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http://www.mdcourts.gov/opinions/coa/2016/86a14ag.pdf

ATTORNEY DICIPLINE – DISBARMENT

Facts:

This matter arose from Garrett V. Williams' representation of Leslie Valentine-Bowers in a medical negligence lawsuit. Nearly two years after entering into a written agreement securing Williams' legal representation, Williams filed two complaints on behalf of Ms. Valentine-Bowers. Williams failed to serve either complaint on any of the defendants. After the two cases were consolidated, Williams engaged in a pattern of violations of his duties as an attorney. Among other things, Williams failed to timely serve two complaints in 2010, failed to respond to at least ten letters, phone calls, or notices as well as five separate motions filed by the defendants. When Williams did respond to the defendants' requests, his responses were untimely, inadequate, and incomplete. Williams failed to propound any discovery on behalf of his client and failed to otherwise advance his client's claim. Williams continually missed discovery deadlines, failed to conduct discovery, did not inform his client of his shortcomings, and affirmatively misrepresented to the Circuit Court that Williams' discovery violations were the result of his inability to reach his client. As a result of Williams' behavior, his client's complaint was dismissed with prejudice. Williams then filed an appeal without the knowledge or consent of his client, and again misrepresented the reasons for his lack of communication with his client to the Court of Special Appeals. As a result, disciplinary proceedings were filed against Williams. Williams did not participate in those proceedings in any manner.

Held:

Based on the Court's independent review of the record, the Court determined that Williams violated Maryland Lawyers' Rules of Professional Conduct 1.1, 1.2(a), 1.3, 1.4(a) and (b), 3.2, 3.3(a), 8.1(b), and 8.4(c) and (d). Under the circumstances, the Court of Appeals held that the appropriate sanction was disbarment. The Court explained that Williams engaged in an

egregious pattern of intentional dishonest conduct in an attempt to conceal his lack of diligence and competence, including filing frivolous actions in the underlying medical negligence complaint, failing to timely respond to discovery requests or conduct discovery himself, and failing to inform his client about the status of her case, which resulted in harm to his client. In addition, Williams made intentional and knowing misrepresentations to the courts in an attempt to cover-up his own lack of diligence and competence. Furthermore, Williams failed to cooperate in the disciplinary proceedings filed against him. The Court noted that because of the magnitude of Williams' indifference toward his client and the legal system, coupled with the fact that Williams did not offer any mitigating factors, the appropriate sanction is disbarment.

Attorney Grievance Commission of Maryland v. Alexander Manjanja Chanthunya, Misc. Docket AG No. 58, September Term 2014, filed March 25, 2016. Opinion by Watts, J.

Harrell, J., joins in judgment only.

http://www.mdcourts.gov/opinions/coa/2016/58a14ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION FROM PRACTICE OF LAW IN MARYLAND WITH RIGHT TO APPLY FOR REINSTATEMENT AFTER SIXTY DAYS

Facts:

On the Attorney Grievance Commission ("the Commission")'s behalf, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Alexander Manjanja Chanthunya ("Chanthunya"), charging him with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 3.3(a)(1) (Candor Toward the Tribunal), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC).

A hearing judge found the following facts. A female client retained Chanthunya to represent her in her application for a green card and her application for a waiver of grounds of inadmissibility. On the client's behalf, Chanthunya filed an application for a green card with the United States Citizenship and Immigration Service ("USCIS"). The application for a green card contained inaccurate statements and spaces that were not filled in that should have been, and Chanthunya failed to attach required or necessary documents. On three occasions, USCIS requested additional documents from Chanthunya, who failed to inform the client of USCIS's three requests. USCIS scheduled an interview regarding the client's application for a green card. Chanthunya failed to: prepare the client for the interview; advise her of what to expect at the interview; appear at the interview himself; and ask USCIS to reschedule the interview. USCIS denied the client's application for a green card and a waiver of grounds of inadmissibility, and Chanthunya failed to inform the client as much. After USCIS informed the client about the applications' denial, the client contacted Chanthunya, who promised to file an appeal. The client, however, did not receive notice from USCIS that the appeal had been filed. The client telephoned Chanthunya to ask about the status of the appeal, and Chanthunya promised to call her back. Chanthunya, however, failed to contact the client, prompting her to visit USCIS herself. Upon visiting USCIS, the client was unable to confirm that the appeal had been filed. On at least ten occasions during Chanthunya's representation of her, the client visited Chanthunya's office because he was not answering her telephone calls.

A second client retained Chanthunya to represent her in an application for asylum. Chanthunya failed to: prepare the client for the asylum hearing; advise her of the benefits and risks of postponing her case; advise her of the type of evidence that she needed; and submit on the client's behalf corroborating evidence, such as evidence that the client's family members had been persecuted in the Central African Republic. Chanthunya also failed to review the Baltimore Immigration Court's file to ensure its completeness. Although the Baltimore Immigration Court denied the client's application for asylum, the hearing judge found that the denial was due to the client's lack of credibility, not Chanthunya's lack of preparation. the client subsequently filed a motion to reopen her asylum application based on ineffective assistance of counsel by Chanthunya, as well as changed conditions in the Central African Republic. The Board of Immigration Appeals granted the motion, and remanded the case to the Baltimore Immigration Court for a de novo asylum hearing.

The hearing judge concluded that Chanthunya violated MLRPC 1.1, 1.3, 1.4, 8.4(b), and 8.4(d), but had not violated MLRPC 8.4(a). The hearing judge found that testimony by the client that Chanthunya allegedly sexually assaulted her was not credible.

The Court of Appeals remanded the attorney discipline proceeding to the hearing judge to address important issues that arose out of the hearing judge's findings of fact and conclusions of law. The Court ordered the hearing judge to, among other things, "[p]rovide a better explanation for why he found that [the first client]'s testimony [that Chanthunya touched her breast] was not credible . . . , if indeed [the hearing judge] continue[d] to maintain that[.]" The hearing judge filed a supplemental opinion in which the hearing judge maintained that the client's testimony was not credible, and concluded that Chanthunya had violated MLRPC 8.4(a), but had not violated MLRPC 8.4(b).

Held: Indefinitely suspended from practice of law in Maryland with right to apply for reinstatement after sixty days.

The Court of Appeals overruled the Commission's exception to the hearing judge's finding that the first client's testimony regarding the alleged sexual assault was not credible. Both in his original opinion and in his supplemental opinion, the hearing judge based his finding on what he believed that a victim of sexual assault would or should do—namely, report the incident to law enforcement and/or the victim's spouse, and cease contact with the perpetrator. The conundrum was that, even if the hearing judge relied on incorrect grounds in finding the client's testimony not credible, it does not follow that the client's testimony that Chanthunya assaulted her was, indeed, accurate. Nonetheless, the Court stated that the hearing judge's beliefs about victims of sexual assault were unfounded, and indicative of an uninformed view of the manner in which a victim of sexual assault responds to the occurrence.

The Court held that clear and convincing evidence supported the hearing judge's conclusions that Chanthunya violated MLRPC 1.1, 1.3, 1.4(a)(2), 1.4(a)(3), 1.4(b), 8.4(d), and 8.4(a). The

Court did supercede the hearing judge's conclusion that Chanthunya did not violate MLRPC 8.4(b).

The Court agreed with the Commission that the appropriate sanction for Chanthunya's misconduct is an indefinite suspension from the practice of law in Maryland with the right to apply for reinstatement after sixty days. Chanthunya's misconduct cost the first client the opportunity to have USCIS consider an appeal, and impeded the progress of both of his clients in becoming naturalized. The Court noted only two mitigating factors: (1) the absence of prior attorney discipline; and (2) the absence of a dishonest or selfish motive. The Court noted five aggravating factors: (1) a pattern of misconduct, as Chanthunya engaged in similar misconduct in separately representing two clients; (2) multiple violations of the MLRPC; (3) a refusal to acknowledge the misconduct's wrongful nature; (4) substantial experience in the practice of law, as Chanthunya had been a member of the Bar of Maryland for approximately ten years at the time of his misconduct; and (5) the victims' vulnerability, as both of Chanthunya's clients, were not United States citizens and had immigrated to this country.

Attorney Grievance Commission of Maryland v. Kristan Peters-Hamlin, Misc. Docket AG No. 30, September Term 2015, filed March 25, 2016. Opinion by Hotten, J.

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

http://www.mdcourts.gov/opinions/coa/2016/30a15ag.pdf

ATTORNEY DISCIPLINE – RECIPROCAL ACTION – INTENTIONAL DISHONEST CONDUCT – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Kristan Peters-Hamlin. Bar Counsel alleged that Respondent engaged in professional misconduct, in connection with her representation as lead counsel of a plaintiff in an action before the United States District Court, Southern District of New York ("New York action"), in violation of the following Maryland Lawyers' Rules of Professional Conduct ("MLRPC"): 3.3(a)(1) (Candor Toward the Tribunal), 3.4(c) (Fairness to Opposing Party and Counsel), and 8.4(a), (c), and (d) (Misconduct).

In April 2007, Respondent, while a partner at Dorsey & Whitney, LLP ("Dorsey & Whitney"), filed suit on behalf of a plaintiff against four of its former employees for alleged trade secrets infringement. At the close of extensive discovery conducted under orders of confidentiality, Dorsey & Whitney voluntarily dismissed the suit and re-filed a substantially identical suit in the United States District Court for the District of Massachusetts ("Massachusetts action"), after the defendants contested personal jurisdiction in the New York action. Dorsey & Whitney subsequently filed a motion in the Massachusetts action seeking injunctive relief and attached some of the discovery material produced by the defendants in the New York action.

As a result of Respondent's involvement in these events, the judge presiding in the New York action imposed non-monetary sanctions against her and notified the Committee on Grievances for the United States District Court, Southern District of New York ("Grievance Committee") of her conduct. On January 30, 2008, the Grievance Committee issued an "Order to Show Cause" alleging, in relevant part, that Respondent violated NYRPC 3.3(a)(1), 3.4(c), 8.4(c) and (d), by instructing an associate in her firm to "mark-up" deposition transcripts and claim them as attorney work product to prevent their discoverability; knowingly making false statements to mislead the court as to those events; and made copies and ordered additional copies of deposition transcripts for use in the Massachusetts action, in contravention of court confidentiality orders in the New York action.

The Grievance Committee issued an interim suspension order and subsequently issued a seven-year suspension against Respondent, which she appealed to the United States Court of Appeals

for the Second Circuit. The Second Circuit vacated the interim suspension and remanded for further proceedings, including an evidentiary hearing on the charges against Respondent.

An eleven-day hearing from June through August 2012 was held before the Honorable Lisa Margaret Smith, United States Magistrate Judge for the Southern District of New York ("magistrate judge"). After receiving evidence and hearing testimony of several witnesses, including Respondent, the magistrate judge issued a 118-page Report and Recommendation, which indicated Respondent's knowing and intentional misconduct relative to the alleged charges. The magistrate judge concluded that Respondent violated New York Rules of Professional Conduct ("NYRPC"), 3.3(a)(1); 3.4(c); and 8.4(c) and (d), and recommended the imposition of a five-year suspension, *nunc pro tunc* to April 10, 2008.

