevated blood-lead levels between 1993 and 1997, and in 2009 he filed suit against the owners of one of his mother’s former residences and the owners of Appleton (identified collectively as “Dackman”). He alleged that he ingested lead-based paint at the homes, which caused him to suffer lead poisoning, leading to brain damage.

Over the course of the case the other property owners were dismissed, leaving only Dackman as a defendant. Dackman moved for summary judgment, arguing that Hamilton lacked sufficient direct or circumstantial evidence to demonstrate his exposure to lead at Appleton, and also arguing that he failed to rule out other sources of lead. Hamilton opposed the motion and presented a report indicating the presence of lead paint on a rear exterior door transom at Appleton, one of eight surfaces tested on the exterior there. The technician did not test any surfaces on the interior of the house; nonetheless Hamilton’s expert toxicologist assumed the presence of lead-based paint on the interior of Appleton solely because it was built before 1950. Even though he could not offer a conclusive opinion as to whether Hamilton was exposed to lead-based paint at other properties, he nonetheless opined that Appleton was “the major source of the lead poisoning in this case.” Hamilton’s expert pediatrician also assumed the presence of lead-based paint at Appleton for the same reason, and opined that Hamilton’s injuries were caused by exposure to lead-based paint there and at two of his other childhood residences.

The circuit court granted Dackman’s motion for summary judgment, reasoning that Hamilton had failed to produce sufficient evidence for a fact-finder to conclude that the elevated blood-lead levels were caused by exposure to lead at Appleton. The court held that Hamilton’s expert witnesses had failed to establish causation because they had improperly presumed the presence of lead-based paint in any house built before 1950. Hamilton appealed, arguing that his experts should have been allowed to offer their opinions as to where Hamilton was exposed to lead. He

also argued that even without the experts' testimony, he had produced sufficient circumstantial evidence of causation to overcome a motion for summary judgment.

Held: Affirmed.

The Court of Special Appeals held that Hamilton had not offered enough evidence of causation to connect his injuries to Appleton, and that the evidence presented would allow a fact-finder to find that it was, at most, possible that Hamilton's injuries resulted from exposure to lead paint there. The Court looked to the recent decision of the Court of Appeals in *Ross v. Housing Authority*, 430 Md. 648 (2013), to determine that where there is more than one source of harm, the plaintiff must proffer facts in opposition to a motion for summary judgment (even if only by way of circumstantial evidence) that establish a probability that lead was present in the particular home at issue.

The Court held first that the circuit court properly rejected the proffered expert testimony by the toxicologist and the pediatrician, as their conclusions about where Hamilton was exposed to lead-based paint were based only on presumptions about the construction date of the house. Their opinions regarding additional potential sources of exposure to lead (the other homes Hamilton had lived in or visited during the period of exposure) were likewise unsupported by any factual evidence, and would have done nothing to assist a jury in determining where exposure took place.

Although the Court held that Hamilton could have survived summary judgment even without the benefit of expert testimony, it held second that he failed to produce even circumstantial evidence that Appleton was a probable source of Hamilton's injuries. Specifically, a lead test on an exterior transom did not establish Appleton as a probable cause of Hamilton's injuries, given that he had been exposed to lead at other properties and had elevated blood-lead levels continuing at least two years after he stopped visiting Appleton.

ATTORNEY DISCIPLINE

*

By a Per Curiam Order of the Court of Appeals dated September 5, 2013, the following attorney has been disbarred:

MICHELLE DAVY

*

By a Per Curiam Order of the Court of Appeals dated September 10, 2013, the following attorney has been disbarred:

PATRICK EDWARD VANDERSLICE

*

By an Opinion and Order of the Court of Appeals dated September 13, 2013, the following attorney has been indefinitely suspended:

GARLAND HOWE STILLWELL

*

By an Opinion and Order of the Court of Appeals dated August 15, 2013, the following attorney has been suspended for sixty days, effective September 14, 2013:

MELISSA DONNELLE GRAY

*

By an Opinion and Order of the Court of Appeals dated August 20, 2013, the following attorney has been suspended for ninety days, effective September 19, 2013:

THOMAS PATRICK DORE

*

*

By an Opinion and Order of the Court of Appeals dated August 21, 2013, the following attorney has been suspended for one year, effective September 20, 2013:

SHERRIE T. HOWELL

*

This is to certify that

CHIKE IJEABUONWU

has been replaced upon the register of attorneys in this state as of September 20, 2013.

*

This is to certify that

GREGORY J. MILTON

has been replaced upon the register of attorneys in this state as of September 20, 2013.

*

This is to certify that

GERALD FREDERICK CHAPMAN

has been replaced upon the register of attorneys in this state as of September 20, 2013.

*

This is to certify that

CHRISTINE A. KEPPLER

has been replaced upon the register of attorneys in this state as of September 20, 2013.

*

*

By an Order of the Court of Appeals dated September 20, 2013, the following attorney has been suspended:

STEPHANIE YVONNE BRADLEY aka STEPHANIE Y. BRADLEY

*

By an Opinion and Order of the Court of Appeals dated September 26, 2013, the following attorney has been disbarred:

JULIA COLTON-BELL

*

JUDICIAL APPOINTMENTS

*

On August 13, 2013, the Governor announced the appointment of **MARK FRANKLIN SCURTI** to the District Court of Maryland – Baltimore City. Judge Scurti was sworn in on September 3, 2013 and fills the vacancy created by the elevation of the Honorable Christopher Panos to the Circuit Court for Baltimore City.

*

On August 13, 2013, the Governor announced the appointment of **MARTIN DOMINIC DORSEY** to the District Court of Maryland – Baltimore City. Judge Dorsey was sworn in on September 9, 2013 and fills the vacancy created by the retirement of the Honorable Ronald A. Karasic.

*

On August 13, 2013, the Governor announced the appointment of **NICOLE PASTORE KLEIN** to the District Court of Maryland – Baltimore City. Judge Klein was sworn in on September 10, 2013 and fills the vacancy created by the retirement of the Honorable James L. Mann.

*

On August 13, 2013, the Governor announced the appointment of **KEVIN MICHAEL WILSON** to the District Court of Maryland – Baltimore City. Judge Wilson was sworn in on September 11, 2013 and fills the vacancy created by the retirement of the Honorable H. Gary Bass.

*