The Grievance Committee adopted the magistrate judge's Findings of Fact and Conclusions of Law, and by order dated April 10, 2013, suspended Respondent from the practice of law in the United States District Court, Southern District of New York for seven years, *nunc pro tunc* to April 10, 2008. The Grievance Committee cited Respondent's "corruption of a young and inexperienced lawyer, over whom she had power and authority," her lack of remorse for her inappropriate behavior, and "habit of twisting the truth" as factors warranting a deviation from the magistrate judge's recommendation. Respondent appealed the Grievance Committee's order to the Second Circuit. By order dated April 4, 2014, the Second Circuit affirmed the Grievance Committee's order of suspension.

In response to the show cause order issued by the Court of Appeals on August 6, 2015, Bar Counsel asked that reciprocal discipline not be imposed, and recommended disbarment due to Respondent's repeated, intentional dishonest conduct. Respondent requested that the Court impose no discipline, or alternatively, follow the other state and federal bars, which imposed reciprocal discipline *nunc pro tunc*.

Held:

The Court of Appeals accepted the Findings of Fact and Conclusions of Law of the magistrate judge and concluded that Respondent engaged in serious misconduct involving repeated intentional dishonesty, misrepresentations, and deceit, and that she exhibited a lack of remorse and accountability for the events that transpired. Such conduct violated MLRPC 3.3(a)(1), 3.4(c), and 8.4(a), (c), and (d), and warranted a deviation from the seven-year suspension, *nunc pro tunc* to April 10, 2008, imposed by the Southern District of New York. Accordingly, the Court ordered disbarment.

Moran Perry v. Asphalt & Concrete Services, Inc., No. 27, September Term 2015, filed March 28, 2016. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2016/27a15.pdf

CIVIL PROCEDURE – INSURANCE – EVIDENCE

Facts:

Moran Perry ("Perry") filed suit against Respondent, Asphalt Concrete Services, Inc. ("ACS"), Higher Power Trucking, LLC ("Higher Power") and William Johnson, II ("Johnson") for injuries he suffered when he was struck by a dump truck owned by Higher Power and operated by Johnson. Perry alleged negligence against Higher Power, Johnson, and ACS[1]. He also alleged that ACS was negligent in its hiring and supervision of Higher Power. When Perry discovered that Higher Power was not in good standing with the Maryland State Department of Assessments and Taxation at the time of the accident, he filed a First Amended Complaint. The first amended complaint alleged the same counts of negligence and negligent hiring but substituted Johnson for Higher Power in the negligent hiring count.

ACS filed a pre-trial motion seeking exclude the testimony of Officer Palkovic that the truck Johnson was driving was uninsured at the time of the accident. The Circuit Court determined that it needed additional facts for this decision and reserved its ruling on this motion. The Circuit Court also indicated that if the evidence of insurance came in, it would be limited to the negligent hiring count. During trial, prior to the Circuit Court's ruling on this motion, Perry called Burt Maggio ("Maggio"), President of ACS at the time of the accident as a witness. Perry elicited testimony from Maggio that ACS hired Higher Power/Johnson despite two unanswered requests for proof of insurance coverage. The Circuit Court overruled ACS's objection to this testimony.

After Maggio's testimony, the Circuit Court determined there was now a sufficient foundation as to ACS and Johnson's employment relationship. Based on this determination, over ACS's objection, the Circuit Court granted Perry's request to call Officer Palkovic as a witness. Officer Palkovic testified that the insurance policy on the truck Johnson was driving was not valid due to a lapse in payment. Prior to resting his case, Perry called additional witnesses to testify on the subject of insurance. The Circuit Court allowed the testimony over ACS's objections. Overruling ACS's request to strike a requested jury instruction, the Circuit Court gave the jury Perry's requested jury instruction regarding the requirement of liability insurance. The jury returned a verdict in favor of Perry.

[1] Neither Higher Power nor Johnson responded to the initial complaint.

Held:

For evidence of insurance to be admissible in a negligent hiring claim, the evidence must also be relevant to the proximate cause of the plaintiff's injuries.

Pursuant to Maryland Rule 5-411 "[e]vidence that a person was or was not insured against liability is not admissible upon the issue [of] whether the person acted negligently or otherwise wrongfully." Evidence of liability insurance may, however, be admissible if "offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." Md. Rule 5-411. Even where evidence of liability insurance falls into one of these exceptions, the admissibility of such evidence is still governed by Maryland Rules 5-402 and 5-403 which state, respectively, that "[e]vidence that is not relevant is not admissible" and "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

To determine whether evidence is relevant to a claim of negligent hiring, we must analyze the elements of the claim. The plaintiff must establish two links in order to establish liability in a negligent hiring claim. First, the plaintiff must show that the failure of an employer to undertake a reasonable inquiry resulted in the contractor's hiring. Second, the plaintiff must prove that the negligent hiring was a proximate cause of his or her injury. To satisfy the element of proximate cause, the plaintiff must show that the employer knew or should have known about a specific quality of the independent contractor, and that quality was relevant to the cause of the plaintiff's injury.

Based on the facts of this case, the Court of Appeals determined that evidence of lack of insurance was not relevant to the claim of negligent hiring because it was not relevant to the proximate cause of Perry's injuries. ACS's failure to comply with its policy of hiring truck drivers with insurance was not the proximate cause of Perry's injuries because lack of insurance coverage due to a lapse in payment is not an indicator of a person's ability to operate a vehicle. Thus, it was legal error for the trial court to admit the evidence of lack of insurance coverage.

Justin Sharp v. State of Maryland, No. 58, September Term 2015, filed March 25, 2016. Opinion by Watts, J.

Battaglia, J., joins in judgment only.

http://www.mdcourts.gov/opinions/coa/2016/58a15.pdf

PRESERVATION FOR APPELLATE REVIEW – ALLEGED IMPERMISSIBLE CONSIDERATIONS DURING SENTENCING – DECISION NOT TO PLEAD GUILTY

Facts:

In the Circuit Court for Baltimore County ("the circuit court"), the State, Respondent, charged Justin Sharp ("Sharp"), Petitioner, with attempted first-degree premeditated murder, first-degree assault, and openly wearing and carrying a dangerous weapon with the intent to injure.

On the day on which trial was scheduled to begin, the parties appeared before the circuit court. The prosecutor stated that the State had offered a plea agreement under which Sharp would plead guilty to first-degree assault, and the State would recommend a sentence of twenty-five years of imprisonment, with all but ten years suspended. The circuit court stated that the circuit court had offered a plea agreement under which Sharp would plead guilty to first-degree assault, and the circuit court would impose a sentence of twenty years of imprisonment, with all but eight years suspended. Sharp declined both plea offers.

On the day on which trial would begin, the circuit court reiterated the court's offer to Sharp, and stated that, under the court's offer, the circuit court would suspend all but a cap of eight years of imprisonment. Sharp again declined the court's offer.

At trial, the State offered evidence of the following facts. Sharp, Raymond Evianiak ("Evianiak"), and other people attended a St. Patrick's Day party. Sharp and Evianiak consumed alcohol, marijuana, and pills. Sharp and Evianiak got into an oral altercation. At some point, Evianiak passed out. Later, Sharp was seen hitting Eviniak with a bottle. At that time, broken glass was all over the floor; Evianiak had multiple gashes and was covered in blood; and blood from Sharp was on the ceiling.

Before the jury reached a verdict, the State nolle prossed the attempted first-degree premeditated murder charge. The jury convicted Sharp of first-degree assault, second-degree assault, and openly wearing and carrying a dangerous weapon with the intent to injure.

At the sentencing proceeding, Sharp's counsel asked the circuit court to consider imposing the sentence that had been part of the court's offer—twenty years of imprisonment, with all but eight years suspended. Sharp's counsel stated: "Your Honor would have heard the same facts from the State in that plea. You would have heard about the injuries, you would have theoretically seen [] Evianiak, you would, I mean, nothing is anything different because we went to trial, other than []

Sharp wanted the opportunity to speak and to defend himself in what he believed was a situation that was more than just himself and mutual as well." The circuit court responded: "So you don't believe that putting [the] State's witnesses, the victim through, reliving that and testifying in Court is no different than if he would have admitted what he did and pled guilty in front of me? You're saying that that, that's all the same?" Soon afterward, Sharp's counsel stated: "I don't believe in punishing someone for wanting to go to trial." The circuit court responded: "[T]he whole idea of an offer of a plea is to give something in exchange for sparing the State and the witnesses and the victims the trauma, the risk of a trial . . . [W]ould you agree?" Sharp's counsel responded: "I would[.]"

Later during the sentencing proceeding, the circuit court announced that it would impose a sentence of twenty-five years of imprisonment for first-degree assault, and three concurrent years of imprisonment for openly wearing and carrying a dangerous weapon with the intent to injure. The circuit court identified the following reasons for its sentence: while Evianiak was unconscious, Sharp "consistently beat [Evianiak] about his face with bottles"; the incident was "a massacre[,]" "not a fight"; Sharp's "attack" on Evianiak was "the most brutal and heinous that [the circuit court] ha[d] seen in almost thirty years [in the] practice of law[,]" and the circuit court "ha[d] never seen photographs of injuries" like Evianiak's, including a fractured eye socket; it was "amazing that [Evianiak] was able to live after having been [so] brutally attacked"; nothing in the pre-sentence report or Sharp's allocution or mitigation "persuade[d the circuit court] that [Sharp] ha[d] any redeeming qualities whatsoever"; and the circuit court "f[ou]nd it repulsive that" Sharp asserted that his mother and child were "victims[.]"

Sharp noted an appeal, and the Court of Special Appeals affirmed the judgments of conviction. Sharp filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that the issue of whether the circuit court impermissibly considered during sentencing his decision not to plead guilty is preserved for appellate review. Although Sharp's counsel did not formally object to the circuit court's remarks at the sentencing proceeding, Sharp's counsel made known to the circuit court that Sharp took issue with what his counsel characterized as the circuit court's "punishing [Sharp] for wanting to go to trial." In other words, Sharp's counsel made known his objection to the circuit court's allegedly penalizing Sharp by impermissibly considering during sentencing that Sharp declined the State's and the circuit court's plea offers.

Upon review of the circuit court's statements at sentencing in the context of the entire sentencing proceeding, the Court of Appeals concluded that the circuit court's remarks do not give rise to the inference that the circuit court might have been motivated by the impermissible consideration of Sharp's decision not to plead guilty. While arguing in favor of a sentence that was within the guidelines' range, Sharp's counsel asked the circuit court to impose the sentence that was part of the circuit court's plea offer. Sharp's counsel asserted that "nothing [wa]s anything different" by

virtue of Sharp's decision not to plead guilty. The circuit court interjected to correctly state that a trial was, in fact, "different" from a guilty plea, in that a trial "put[the] State's witnesses[and] the victim through[] reliving [their experiences] and testifying in Court[.]" Indeed, Sharp's counsel acknowledged that the circuit court was correct: "I'm not saying [that] it's no different[.]" The circuit court pointed out that Sharp's counsel had just contradicted herself: "[Y]ou just said [that] there's no difference." Sharp's counsel responded: "No, I don't believe in punishing someone for wanting to go to trial." The circuit court swiftly rebutted any implication that it was "punishing" Sharp for his decision not to plead guilty: "[T]he whole idea of an offer of a plea is to give something in exchange for sparing the State and the witnesses and the victims the trauma, the risk of a trial. . . . [T]here's a give and take when it comes to a plea negotiation." Once again, Sharp's counsel acknowledged that the circuit court was correct.

Significantly, the circuit court did not make the remarks at issue while announcing and giving the reasons for the circuit court's sentence; to the contrary, the circuit court made the remarks during an earlier exchange that began when Sharp's counsel asked the circuit court to impose the sentence that was part of the circuit court's plea offer and asserted that "nothing [wa]s anything different" by virtue of Sharp's decision not to plead guilty. In expressing its views about why sentencing after trial differed from sentencing after a guilty plea, the circuit court merely responded to Sharp's counsel's assertion; contrary to Sharp's contention in this Court, the circuit court was not spontaneously explaining one of the circuit court's considerations during sentencing. Indeed, later, when the circuit court announced, and explained the reasons for, its sentence, the circuit court never mentioned the circuit court's and the State's plea offers, or that Sharp had declined them. Instead, the circuit court identified entirely permissible reasons for its sentence.

Given that one of the circumstances that comprised Sharp's counsel's argument that the circuit court might have been motivated by an impermissible consideration during sentencing was that the circuit court made a "court's offer," which Sharp rejected, the Court of Appeals addressed the propriety of the circuit court having made a "court's offer." The Court advised trial courts to refrain from directly making plea offers to defendants in criminal cases. Indeed, Maryland Rule 4-243 (Plea Agreements) does not authorize a trial court to make a plea offer. And, in *Barnes v. State*, 70 Md. App. 694, 707, 523 A.2d 635, 641 (1987), the Court of Special Appeals concluded that, by making a plea offer and encouraging the defendant to accept it, the trial court "improperly interjected [it]self into the plea bargaining process as an active negotiator, infringing upon the function reserved to counsel in the adversary process." Here, the Court of Appeals stated that it is the role of the State, not a trial court, to make a plea offer. The trial court's role is to approve or reject a plea agreement that the parties submit to it, not to come up with its own plea offer—i.e., a "court's offer."

The Court determined that the record contains no indication that the circuit court imposed a harsher sentence because Sharp declined either the circuit court's plea offer or the State's plea offer. At the sentencing proceeding, Sharp's counsel, not the circuit court, initiated the exchange about plea offers. And, although Sharp's counsel referred to the circuit court's plea offer—as opposed to the State's—the circuit court observed that Sharp had declined to "ple[a]d guilty in

front of" the circuit court. The circuit court's observation included Sharp's decision to decline both the circuit court's plea offer and the State's plea offer.

Maryland Department of the Environment, et al. v. Anacostia Riverkeeper, et al., No. 42, September Term, 2015, *Blue Water Baltimore, et al. v. Maryland Department of the Environment*, No. 43, September Term, 2015, *Blue Water Baltimore, et al. v. Maryland Department of the Environment, et al.,* No. 44, September Term 2015, filed March 11, 2016. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2016/42a15.pdf

ENVIRONMENTAL LAW – ADMINISTRATIVE LAW – CLEAN WATER ACT – PERMITTING PROCESS

Facts:

The Maryland Department of the Environment ("MDE") issued municipal separate storm sewer system ("MS4") discharge permits ("the Permits") to Anne Arundel County, Baltimore City, Baltimore County, Montgomery County, and Prince George's County ("the Counties"). The Water Groups challenged the Permits in the various counties where MDE issued them.

The Circuit Court for Montgomery County remanded for MDE to revise the Permit in accordance with its opinion and order. In a reported opinion, the Court of Special Appeals affirmed. MDE then filed a petition for writ of certiorari, which the Court of Appeals granted.

The Circuit Court for Baltimore County, the Circuit Court for Anne Arundel County, and the Circuit Court for Prince George's County affirmed MDE's decision to issue the Permits issued to those counties. The Water Groups filed notices of appeal to the Court of Special Appeals and, upon MDE's motion, the Court of Special Appeals consolidated these three cases. MDE then filed a petition for writ of certiorari to the Court of Appeals with questions nearly identical to those MDE submitted in its petition for writ of certiorari with respect to the Montgomery County Permit.

Finally, the Circuit Court for Baltimore City also affirmed MDE's decision to issue the Baltimore City Permit. The Water Groups filed a notice of appeal, and the Mayor & City Council of Baltimore ("Baltimore City") filed a petition for writ of certiorari with a request that the Court of Appeals consider this petition in conjunction with MDE's petitions. The Court of Appeals granted the City's petition.

Held: In Case No. 42: Reversed. In Cases Nos. 43 & 44: Affirmed.

The Water Groups first challenge a provision that required the Counties to restore 20% of the impervious surface areas in their watersheds that have not been restored to the maximum extent practicable ("MEP"). The purpose of the 20% restoration requirement is to use stormwater

management practices to restore the natural, beneficial processes in our environment that we have changed by developing impervious surfaces. The Water Groups argue that the 20% restoration requirement is too opaque to comply with 33 U.S.C. § 1342(p)(3)(B)(iii), the MEP standard. But 33 U.S.C. § 1342(p)(3)(B)(iii) imposes no minimum standard or requirement on MDE other than to establish controls for MS4s to reduce the discharge of pollutants. Moreover, the record reflects that MDE established a performance standard, the water quality volume standard ("WQv"), that defines as acceptable those practices the Counties may choose from to fulfill the 20% restoration requirement.

The Water Groups also argue that MDE has not explained why it selected 20% as the restoration goal or how this Permit provision will promote necessary pollution reduction. We disagree with the Water Groups' position because the applicable law affords permitting authorities flexibility in establishing controls for MS4s. That is, MS4s shall require controls "and such other provisions as the Administrator or *the State determines appropriate* for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added). MDE has also justified its decision based on a well-developed and vetted strategy for restoring the Chesapeake Bay. MDE selected the 20% restoration requirement from a state plan called a Watershed Implementation Plan whose pollution reduction targets the EPA were attainable.

Finally, with respect to the 20% restoration requirement, the Water Groups object to MDE's method of calculating impervious surface area not restored to the MEP. We disagree with the Water Groups because MDE reasonably justified its decision based on the accurate determination that 2002 marked a significant milestone in the State's treatment of water quality. Around 2002, MDE subjected best management practices ("BMPs") to performance standards to better treat water quality. Thus, the Water Groups' challenges to the 20% restoration requirement fail.

Next, the Water Groups argue that MDE failed to comply with 40 C.F.R. § 122.44(d)(1)(vii)(B), a federal regulation that requires MDE to establish effluent limitations that take into account wasteload allocations ("WLAs"). They argue that MDE committed legal error by designing the Permits so that MDE will review the effluent limitations one year *after* issuing the Permits, thereby precluding the agency from knowing whether the effluent limitations are consistent with the WLAs. We disagree with the Water Groups because 40 C.F.R. § 122.44(d)(1)(vii)(B) is, like the MEP standard, flexible as to how a permitting authority complies with this regulation. The EPA set a minimal, flexible requirement in which the permitting authority is to design a scheme where effluent limits are compatible or in agreement with WLAs. Moreover, MDE complied with the regulation by incorporating the WLAs into the Permits and by using an "iterative" process of agency review and program change to ensure progress in meeting the WLAs.

Next, the Water Groups challenge the Permits' monitoring provisions in two ways. As required by federal regulations, the Water Groups first contend that the provisions do not produce representative data in the MS4 jurisdictions. MDE, however, has ensured that the Counties monitor stormwater discharges at monitoring locations that represent an adequate range of land uses statewide, and the agency has also increased the frequency of monitoring in this version of

the Permits to yield more representative information at the County level. Thus, we conclude that MDE's monitoring program will produce representative data.

The Water Groups also argue that the Permits' monitoring provisions fail to assure compliance with Permit requirements. Through its monitoring and modeling scheme and the concept of adaptive management, however, MDE has assured compliance with the two applicable requirements: (1) controls to reduce the discharge of pollutants and (2) the restoration of 20% of impervious surface area not restored to the MEP.

With respect to pollutant controls (also known as BMPs), MDE relies on an approach known as adaptive management whereby the agency imposes program changes based on annual report data obtained from monitoring. In addition, because, as we observe, BMPs are subject to estimation and prediction in this context, MDE uses focused monitoring and modeling to produce high quality assessments of BMPs. Consequently, all interested parties better understand the effects that restoration activities like BMPs will have on the State's waters. And through adaptive management, MDE will force the Counties to select BMPs that will reduce the discharge of pollutants if those Counties submit data indicating that their activities are ineffective at pollution reduction.

With respect to the 20% restoration requirement, MDE incorporated a clear evaluation tool into the Permits—the Guidance—to assess restoration of impervious surfaces. Thus, we conclude that MDE has assured compliance with the 20% restoration requirement. Under the Guidance, to ensure that the Counties implement satisfactory BMPs on their untreated surfaces, MDE requires the Counties to translate activities into credits. Because the Counties must adhere to the credit system, MDE can evaluate the jurisdictions' performances uniformly. This accounting system is also flexible enough to accommodate more non-traditional activities for which restoration credits are still available. Importantly, the applicable monitoring provision the Water Groups have raised for our review contemplates a flexible approach to monitoring. Moreover, the Counties must report annually on their progress in achieving the 20% restoration requirement, thereby allowing MDE to review the Counties' progress.

Finally, the Water Groups contend that MDE has "unlawfully circumvent[ed]" federal and state public participation requirements because the TMDL restoration plans, which include significant new requirements, come into existence more than one year after the Permits are issued, without providing for public notice and comment. They view the TMDL plans that must be submitted to MDE as a modification of the Permits. But the Permits direct the Counties to develop the restoration plans using BMPs that are found in documents that MDE incorporated into the Permits during the notice-and-comment period: the Manual and the Guidance. When the Counties submitted (or will submit) restoration plans using these BMPs, no modification will have occurred because the Counties will merely have drawn from the same pool of BMPs that the agency had previously analyzed and approved of for *restoration* purposes.

For these reasons, we also find unavailing the Water Groups' argument that the restoration plans violate federal and state laws on public notice and comment because the groups could not meaningfully comment about decisions that have yet to be made. As we have explained, the

BMPs were previously able for the public to comment on because the Counties select BMPs from publicly available documents, the Manual and the Guidance. Moreover, even though the Counties create the restoration plans after the Permits are approved, the public is still able to participate in the formulation of the plans. The Permits explicitly provide for "[a] minimum 30 day comment period" before finalization of the restoration plans. Critically, the Counties must also include a summary in their annual reports of how they "addressed or will address any material public comments received." The failure by any County to comply with this requirement constitutes a violation of the CWA and is grounds for an enforcement action.

The Water Groups rely on the Second Circuit's decision in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005), in support of their argument that the contents of the TMDL plans are subject to public participation requirements. In contrast to the nutritional plans discussed in *Waterkeeper Alliance*, however, the most critical element of the restoration plans—the BMPs—is already included in the Permits because the Permits incorporate the Manual and Guidance, which set forth those practices.

The Water Groups further argue that MDE must formally incorporate the restoration plans through modification procedures because the plans contain compliance schedules. A schedule of compliance is "any restriction *established by a State*." 33 U.S.C. § 1362(11) (emphasis added). Quite obviously, the restoration plans contain schedules. The schedule in the restoration plan, however, is set by the *Counties*. States are not required to set compliance schedules, 40 C.F.R. § 122.47, and MDE has not exercised its discretion to do so.

In the final argument in their public participation challenge, the Water Groups allege that the 20% restoration requirement "is not specific, measurable, or enforceable." Thus, they argue, MDE has created a requirement that the Water Groups cannot comment on or seek judicial review of. We disagree. Although the Water Groups do not know in advance which specific practices the Counties will select to restore their impervious surfaces, MDE has permitted the Counties to select from among practices that satisfied a specific performance standard, WQv, as set out in the Manual.

The Water Groups attempt to support their argument by averring that MDE incorporated an assessment tool, the Guidance, which only provides assumptions about stormwater practices, not an enforceable standard. Thus, according to the Water Groups, MDE could not know whether the Counties' efforts would be adequate when it issued the Permits because "whether the chosen practices actually meet these [pollution reduction] expectations depends entirely on the details of a permittee's restoration plans." This argument, however, must fail because it overlooks the nature of the 20% restoration requirement: a surrogate. Because the 20% restoration requirement is a surrogate for reducing pollution, MDE has logically created an accountability system in the Permits, including through the Guidance, based on an assessment of compliance *with the surrogate*, not on assessment of pollution reduction in fact.

Fraternal Order of Police, et al. v. Montgomery County, Maryland, et al., No. 45, September Term 2015, filed February 23, 2016. Opinion by Wilner, J.

http://www.mdcourts.gov/opinions/coa/2016/45a15.pdf

STANDING – LACHES – GOVERNMENT SPEECH – LOCAL GOVERNMENT LAW

Facts:

The Montgomery County Code authorizes the County to collectively bargain with the certified representative of police officers below the rank of lieutenant- Petitioner Fraternal Order of Police, Lodge 35 ("FOP"). In addition to the usual mandatory items specified for collective bargaining (wages, benefits, hours, and working conditions), the County Code, prior to 2011, also made "the effect on employees of the employer's exercise of [management] rights listed in [the collective bargaining law]" a mandatory subject of collective bargaining. The management rights listed in the code included, among others, transferring and assigning employees, providing standards governing the promotion of employees, hiring and selecting employees, determining the organizational structure of the police force, making job classifications, and setting the overall budget and mission of the police force. Mandatory "effect" bargaining was unique to code provision governing collective bargaining with police and was not part of collective bargaining for other County employees.

In early 2011, a County reform commission recommended that the unique "effect" bargaining provision for police be eliminated (the commission believed that the provision hampered the ability of the police department to make and implement management directives). In response to that recommendation, the County Council passed a bill limiting "effect" bargaining to situations where the county's exercise of its management rights causes a loss of jobs in the bargaining unit. The FOP organized a successful effort to petition the ordinance to referendum, which had the effect of suspending the law pending the result of the referendum.

The referendum question was slated to appear on the ballot during the November 2012 general election. A "yes" vote would sustain the law, while a "no" vote would nullify it.

The County Executive directed an effort by the County government to encourage voters to uphold the law. He authorized the County's Director of Public Information, who managed that effort, to expend up to $200,000 from appropriated funds for such things as bus ads, posters in libraries, bumper stickers on County cars, ads in the local media, flyers, lawn signs, and mass mailings.

The FOP objected to the County's advocacy on behalf of the ordinance and, in particular, to the use of County funds and personnel in that effort. The FOP complained to various public officials, and ultimately filed a law suit in the Circuit Court for Montgomery County the day before the election. At the election the next day, the voters approved the ordinance by a large margin. The

FOP's complaint sought declaratory, injunctive, and monetary relief, but did not ask the court to overturn the election result. In particular, the FOP asserted that County officials and employees lacked authority to engage in electioneering and campaigning and that they had violated the campaign finance provisions of the State Election Law and provisions of the County code and Local Government Article restricting on-the-job political activities of government employees. The County contested the merits of those claims. In addition, the County asserted that the FOP lacked standing to bring the action and that its claims were barred by laches.

Following a bench trial, the Circuit Court awarded declaratory and injunctive relief to the FOP but declined to award monetary damages. At the heart of its decision, the Circuit Court concluded that the County Executive and the Director of Public Information lacked authority to engage in electioneering. Both the FOP and the County noted appeals to the Court of Special Appeals.

The intermediate appellate court affirmed the Circuit Court's rejection of the County's standing and laches defenses, but reversed the Circuit Court's judgments awarding declaratory and injunctive relief. The Court of Special Appeals concluded that doctrine of "government speech" authorized the County's activities, that County officials were not required to comply with the campaign finance provisions of the State Election Law, and that the Local Government Article did not prohibit those activities.

The Court of Appeals granted the FOP's petition for a writ of *certiorari* and the County's cross-petition.

Held:

Legal conclusions of the Court of Special Appeals affirmed, but judgment vacated and case remanded for entry of declaratory judgments consistent with the opinion of the Court.

The Court first addressed whether the FOP lacked standing and whether its claims were barred by laches. The Court held that the FOP had standing because it had a special interest in sustaining "effect" bargaining and in assuring that the County did not use unlawful means to repeal that provision. With respect to laches, the Court determined that the County did not suffer any prejudice from FOP's decision to file its complaint on the eve of the election. The Court explained that the FOP's delay in bringing the action was not inordinate and that the FOP's claims could be adjudicated as easily after the election as before. The Court noted out that the FOP did not seek to overturn the results of the election; rather, it sought only monetary relief and to prevent the County officials from engaging in similar conduct in the future.

The Court then discussed the County's "government speech" defense. The Court noted that issues relating to government advocacy in an election had traditionally been resolved by reference to various laws governing the particular agency and the particular election process. The doctrine of "government speech" was newer and derived from First Amendment case law. The Court explained that "government speech" permits a government entity to inform the public of its

views regarding legislative measures that may significantly affect its operations or programs, including ballot questions, provided that there are no clear and specific prohibitions under applicable State or federal law.

In regard to authority under State law, the Court noted that nothing in the express powers act applicable to charter counties either authorized or limited advocacy with respect to ballot measures. Recent decisions of the Court, however, had read the delegated powers as "an expansive grant of authority." In that regard, the Court highlighted the express power, now codified in LG §I 0-206, that authorizes a county council to pass any ordinance consistent with State law that may aid in executing and enforcing any power in Title 10 of the Local Government Article or "may aid in maintaining the peace, good government, health, and welfare of the county." Pursuant to that statute, the Court held that the County appropriately expended funds to inform voters of the impact of nullifying the law and how the law would improve the welfare of the County. Thus, the County appropriately engaged in "government speech" because it provided information on a ballot question that would affect County operations and did so without violating any prohibitions under applicable law. The Court cautioned that this case did not involve a partisan political cause, such as the election of particular candidates to office or a politically-tainted ballot measure involving issues of social policy that would neither hamper nor enhance the operations or programs of County government.

The Court also addressed the FOP's allegations that the County officials had engaged in unauthorized or unlawful activity. The Court first noted that the FOP did not assert that the County itself was subject to the campaign finance provisions of the State Election Law. The Court concluded that those provisions also did not apply to individual County officials, who were simply acting on behalf of the County, as a contrary conclusion would lead to absurd consequences.

The Court also concluded that the use of County employees in furtherance of the County's advocacy efforts did not violate State and local laws limiting the political activities of government employees while on the job. Because the advocacy efforts of the County Executive and Director of Public Information were an authorized and proper instance of government speech, it followed that any assistance in those activities by subordinate county employees acting at their direction was also a proper County function and fell within the scope of the official duties of those employees.

Finally, the Court denied the FOP's request for attorneys' fees. Because the FOP did not prevail on any claim in the case, the Court determined that there was no basis for an award of attorneys' fees.

Although the Court of Appeals essentially affirmed the legal conclusions of the Court of Special Appeals, it vacated the lower court's judgment and remanded the case for entry of new declaratory judgments consistent with the opinion of the Court.

Reliable Contracting Company, Inc. v. Maryland Underground Facilities Damage Prevention Authority, No. 47, September Term 2015, filed March 25, 2016. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2016/47a15.pdf

CONSTITUTIONAL LAW – ADMINISTRATIVE AGENCIES – QUASI-JUDICIAL POWERS – PUBLIC UTILITIES

Facts:

In order to protect underground infrastructure such as water and gas lines, State law requires certain procedures, including notification of a one-call system, sometimes referred to as "Miss Utility," before performing underground excavation. Public Utilities Article, §12-101 *et seq*. The Maryland Underground Damage Prevention Authority (the Authority) enforces this statute by, among other things, imposing penalties for violations.

This case arose when the Authority cited Reliable Contracting Company, Inc., (Reliable Contracting) for violating the statute and imposed a civil monetary penalty. Reliable Contracting challenged the constitutionality of the statutory provisions that empower the Authority to adjudicate violations and assess penalties. It argued that the statutory scheme violates the separation of powers set forth in the Maryland Constitution because it vests judicial power in a non-judicial body – the Authority. Reliable Contracting also contended that the statute fails to provide adequate guidance to the Authority for the assessment of penalties, which would also render it unconstitutional under a prior decision of the Court of Appeals.

The Circuit Court rejected both of these contentions, holding that the Authority's adjudicatory power was quasi-judicial rather than judicial and that grant of discretion to the Authority to assess civil monetary penalties without detailed guidance was acceptable because the Authority regulated in the area of public health and safety. The Court of Special Appeals affirmed, although on different grounds as to the second issue: it held that the Authority was subject to State Government Article (SG), §10-1001, which provides general guidance to any "officer or other entity in the Executive Branch" that assesses penalties and is not governed by any other statute or regulation. Reliable Contracting appealed on both issues. With respect to the second issue, both Reliable Contracting and the Authority disputed that the Authority was a State entity subject to SG §10-1001.

Held:

The Authority's power is constitutional because it is quasi-judicial and subject to the guidance of SG §10-1001. Like many other administrative agencies, the Authority exercises adjudicative

powers that are limited and subject to judicial review, so they are quasi-judicial rather than fully judicial and may be vested in a non-judicial body.

Also, while it is true that the statute authorizing the Authority to impose civil penalties does not itself specify the criteria for the Authority to consider in setting the amount of a civil monetary penalty, the General Assembly enacted SG §10-1001 in order to provide criteria for assessment of civil penalties by State administrative agencies when no other statute or regulation does so. Hence, if the Authority is a State agency, SG §10-1001 provides guidelines for its penalty-assessing powers. Because of the relationship between the State and the Authority, as evidenced by the Authority's public purpose, designation of the Authority's officials and employees as "State personnel," the Authority's potential to be funded partly by the State, the appointment and removal of the Authority's members by the Governor (albeit with some limitations), the tort immunity of the Authority's officials and employees, and other considerations, the Authority is a State agency subject to SG §10-1001.

Rowhouses, Inc. v. Myishia Smith, No. 60, September Term 2015, filed March 25, 2016. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2015/60a15.pdf

NEGLIGENCE – LEAD-BASED PAINT – CIRCUMSTANTIAL EVIDENCE – REASONABLE PROBABLE SOURCE OF LEAD EXPOSURE

Facts:

Myishia Smith, Respondent, alleged that she suffered lead-based paint poisoning while residing at 1622 East Oliver Street ("the Oliver Street Property") from approximately 1991 to 1993. At various points during the first years of her life, Respondent resided at 418 South Monroe Street ("the Monroe Street Property") and 1508 North Collington Avenue ("the Collington Avenue Property"), and visited 2017 Ashland Avenue ("the Ashland Avenue Property").

On October 21, 1991, Respondent was born. According to Respondent's mother, Respondent lived at the Monroe Street Property from her birth until Spring 1992. At her deposition, Respondent's mother testified that the Monroe Street Property was in "[g]ood condition." In approximately 1991 or sometime in Spring 1992, Respondent and her mother moved from the Monroe Street Property to the Oliver Street Property. Rowhouses, Inc., Petitioner, owned and managed the Oliver Street Property. Approximately three to four months after moving into the Oliver Street Property, Respondent's mother noticed that the paint on the "[w]indowsills, the banister[, and the] baseboards" "started chipping and peeling[.]" Respondent's mother also noticed dust on the floor. During the time that they lived at the Oliver Street Property, Respondent began to walk at age ten months, and Respondent's mother testified that Respondent spent time in areas in the house near deteriorated paint and that she observed Respondent put her hands in her mouth "three or four times" per day while living at the Oliver Street Property. Respondent spent most of her time at the Oliver Street Property, and did not attend daycare and was not babysat at any other address while residing at the Oliver Street Property. In Spring 1993, Respondent and her mother moved from the Oliver Street Property to the Collington Avenue Property, where they resided until Spring 1994.

While Respondent resided at the Monroe Street Property, the Oliver Street Property, and the Collington Avenue Property, Respondent's mother took Respondent to visit her grandmother at the Ashland Avenue Property "[e]very week" for approximately "[t]wo, three hours." At her deposition, when asked if, while residing at the Oliver Street Property, Respondent's mother took Respondent to the Ashland Avenue Property "every other week like [she did] when [she was] at" the Monroe Street Property, Respondent's mother responded "[y]es." Respondent's mother never observed any chipping, flaking, or peeling paint at the Ashland Avenue Property.

Respondent's blood-lead levels were tested on three occasions between 1992 and 1993—September 25, 1992, May 28, 1993, and September 21, 1993. On September 25, 1992, while

Respondent was residing at the Oliver Street Property, Respondent's blood-lead level was reported as 11 micrograms per deciliter (μg/dL); on May 28, 1993, Respondent's blood-lead level was reported as 7 μg/dL; and on September 21, 1993, while Respondent was residing at the Collington Avenue Property, Respondent's blood-lead level was reported as 15 μg/dL.

On October 24, 2011, Respondent filed in the Circuit Court for Baltimore City ("the circuit court") a complaint and demand for jury trial against Petitioner for negligence and violations of the Maryland Consumer Protection Act arising out of Respondent's alleged exposure to lead-based paint at the Oliver Street Property. By the time that Respondent filed the complaint, the Oliver Street Property had been demolished and thus could not be tested for lead-based paint. Moreover, before being razed, the Oliver Street Property had not been tested for lead-based paint, and there were no violation notices issued for lead-based paint hazards. In other words, there was no direct evidence that the Oliver Street Property contained lead-based paint.

During discovery, Respondent designated Robert K. Simon, Ph.D., as an expert in toxicology, lead risk assessment, and industrial hygiene. Dr. Simon opined that the Oliver Street Property was a substantial contributing source of Respondent's lead exposure. On May 29, 2014, Petitioner filed a motion for summary judgment and memorandum in support. On June 12, 2014, Respondent filed a motion to strike the motion for summary judgment or, in the alternative, an opposition to the motion for summary judgment. On June 26, 2014, Respondent filed a supplement to the opposition. On June 27, 2014, the circuit court conducted a hearing on the motion for summary judgment. At the conclusion of the hearing, the circuit court granted the motion for summary judgment and ruled that Dr. Simon lacked an adequate factual basis for his opinion. On June 30, 2014, the circuit court issued an order consistent with its oral ruling, granting summary judgment in favor of Petitioner as to both negligence and the Maryland Consumer Protection Act claim.

Respondent appealed, and in a reported opinion, the Court of Special Appeals reversed the circuit court's grant of summary judgment as to negligence, affirmed the circuit court's judgment in all other respects, and remanded for further proceedings. Petitioner filed a petition for a writ of *certiorari*, and the Court of Appeals granted the petition.

Held: Affirmed.

The Court of Appeals held that the circuit court erred in granting summary in Petitioner's favor as to Respondent's negligence claim because, even without direct evidence that the Oliver Street Property contained lead-based paint and without Dr. Simon's expert testimony as to the source of Respondent's lead exposure, there was sufficient circumstantial evidence from which a trier of fact could conclude that the Oliver Street Property contained lead-based paint; and, the evidence was sufficient for a jury to conclude that the Oliver Street Property was a reasonable probable source of Respondent's lead exposure, and that there were no other reasonably probable sources of lead exposure.

The Court of Appeals determined that, for purposes of causation in lead-based paint cases at the summary judgment phase, a reasonable probability requires a showing that is less than "more likely than not," but more than a mere "possibility." The Court of Appeals defined a "reasonable probability" as a fair likelihood that something is true. The Court of Appeals explained that, in the context of lead-based paint cases, that means that the subject property is a reasonable probable source of a plaintiff's lead exposure where there is a fair likelihood that the subject property contained lead-based paint and was a source of the lead exposure.

The Court of Appeals held that, at the summary judgment stage, circumstantial evidence may be used both to establish the subject property as a reasonable probable source and to rule out other reasonably probable sources. In other words, to rule out or eliminate other reasonably probable sources of lead exposure, a plaintiff does not need to produce direct evidence that another property did not contain lead-based paint—through, for example, a test for lead-based paint. The Court of Appeals concluded that requiring direct evidence to rule out other reasonably probable sources of lead is simply too high a burden of production on a plaintiff in a lead-based paint case, especially at the summary judgment stage. Thus, the Court of Appeals held that a plaintiff need only produce circumstantial evidence that, if believed, would rule out other reasonably probable sources of lead. The Court of Appeals stated that, at the summary judgment stage, although expert witness testimony may be helpful to rule out another property as a reasonable probable source, it is not necessary. The Court of Appeals explained that circumstantial evidence that rules out other reasonably probable sources may take the form of a lay witness's testimony at a deposition or averment in an affidavit that a property other than the subject property did not contain deteriorated, chipping, or flaking paint and was in good condition.

The Court of Appeals held that, viewing the evidence in the light most favorable to Respondent, and keeping in mind that credibility determinations are properly left to the trier of fact, Respondent produced sufficient admissible circumstantial evidence that, if believed, ruled out the Monroe Street Property, the Ashland Avenue Property, and environmental and other sources as reasonably probable sources of her lead exposure.

The Court of Appeals held that Respondent produced sufficient circumstantial evidence to demonstrate that the Oliver Street Property contained lead-based paint while she resided there, and, given the circumstantial evidence that ruled out other reasonably probable sources of lead, that the Oliver Street Property was the only reasonable probable source of Respondent's lead exposure for the relevant time frame. The Court of Appeals determined that, although there was no direct evidence of lead-based paint at the Oliver Street Property, Respondent produced evidence that, between approximately 1991 and Spring 1993, she spent substantially all of her time in one house, the Oliver Street Property, a property that had chipping and peeling paint and where she experienced elevated blood-lead levels. The Court of Appeals held that this evidence was sufficient to establish a reasonable probability that the Oliver Street Property contained lead-based paint and was the source of Respondent's lead exposure. Accordingly, the Court of Appeals determined that the circuit court erred in granting summary judgment in Petitioner's favor as to Respondent's negligence claim.

Andrew David Toms v. Calvary Assembly of God, Inc., et al., No. 26, September Term 2015, filed February 29, 2016. Opinion by Greene, J.

Harrell, J., joins in judgment only.

http://www.mdcourts.gov/opinions/coa/2016/26a15.pdf

CIVIL LAW – TORTS – STRICT LIABILITY FOR AN ABNORMALLY DANGEROUS ACTIVITY

Facts:

Petitioner, Andrew David Toms ("Toms"), operates a dairy farm in Frederick County, Maryland, and maintains a herd of approximately 90 head of cattle. On September 9, 2012, a church-sponsored fireworks display, which was open to the public, took place on property adjacent to Toms' dairy operation. A permit to discharge fireworks had been obtained, and the event was supervised by a deputy fire marshal. No misfires or malfunctions took place. At the time of the event, Toms' cattle were inside the barn. According to Toms, the fireworks display was so loud that it startled his cattle, and caused a stampede inside the barn. The stampede resulted in the death of four dairy cows, property damage, disposal costs, and lost milk revenue.

Toms filed suit against the respondents, collectively, Calvary Assembly of God, Inc. ("Calvary"), Zambelli Fireworks Manufacturing Co. ("Zambelli"), Zambelli employee Kristopher Lindberg, and Auburn Farms, Inc.[2] in the District Court of Maryland sitting in Frederick County ("District Court"). Toms sought damages of $13,148.20 under the theories of negligence, nuisance and strict liability for an abnormally dangerous activity. On the issue of strict liability, Toms alleged that the noise produced by a fireworks discharge was abnormally dangerous to livestock. The District Court did not find any basis for liability, and entered judgment in favor of the respondents. Pursuant to Md. Rule 7-113, Toms noted an appeal on the record to the Circuit Court. The Circuit Court affirmed the District Court's judgment.

Held: Affirmed.

The Court of Appeals held that lawful fireworks displays are not an abnormally dangerous activity, because the statutory scheme regulating the use of fireworks significantly reduces the risk of harm associated with the discharge of fireworks. Instead of focusing solely on the noise produced by a fireworks display, the Court considered all of the characteristics and risks associated with discharging fireworks. The Court applied the multi-factor test for strict liability

[2] Auburn Farms, Inc. participated in the District Court proceedings, however, it was dismissed as a party.

for an abnormally dangerous activity, and determined that all of the factors weighed against the application of no-fault liability. Restatement (Second) of Torts § 520 (Am. Law Inst. 1977). The respondents obtained a permit to discharge fireworks, and did not violate the conditions of the permit. All applicable laws and regulations were complied with.

In enacting Md. Code (2003, 2011 Repl. Vol.), §§ 10-101 et seq. of the Public Safety Article, the General Assembly took care to implement sufficient precautions so as to ensure that lawful fireworks displays can be a safe and enjoyable activity. Special events requiring the use of large, professional "display fireworks" are heavily regulated in Maryland. A lawful fireworks display does not pose a high degree of risk, because the statutory scheme is designed to mitigate the risks associated with fireworks, namely mishandling, misfires, and malfunctions. Notably, the Public Safety Article does not regulate the audible effects of display fireworks, but § 10-103(c)(1) recognizes that other authorities may further regulate this field.[3] Frederick County, however, does not have a noise ordinance regulating the decibel level of fireworks. If Frederick County enacted regulations further restricting the use of fireworks, the respondents would be obliged to comply with those regulations in addition to applicable State laws. It is not the province of the Judiciary, but rather, the Legislature to determine zoning classifications and enact noise ordinances that would further regulate the use of fireworks.

[3] Pursuant to § 10-103(c)(1) of the Public Safety Article, a permit to discharge fireworks "does not authorize the holder of the permit to possess or discharge fireworks in violation of an ordinance or regulation of the political subdivision where the fireworks are to be discharged. . .."

COURT OF SPECIAL APPEALS

Charne Spencer v. Estate of Leonidas G. Newton, et al., No. 364, September Term 2015, filed February 25, 2016. Opinion by Wilner, J.

http://www.mdcourts.gov/opinions/cosa/2016/0364s15.pdf

CIVIL PROCEDURE – DISMISSAL FOR LACK OF PROSECUTION

Facts:

Charne Spencer filed a lead paint 10-count complaint in July 2012 against five defendants. One of the defendants was "Leonidas G. Newton and/or the Estate of Leonidas G. Newton." Newton had died in November 2009, and on December 17, 2009, his son, Leonidas A. Newton, and an attorney, Donald P. Mazor, Esq. were appointed co-personal representatives. There were acknowledged problems in obtaining proper service of the complaint on two of the other defendants. Service on one was effected in November 2012, and the action against the other one was dismissed in August 2013. Unrealized by appellant at the time, there also was a problem regarding service on Leonidas and/or his Estate. A private process server left a copy of complaint and summons with someone who it was later determined was not authorized to accept service. Plaintiff, however, believed that all, except one, had been properly served and yet did nothing for two years to move forward with the case. The clerk of court sent a notice that the action would be dismissed for lack of prosecution pursuant to Maryland Rule 2-507. The trial court dismissed the action, stating there was no good cause to defer the dismissal.

Held: Affirmed.

Md. Rule 2-507 permits the court to dismiss a civil action for lack of jurisdiction over a defendant when the defendant has not been served or the court has not otherwise acquired jurisdiction over the defendant at the expiration of 120 days from the issuance of original process directed at that defendant and for lack of prosecution at the expiration of one year from the last docket entry. In this case, although there was a two-year delay in serving the appellee, the action was dismissed for inactivity extending more than a year since the filing of the action. Appellant assumed that service had been properly made but still there was no further activity until clerk of court sent the Rule 2-507 notice. The notice of potential dismissal produced three responses from appellant, all filed on November 13, 2014 – a motion for an order of default against one defendant for failure to file a timely answer to the complaint, a similar motion directed against

Newton, and a motion to suspend Rule 2-507. The appellant contended that the purpose of Rule 2-507 was to remove cases that no one desired to litigate, but that this was not one of them. The Newton estate responded that there was, in fact, no justification for the inactivity and that the estate had been prejudiced by the delay. The case was dismissed. The appeal ensued. In *Powell v. Gutierrez*, 310 Md. 302 (1987), this court made clear that lack of prosecution alone does not require automatic dismissal. The test under the Rule is whether there is "good cause" to defer dismissal and, in applying that test, there are several factors that a court must consider, weigh and balance. Two factors pertain to the status and conduct of the plaintiff: (1) is the plaintiff currently ready, willing, able, and desirous of proceeding with prosecution of the case, and (2) was there any justification for the delay. The ultimate decision whether to defer dismissal is within the trial court's discretion, and the appellate court must give deference to the exercise of that discretion. There was no abuse in the lower court's exercise of its discretion in this case. Appellant believed as early as 2012 that all defendants, except the one dismissed, had been properly served and yet did nothing for two years to move the case – even, so far as the record reveals, to commence discovery. The delay was wholly attributable to appellant and simply was inexcusable and without any justification. The Newton defendant was not served until the estate was about to be closed and would be substantially prejudiced if the case was allowed to proceed further. While the purpose of Rule 2-507 is to prune dead cases and not to punish plaintiffs for having lax attorney, a court is not required to defer dismissal under the rule simply because, after inexcusable inaction for two years and resulting prejudice to a defendant, the plaintiff suddenly decides he is ready, willing, and able to proceed.

Johnnie Armstead Riley v. State of Maryland, No. 2110, September Term 2014, filed March 30, 2016. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2016/2110s14.pdf

ASSAULT AND BATTERY – PROVOCATION

STATUTES – PLAIN, LITERAL, OR CLEAR MEANING OF STATUTE – AMBIGUITY

Facts:

This case stems from an on-duty police shooting wherein appellant, Sergeant Johnnie Armstead Riley ("Sgt. Riley"), shot twenty-five year old Calvin Kyle ("Kyle"), when Kyle attempted to flee after Sgt. Riley placed him under arrest for riding a stolen motorcycle in the District Heights municipality of Prince George's County. Prior to the shooting incident, Sgt. Riley had handcuffed Kyle, removed his shoes, and placed him in the front passenger seat of the police vehicle for transport to the jail, securing him with a seat belt, before locking the door. When Sgt. Riley left to photograph the motorcycle in order to document the missing ignition, he realized that Kyle had taken off running.

Sgt. Riley began pursuit on foot and first threw his baton at Kyle. Sgt. Riley then yelled four times, "stop or I'll shoot," before firing two shots as he ran. One of the shots hit a parked vehicle. Sgt. Riley stopped and turned, and fired a third shot hitting Kyle. Sgt. Riley testified that when he walked up to Kyle following the shooting, he "was surprised [to see] that Mr. Kyle was still cuffed." As a result of being shot, Kyle's spine was severed, leaving him paralyzed from the waist down.

The State presented two experts who testified that Sgt. Riley did not use a reasonable use of force and instead, exercised a "tactical error in judgment." The defense presented its own expert, who opined that "viewed from the perspective of a reasonable police officer and the information that officer possessed at the time he made the decision to use deadly force and all the pre-assaultive indicators[ ] that were present, his actions were objectively reasonable."

On June 10, 2014, Sgt. Riley was convicted of first and second degree assault, use of a handgun in the commission of a crime of violence, and misconduct in office by a jury in the Circuit Court for Prince George's County. On November 13, 2014, the court sentenced Sgt. Riley to twenty years in prison with all suspended except for five years to be served without the possibility of parole, for use of a handgun during the commission of a crime of violence; a concurrent twenty-year sentence, with all but three years suspended, for assault in the first degree; and to a concurrent three years in prison for misconduct in office. The court also placed Sgt. Riley on five years of supervised probation. On November 17, 2014, Sgt. Riley noted this appeal, asking us to determine whether the evidence was sufficient to sustain his convictions.

Held: Affirmed.

Assault is a general intent crime that does not require a showing of malice, even where the defendant was an on-duty police officer. Resultantly, it cannot be reduced by the defense of provocation into some lesser offense. In addition, on-duty police officers are not exempt from the prohibition imposed by Md. Code (2002, 2012 Repl. Vol.), § 4-204 of the Criminal Law Article.

Kevin Collini v. State of Maryland, No. 2390, September Term 2014, filed February 24, 2016. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2016/2390s14.pdf

VOIR DIRE - PEREMPTORY CHALLENGES GENERALLY

While the exercise of peremptory challenges is not absolute—that is, they may not be exercised solely on the basis of race or gender—the importance of these challenges requires that any denial or impairment of the right to exercise them is reversible error without a showing of prejudice.

CONSTITUTIONAL LAW – A TRIAL COURT'S REMEDIES UNDER *BATSON V. KENTUCKY*

A trial court's decision to seat a properly struck prospective juror, as a remedy for a *Batson* violation, is an abuse of discretion because such a remedy fails to achieve any of the underlying purposes of *Batson* that would justify abridging a party's right to fully exercise their peremptory strikes allotted by law.

VOIR DIRE – EXERCISE OF PEREMPTORY CHALLENGES

A trial court's decision, during jury selection, to have the parties exercise their peremptory challenges in "open court," and thus presumably before those prospective jurors that were ultimately struck by the parties, creates the unnecessary risk in which the striking party could be unfairly prejudiced by a prospective juror, who knows that he or she was improperly struck, being ultimately seated on the jury and potentially harboring animosity or biased sentiments towards the striking party.

Facts:

Kevin Collini, appellant, was charged with first and second degree assault after he sliced his neighbor's chest, with a box-cutter, during a violent altercation between the two. During the jury trial that ensued on those charges, the State, pointing out that defense counsel had exercised six peremptory challenges on female prospective jurors, accused the defense of exercising those strikes on an impermissibly discriminatory basis (gender), in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

After engaging in the three-step process under *Batson*, for determining whether a party exercised its peremptory challenges in an impermissibly discriminatory manner, the circuit court concluded that, out of the six female prospective jurors that the defense was accused of improperly striking, only one them, prospective juror 22, had been improperly struck. But, rather than seating prospective juror 22 on the jury, as a remedy for that *Batson* violation, the court instead sat a different prospective juror (prospective juror 42), whom the court did not find was improperly struck by the defense.

Collini was ultimately found guilty of both first and second degree assault, with the latter offense merging into the former, and subsequently sentenced to twenty-five years' imprisonment, with all but fifteen years of that sentence suspended.

Held: Reversed and remanded.

Peremptory challenges play a vital role in insuring that an impartial jury is chosen, in that they allow a party to eliminate a prospective juror with personal traits or predilections that, although not challengeable for cause, will, in the opinion of the litigant, impel that individual to decide the case on a basis other than the evidence presented. Thus, parties are given wide latitude in exercising such challenges, which they may do for any reason or indeed for no reason. Consequently, the importance of these challenges requires that any significant deviation that impairs or denies the full exercise of these challenges is error that, unless waived, ordinarily will require reversal without the necessity of showing prejudice.

And, though *Batson* does place limitations on the use of these challenges—that is, parties may not exercise these challenges solely on the basis of race or gender—the trial court's decision to seat prospective juror 42, a properly struck prospective juror, fails to achieve any of the underlying purposes of *Batson* that would justify abridging Collini's right to fully exercise the peremptory strikes allotted to him by law. Such a decision cannot be said to safeguard the prospective juror's right not to be excluded on an impermissible, discriminatory basis, as there was no finding that juror 42 was struck on the basis of race or gender. Nor can the decision be said to protect the parties' right to a fair trial or preserve public confidence in the system, as it placed an individual on the jury, whom defense counsel had previously struck.

Justin T. Anderson v. State of Maryland, No. 2487, September Term 2014, filed March 30, 2016. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2016/2487s14.pdf

EVIDENCE – IMPEACHMENT – CRIMES OF DECEPTION

EVIDENCE – IMPEACHABLE OFFENSES – CARRYING A CONCEALED WEAPON.

VIOLATION OF SEQUESTRATION ORDER – SANCTIONS WITHIN DISCRETION OF TRIAL COURT.

Facts:

On October 30, 2012, Cariol "Jeff" Toliver was home, in Gaithersburg, with his mother Theresa Toliver, his sister Celestine "Tina" Toliver, his son Pierre Toliver, and Pierre's live-in girlfriend, Edwerta Hughes. That evening, Emmanuel Gbadyu, a childhood friend of Pierre's, arrived at the house with two other men—appellant and a man later identified as Russell Bass. Gbadyu told Jeff he wanted to see Pierre.

Something in appellant's demeanor made Jeff uncomfortable, but he permitted Gbadyu to go down to Pierre's basement bedroom. A short time later, Theresa, also having "vibes" and not wanting the men in her house, told Pierre that the three men had to leave. They left through the front door and walked to a white Cadillac parked in front of the house. Jeff exited the house to make sure the men left and saw appellant pointing a small gun at Gbadyu, who was sitting in the driver's seat of the car. Shots were fired, and Jeff identified appellant, who had been standing by the open front passenger door of the Cadillac, as the shooter. Theresa dialed 911.

At trial, the State's witnesses all presented virtually the same testimony, that is, that Gbadyu and appellant came to the Tolivers' house and spoke with Pierre for a short period of time before leaving. After Gbadyu and appellant left the house, Jeff, Theresa, and Tina witnessed the shooting, and all three identified appellant as the shooter, but only Jeff testified that he saw appellant with a gun. Pierre, however, did not witness the shooting. Appellant argued that the trial court erred in declining to permit him to impeach Pierre with a prior conviction for carrying a concealed weapon.

Following Theresa's testimony at trial, the prosecutor advised the court she had been handed a note by another Assistant State's Attorney ("ASA") indicating that, as the ASA was walking toward the courtroom, she heard Pierre talking to Tina and Ms. Hughes about giving somebody $20 and then something to the effect that he gave him a shirt and that he didn't give the other person a shirt because he didn't want one, or something to that effect. And then she heard him say wrong.

She did not hear Tina or Ms. Hughes say anything to Pierre in response, nor did she observe any non-verbal responses from them that indicated a two-sided conversation. She added that the prosecutor had asked her to tell the witnesses to stop speaking about the case, and when she returned to do so, their conversation had moved on to another topic unrelated to the case.

The court questioned Tina and Ms. Hughes. Tina said that she had not exactly discussed Pierre's testimony with him, but he said it was a lot more than last time. She responded, "oh God, we're going to be in here long." She denied any further discussion about anything related to the trial. Ms. Hughes denied any conversation with Pierre regarding his testimony or the shirt or $20.

Counsel sought exclusion of Tina's and Ms. Hughes's testimony, as well as an instruction to the jury that Pierre had violated the rule and it could take that into account in assessing his credibility.

Held:

The elements of the crime of carrying a concealed weapon do not clearly identify conduct showing that a witness is unworthy of belief. That is, that in the course of carrying a concealed weapon that individual is living a life of secrecy and engaging in dissembling; and he is prepared to say, whether truth or lie, whatever is required by the demands of the moment. Thus, the trial court correctly precluded appellant from using Pierre's conviction for that offense to impeach him because the crime of carrying a concealed weapon is neither an infamous crime nor a crime relevant to his credibility.

When a witness violates a sequestration order, whether there is to be a sanction and, if so, what sanction to impose, are decisions left to the sound discretion of the trial judge, and will not be reversed absent an abuse of discretion. Critical to the court's exercise of its discretion of what, if any, sanction should be imposed, is the consideration of the degree of schooling in the details of the evidence obtained by the potential witness as a result of the violation. Here, there was no evidence that Pierre's statements would have influenced either Tina's or Ms. Hughes's testimony. Accordingly, there was no abuse of discretion in the court's denial of appellant's request to exclude their testimony.

Jonathan Eugene Bowers v. State of Maryland, No. 2719, September Term 2014, filed March 30, 2016. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2016/2719s14.pdf

CRIMINAL LAW – MANSLAUGHTER – MAXIMUM PENALTY

Facts:

Following a guilty plea for involuntary manslaughter, Jonathan Eugene Bowers was sentenced to 10 years' incarceration, the maximum permitted under the Maryland manslaughter statute, Md. Code (2002, 2012, Repl. Vol.), Criminal Law Article § 2 207. Bowers challenged his sentence, arguing that the manslaughter statute is ambiguous because it includes two possible maximum penalties. Because of its ambiguity, Bowers opined that the rule of lenity must apply and the statute must be construed as the lesser of the two penalties applying to involuntary manslaughter and the greater to voluntary manslaughter. This interpretation would impose only a two-year penalty on Bowers for his involuntary manslaughter conviction.

Held:

First, the Maryland manslaughter statute is not ambiguous because it has been consistently and uniformly applied and interpreted by courts and scholars. Second, even if the Maryland manslaughter statute could be considered ambiguous and the court must look beyond the plain meaning of the statute to discern the legislative intent, a review of the statute's legislative history dating back to the Maryland Laws from 1809 forward shows there was no intent to impose different maximum penalties for voluntary and involuntary manslaughter.

Frederick Classical Charter School, Inc. v. Frederick County Board of Education, No. 42, September Term 2015, filed March 31, 2016. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2016/0042s15.pdf

STATUTORY CONSTRUCTION – EDUCATION – CHARTER SCHOOLS

Facts:

Following the approval of its charter application, Frederick Classical Charter School, Inc. ("Frederick Classical") objected to the Frederick County Board of Education ("FCPS") funding allocation, arguing that it violated Maryland Code (1978, 2015 Repl. Vol.), Education Article ("Educ.") § 9-109—which requires that charter school funding be "commensurate" with funding for other public schools—by failing to include transportation funds in its fiscal year 2014 funding allocation. Frederick Classical's charter stated that "[t]ransportation shall be the responsibility of [Frederick Classical] families with the . . . exception[]" of students who live along an established bus route and certain special education students. It was undisputed that Frederick Classical did not at the time provide transportation for its students and did not provide transportation during the 2013-2014 school year. The decision of FCPS was upheld by both the State Board of Education (the "State Board") and the Circuit Court for Frederick County.

Before the Court of Special Appeals, Frederick Classical argued that the State Board acted arbitrarily and capriciously in declining to reverse FCPS's decision not to provide transportation funding. Specifically, it contended that the State Board erred in interpreting the charter language, that the State Board's ruling is inconsistent with its decisions in *City Neighbors Charter Sch. v. Balt. City Bd. of Sch. Comm'rs*, MSBE Op. No. 05-17 (2005), and *Monocacy Montessori Communities, Inc. v. Frederick County Bd. of Educ.*, MSBE Op. No. 06-17 (2006) ["MMCI"], and that the Board's ruling was inconsistent with state law because it resulted in a disproportionate funding allocation. FCPS responded that the State Board's decision was not arbitrary or capricious because charter language unambiguously placed the responsibility for transportation on Frederick Classical families and because the funding formula used by the Board was consistent with *City Neighbors* and *MMCI* and did not violate state law. FCPS maintained that due to the nature of the budget process, it was not withholding transportation funding to spend on other schools' students, and so the formula did not result in disproportionate funding.

Held: Affirmed.

The Court first reviewed the "visitatorial power" of the State Board, which "invests the State Board with the last word on any matter concerning educational policy or the administration of

the system of public education." The Court determined that the State Board was deciding a matter of education policy, and, thus deserved the heightened deference accorded to it.

The Court held that the State Board did not err in interpreting the plain language of the charter as shifting the responsibility for transportation from Frederick County to Frederick Classical families. Regarding the alleged inconsistency with the State Board's prior opinions on charter school funding, the Court found that the Board's decisions in *City Neighbors* and *MMCI* supported its decision in this case. In *City Neighbors*, the State Board incorporated documents that specifically acknowledged that the funding mix of each fund source to the local school system need not be duplicated at the charter school level. The State Board clarified in *MMCI* that the language it used in *City Neighbors* should not be strictly construed, and that the formula it announced there was not the only way a local school board could distribute funding to a charter school. Acknowledging that, in *MMCI*, the State Board approved a formula in which the local school board withheld funding for transportation for a charter school, the Court held that formula used by FCPS was consistent with the State Board's opinions.

The Court also held that the Board's opinion in this case was not contrary to the Court of Appeals's decision upholding the State Board in *Baltimore City Bd. of Sch. Com'rs v. City Neighbors Charter Sch.*, 400 Md. 324, 328 (2007), and recognized that "the Court [of Appeals]'s decision rejecting the mandatory exclusion of transportation funds from the per pupil allocation amount is not an affirmative holding that transportation funds can never be excluded from the funds dispersed to a charter school." Concluding that Frederick Classical's decision not to participate in the public school transportation program was, in actuality, representative of the flexibility accorded to charter schools, the Court declared that "Frederick Classical cannot now complain that it has been given short shrift, contrary to its charter, by not receiving transportation funding for transportation services that it does not provide."

Byron Alexander Kelly v. Montgomery County Office of Child Enforcement, et. al., No. 2504, September Term 2014, filed February 24, 2016. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2016/2504s14.pdf

FAMILY LAW – CHILD SUPPORT ENFORCEMENT

Facts:

The Montgomery County Office of Child Support Enforcement (the "Office") sought to collect a judgment of $9,866.80 against Byron Alexander Kelly for unpaid child support. At the request of the Office, the Circuit Court for Montgomery County issued a writ of garnishment against Capital One Bank, N.A., where Kelly held two accounts with a combined balance of $2,705.05. Kelly filed a motion in circuit court seeking to insulate these funds from garnishment, claiming that Courts and Judicial Proceedings Article ("CJP") § 11-504(b)(5) entitled him to exempt up to $6,000 from the Office's collection action. The circuit court denied Kelly's motion and separately ordered Capital One to pay the account proceeds to the Office.

Held: Affirmed.

There are two relevant statutes: CJP § 11-504(b)(5), which authorizes a ***debtor*** to exempt up to $6,000 in cash or property from a collection action, and Family Law Article ("FL") § 10-108.3(b)(1), which authorizes the Child Support Enforcement Administration and its constitute agencies to garnish child support ***obligors'*** bank accounts to collect arrears.

The exemption in CJP § 11-504(b)(5) is inapplicable to child support collection actions. In considering whether assets are exempt from execution on judgments for unpaid alimony, Maryland courts have distinguished between a "debtor," that is, someone who simply owes money to another, and an "obligor" who must pay money arising out of a separate, and separately enforceable, legal duty. Kelly is an obligor. By its terms, CJP § 11-504(b)(5) applies to debtors. Because Kelly is an obligor, the exemption is not available to him. *Safe Deposit & Trust Co. v. Robertson*, 192 Md. 653, 662–63 (1949); *see also United States v. Williams*, 279 Md. 673, 678 (1977); *Pope v. Pope*, 283 Md. 531, 537 (1978).

Earl Stone, et al. v. Cheverly Police Department, et al., No. 2526, September Term 2014, filed March 31, 2016. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/2526s14.pdf

LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS ("LEOBR") – SECTION 1-305, APPLICATION FOR SHOW CAUSE ORDER IN CIRCUIT COURT – EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Facts:

Prior to hearing board trial, officers filed a petition in the circuit court for relief pursuant to section 1-305 of the LEOBR. The circuit court promptly ruled, denying the relief sought. The officers noted an appeal. The hearing board trial went forward, but the officers refused to participate. They were found guilty of all charges and were terminated from employment as a sanction.

Held: Dismissed for failure to exhaust administrative remedies.

The officers were entitled, under section 1-305, to obtain a ruling from the circuit court on the issues they raised in advance of the hearing board trial; and that is what they received. At that point, they could pursue an appeal of the section 1-305 ruling only if they also exhausted their administrative remedies by participating in the trial before the hearing board. This case is unlike *MTA v. Hayden*, 141 Md. App. 100 (2001), where the hearing board trial went forward without the officer participating, before the circuit court ruled on the section 1-305 petition.

Ramachandra S. Hosmane v. Katherine Seley-Radtke, et al., No. 689, September Term 2014, filed February 24, 2016. Opinion by Raker, J.

http://www.mdcourts.gov/opinions/cosa/2016/0689s14.pdf

CIVIL LAW – DEFAMATION

Facts:

Appellant Ramachandra S. Hosmane, Ph.D., appealed from a jury verdict in the Circuit Court for Baltimore County in favor of appellee Katherine Seley-Radtke, Ph.D., on one count of defamation and one count of invasion of privacy, false light.

On request by defendant/appellee Dr. Seley-Radtke, the circuit court revised Maryland Civil Pattern Jury Instruction 12:12, Conditional Privilege, to change the burden of persuasion—from the "preponderance of evidence" to "clear and convincing evidence"—for appellant to prove that appellee abused a conditional privilege.

The central issue in this case—a defamation case by a private person against another private person—was which burden of proof a plaintiff must meet in order to overcome a qualified or conditional privilege: the preponderance of evidence or clear and convincing evidence.

Held: Reversed and remanded.

As to the central issue in the case, the Court of Special Appeals held that in common law tort defamation involving only private individuals, the burden of persuasion a plaintiff must satisfy to overcome a conditional privilege is preponderance of the evidence.

The Court of Special Appeals reasoned that while the Court of Appeals had adopted a "uniform standard" or definition of the malice burden of production applicable to determining abuse of a conditional privilege and required the same to establish punitive damages, this did not change or elevate the burden of persuasion in common law defamation required to overcome the conditional privilege. The Court of Appeals had defined only the *definition* of the term *malice*, and had not altered the burdens of proof.

Prince George's County, Maryland, et al. v. Frederick Minor, No. 1871, September Term 2014, filed March 29, 2016. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2016/1871s14.pdf

WORKERS' COMPENSATION – ATTORNEY FEES – PAYABLE BY CLAIMANT

WORKERS' COMPENSATION – ATTORNEY FEES – LIEN – TIME OF ATTACHMENT

WORKERS' COMPENSATION – ATTORNEY FEES – COMPENSATION AWARD – ATTACHMENT OF LIEN – ESCROW

WORKERS' COMPENSATION – ATTORNEY FEES – NO FEES IN COMPENSATION AWARD – OBLIGATIONS OF EMPLOYER/INSURER.

Facts:

On September 3, 2008, Mr. Minor, filed a claim for workers' compensation. The Workers' Compensation Commission, on October 15, 2008, found that he sustained an accidental injury arising out of and in the course of employment on July 08, 2008, that his average weekly wage was $1,500.00, and that the nature and extent of his disability could not be determined at that time. A hearing on the nature and extent of disability was held on December 8, 2009, and the Commission entered an award for temporary total disability and permanent partial disability. In the award, the Commission noted that "No Claimant's Consent to Pay Attorney Fee and Doctor Fees [was] Submitted."

Mr. Minor's counsel wrote the Commission on December 7, 2009, and attached Claimant's Consent to Pay Attorney Fee and Doctor Fee. Both the County's counsel and the senior claims specialist for the County's third party claim administrator were copied on the letter, but neither acknowledged receiving it. The consent form was signed by Mr. Minor on December 8, 2009, and the Commission docketed the letter and accompanying consent form on December 9, 2009.

On December 15, 2009, the claims specialist for the County's third party claim administrator emailed Mr. Minor's counsel's office inquiring about the amount of attorney's fees, so she could deduct them. When there was no response, the County, on December 22, 2009, wrote a check for the full amount of the award made payable to Frederick Minor C/O his attorney and mailed it to Mr. Minor's attorney's office, in accordance with its statutory obligation to pay the compensation award within fifteen days of the date that it was issued, i.e., December 8, 2009. Counsel then delivered the check to Mr. Minor, who cashed or deposited it on January 6, 2010.

On January 11, 2010, the Commission rescinded its December 8, 2009 compensation award and entered a new award that included Mr. Minor's consent to pay counsel in the amount of the fees owed. On May 23, 2013, Mr. Minor's counsel filed issues with the Commission for the County's alleged non-compliance with the award dated January 11, 2010. A hearing was held on

September 13, 2013, and, on September 20, 2013, the Commission issued its order that the County is not responsible for the payment of attorney's fees, but that the approved fee is payable by Mr. Minor and may be collected from him or constitute a lien against the payment of any future benefits.

On October 15, 2013, Mr. Minor filed for judicial review of the order. A hearing was held in the circuit court on June 6, 2014. On September 16, 2014, the circuit court filed an "Opinion and Order" finding that the Commission's September 20, 2013 order was an incorrect construction of the law and facts and that the County is required to pay attorney's fees to Mr. Minor's counsel.

Held:

A claim for fees by an attorney representing a workers' compensation claimant is not a claim against either the Commission or the employer/insurer, but remains at all times the personal responsibility of the claimant payable from the fund to which that individual is entitled as compensation. In addition, an employer/insurer is not obligated to inquire into or set aside the amount of fees requested in a Consent to Pay Attorney Fee and Doctor Fee form when those fees have not been approved and made part of the compensation award. The fee does not become a lien on the compensation awarded until it is approved by the Commission. Thus, when a claimant's attorney fails to file a consent form at the Commission hearing and no award for attorney's fees is included in the Commission's award, no lien attaches to the fund established by the award and the employer is not, as a matter of law, on notice to reserve a portion of the award in escrow.

Terry Bradley v. Construction Labor Contractors, No. 2041, September Term 2014, filed February 24, 2016. Opinion by Wilner, J.

http://www.mdcourts.gov/opinions/cosa/2016/2041s14.pdf

LABOR AND EMPLOYMENT – WORKERS' COMPENSATION COMMISSION

Facts:

Appellant, a Tennessee resident, was employed by Innovated Construction LLC (Innovated), a Kentucky company, when he came to Maryland to do work at a Sam's Club facility in Baltimore County. He said he later became employed by Construction Labor Contractors (CLC). In August 2010, he was injured when a Sam's Club employee operating a forklift struck him. He filed a claim with the Maryland Worker's Compensation Commission against Innovated, CLC, Rand Construction Company, and the Maryland Uninsured Employers Fund. The claim was contested, as to whether appellant was a "covered employee" and as to who was appellant's employer for purposes of the Workers' Compensation Law. In December, the Commission concluded that Innovated was the correct employer but that, because appellant was a Tennessee resident and Innovated was a Kentucky company, the Maryland Commission had no jurisdiction, and, for that reason, the claim was disallowed.

The Workers' Compensation Law permits an aggrieved party to file a written motion for a rehearing before the commission or file an action for judicial review. The appellant filed a timely request for a rehearing, complaining the Commission had not properly applied the statute in dismissing his claim. A rehearing was scheduled for April 2011, but the parties agreed to a continuance because of the possible existence of workers' compensation insurance for injuries in Maryland may resolve the claim. In July 2011, before a rehearing was rescheduled, the Commission issued a one-sentence order noting the requested rehearing but ordering the denial of appellant's claim. The appellant, who had not received a response on the possibility of other insurance, filed a timely request for another rehearing, stating the dismissal of the Maryland claim was premature. He was given another hearing, but then another order affirming the first denial was issued on March 1, 2012. Within 30 days, appellant sought judicial review, which the Circuit Court dismissed on the ground that it had not been filed within 30 days after the July 2011 order.

Held: Reversed and remanded.

A party before the Workers' Compensation Commission who is aggrieved by a final decision of the Commission may file a motion for rehearing pursuant to Lab. & Emp. Art. § 9-726. The Commission may deny that motion with or without holding a hearing on it. If the Commission agrees to hold a rehearing but then affirms the decision without holding one, the party may file

another petition for rehearing, but that does not, of itself, stay the time for seeking judicial review. If the Commission agrees to hold another rehearing, however, and does so, it effectively withdraws the order affirming the initial decision, and the time for seeking judicial review is stayed until the Commission enters another order affirming or modifying the initial order.

In this case, the decision on whether the December 10, 2010 order was correct was not forthcoming until March 1, 2012, following the rehearing held on February 28, 2012. The March 1 order became the effective final order of the Commission, making the March 16 petition for judicial review timely. The Circuit Court erred in concluding otherwise.

ATTORNEY DISCIPLINE

*

By a Per Curiam Order of the Court of Appeals dated March 3, 2016, the following attorney has been disbarred:

WAYNE GORDON GRACEY

*

By an Opinion and Order of the Court of Appeals dated March 25, 2016, the following attorney has been disbarred:

KRISTAN L. PETERS-HAMLIN

*

By an Opinion and Order of the Court of Appeals dated February 19, 2016, the following attorney has been indefinitely suspended, effective March 21, 2016:

JENNIFER VETTER LANDEO

*

By an order of the Court of Appeals dated March 30, 2016, the following attorney has been indefinitely suspended by consent:

JOSEPH D. REID II

*

This is to certify that the name of

ANTHONY J. DeLAURENTIS

has been replaced upon the register of attorneys in this state as of March 31, 2016.

*

Return to ToC

*

This is to certify that the name of

JOHN K. REIFF

has been replaced upon the register of attorneys in this state as of March 31, 2016.

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UNREPORTED OPINIONS

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Baltimore City Entertainment Grp. v. Baltimore	0440	March 28, 2016
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Brightwell, David v. State's Att'y for Somerset Co.	2842 *	March 16, 2016
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C.		
Carmean, Glenn Allen v. State	0821	March 7, 2016
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Chaka, Zekarias v. Towson Manor Village	0039 *	March 16, 2016
Chavis, Andre v. State	1717 *	March 3, 2016
Clark, Ronald Linwood v. State	1389 *	March 8, 2016
Cohen, Susan v. Veolia Transportation Servs.	0199	February 29, 2016
Coleman, Michael J. v. State	0564	March 8, 2016
Collins, Ruben Arnez v. State	0618 *	March 16, 2016
Craig, Brian S. v. Wittstadt	0041	March 24, 2016
Crockett, Timothy v. State	0515	March 17, 2016

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* September Term 2014
** September Term 2013
*** September Term 2011

D.

Dansby, Barbara v. Jackson Investment Co.	0317	March 10, 2016
Dept. of the Environment v. Shipley's Choice HOA	1660 *	March 4, 2016

E.

Evans, Antonio v. State	0192	March 10, 2016

F.

Feldman, Jonathan v. Fidelity & Deposit Co.	0102	March 7, 2016
Ferreira, Javier v. Dept. of Social Services	0534	March 21, 2016
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G.

Gaines, James v. Montgomery Co.	0384	March 3, 2016
Gallint, Jiovanni A. v. State	1084	March 15, 2016
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Govan, Kendall Alonzo v. State	2127 *	March 17, 2016
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H.

Hagerstown v. IAFF, Local 1605	0362	March 21, 2016
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Hodges, Cierra O. v. Polakoff	0029	March 10, 2016
Holden, Gregory v. State	1713 *	March 15, 2016
Hughes, Laura Lynn v. Dep't of Pub. Safety	0275	March 11, 2016

I.

In re: A. M.	1193	March 18, 2016
In re: A.C., M.V., D.N., & D.N.	1670	March 22, 2016
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In re: Adoption/G'ship of D.W.	1744	March 10, 2016
In re: Adoption/G'ship of H.L.N.B. and H.C.M.B.	0863	March 4, 2016
In re: Adoption/G'ship of Lailie M. and Xavier M.	1681	March 16, 2016

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In re: C.A.	2725 *	March 11, 2016
In re: Cecilia F.	1728 *	March 2, 2016
In re: D.B., K. T., and D.C.	1706	March 25, 2016
In re: Jason Daniel M.-A.	0128	February 29, 2016
In re: Rashaun C.	0210	February 29, 2016
In re: Tessa S.	1669	March 17, 2016
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J.		
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K.		
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Kim, Soonsue v. Golden Ashland Services	0309	March 18, 2016
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L.		
Lanier, April v. Haskins	0861	March 8, 2016
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Little, Lorette E. v. Generation Mortgage	2286 *	March 8, 2016
M.		
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McNeil, Rudolph v. State	1365 *	March 3, 2016
Melhorn, Edwin R. v. United Methodist Church	2065 *	March 16, 2016
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N.		
Nelson, Christopher A. v. Nelson	2196 **	March 3, 2016
P.		
Parks, David Clifton v. State	0486	March 16, 2016
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Q.		
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R.		
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Rubenstein, Michael v. State, et al.	1546 *	March 24, 2016
S.		
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Schmidt, Francis v. Cheverly Police Dept.	0385	March 2, 2016
Seivwright, Nicholas Avaskia v. State	1390 *	March 15, 2016
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Short, Kevin v. Bishop	0496	March 9, 2016
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Sullivan, Lloyd v. State	1721 *	March 11, 2016

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T.

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V.

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W.

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