Amicus Curiarum

VOLUME 31
ISSUE 7 JULY 2014

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

Attorney Discipline
- Reprimand
  - *Attorney Grievance v. McDowell & Burson* 3
- Sixty-Day Suspension
  - *Attorney Grievance v. Narasimhan* 5

Criminal Law
- Allegations of Juror Misconduct
  - *Nash v. State* 8

Election Law
- Candidate's Party Affiliation
  - *Cabrera v. Penate* 11

Financial Institutions
- Assigned Consumer Debt
  - *Bartlett v. Portfolio Recovery Assoc* & *Townsend v. Midland Funding* 13
- Secondary Mortgage Loan Law
  - *Thompkins v. Mountaineer Investments* 15

Insurance Law
- "Business Pursuits" Exclusion
  - *Springer v. Erie Insurance Exchange* 17

Real Property
- "Quick-Take" Condemnation
  - *Makowski v. Mayor and City Council of Baltimore* 19

Statutory Interpretation
Sex Offender Registration and Notification Act
Dep't of Public Safety v. Doe & Hershberger v. Roe 20

Torts
Lead-Paint Poisoning: Circumstantial Evidence
Hamilton v. Kirson & Alston v. 2700 Virginia Ave. Assoc. 22

Vicarious Liability
Bradford v. Jai Medical Systems Managed Care 25

COURT OF SPECIAL APPEALS
Criminal Law
Appointment of Counsel
Westray v. State.....27

Closing Arguments
Jones v. State.....31

Confrontation Clause: Expert Testimony
Norton v. State 33

Real Property
Restrictive Covenants
Shader v. Hampton Improvement Ass'n.....36

Statutory Interpretation
Secondary Mortgage Loan Law ("SMLL")
Larocca v. The Creig Northrop Team.....39

Statute of Limitations
Wilcox v. Orellano 41

Torts
Conversion and Constructive Fraud
UBS Financial Services v. Thompson.....43

Local Government Tort Claims Act
City of Baltimore v. Stokes.....45

ATTORNEY DISCIPLINE 47

JUDICIAL APPOINTMENTS 49

RULES ORDERS 50

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Matthew John McDowell & John Stephen Burson, Misc. Docket AG No. 50, September Term 2012, filed June 19, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/50a12ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – REPRIMAND

Facts:

The Attorney Grievance Commission ("the Commission"), Petitioner: charged Matthew John McDowell ("McDowell"), Respondent, with violating Maryland Lawyers' Rule of Professional Conduct ("MLRPC") 5.2(a) (Responsibilities of a Subordinate Lawyer); charged John Stephen Burson ("Burson"), Respondent, with violating MLRPC 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) and 5.3 (Responsibilities Regarding Non-Lawyer Assistants); and charged McDowell and Burson with violating MLRPC 1.1 (Competence) and 8.4 (Misconduct).

A hearing judge found the following facts. Burson was the managing partner of the law firm that is now Shapiro Brown & Alt, LLP ("the Shapiro Firm"). McDowell, a lawyer at the Shapiro Firm, signed trustee's deeds and affidavits on behalf of William M. Savage ("Savage"), another lawyer at the Shapiro Firm. At the Shapiro Firm, paralegals (who were also notaries public) notarized the trustee's deeds and affidavits. Although McDowell had signed the trustee's deeds and affidavits outside the paralegals' presence, the notary jurats stated that the trustee's deeds and affidavits had been signed in the paralegals' presence. Burson had made no efforts to ensure that the Shapiro Firm had in effect measures giving reasonable assurance that lawyers did not robo-sign documents and that paralegals did not falsely notarize documents.

Based on the above facts, the hearing judge concluded that McDowell had not violated any MLRPC and that Burson: had violated MLRPC 5.1(a) and 5.3(a); had not violated MLRPC 1.1, 5.3(b), or 8.4; was not vicariously responsible for McDowell's conduct under MLRPC 5.1(c); and was not vicariously responsible for the paralegals' conduct under MLRPC 5.3(c).

McDowell and Burson stated that they did not except to any of the hearing judge's findings of fact. The Commission excepted to the hearing judge's finding that, at the hearing, Burson testified that he believed that the notarizations at the Shapiro Firm did not violate Virginia law.

McDowell and the Commission excepted to the hearing judge's conclusion that McDowell had not violated MLRPC 8.4(d).

Burson recommended that the Court of Appeals reprimand him; the Commission recommended that the Court of Appeals suspend Burson from the practice of law in Maryland for thirty days. McDowell and the Commission recommended that the Court of Appeals reprimand him.

Held:

The Court of Appeals held that McDowell had violated MLRPC 8.4(d) and 8.4(a), and that Burson had violated MLRPC 5.1(a), 5.3(a), and 8.4(a).

The Court of Appeals reprimanded McDowell. Although McDowell signed trustee's deeds and affidavits on Savage's behalf, McDowell had a relatively blameless mental state in doing so, as McDowell did so at Savage's direction, believed that doing so was not improper, and did not intend to deceive anyone. Although McDowell's misconduct was aggravated by a pattern of misconduct and multiple violations of the MLRPC, McDowell's misconduct was mitigated by the absence of prior attorney discipline, the absence of a dishonest or selfish motive, a cooperative attitude toward the attorney discipline proceeding, and remorse.

The Court of Appeals reprimanded Burson. Although Burson made no efforts to ensure that the Shapiro Firm had in effect measures giving reasonable assurance that lawyers did not robo-sign documents or that notaries public did not falsely notarize documents, Burson's misconduct was negligent rather than knowing or intentional, did not cause any tangible injury, was aggravated only by substantial experience in the practice of law, and was mitigated by a myriad of significant, persuasive, and impressive factors.

Attorney Grievance Commission of Maryland v. Sudha Narasimhan, Misc. Docket AG No. 77, September Term 2012, filed May 23, 2014. Opinion by Watts, J.

Adkins and McDonald, JJ., concur and dissent.

http://www.mdcourts.gov/opinions/coa/2014/77a12ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – SIXTY-DAY SUSPENSION

Facts:

The Attorney Grievance Commission ("the Commission"), Petitioner, charged Sudha Narasimhan ("Respondent") with violating Maryland Lawyers' Rule of Professional Conduct ("MLRPC") 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication Generally), 7.1 (Communications Concerning Lawyer's Services), 8.4(c) (Dishonesty, Fraud, Deceit or Misrepresentation), 8.4(d) (Conduct Prejudicial to the Administration of Justice), and 8.4(a) (Violating MLRPC).

A hearing judge found the following facts. On June 11, 2007, this Court admitted Respondent to the Bar of Maryland. In January 2009, Respondent met Edmundo Gordon Rogers, Esquire ("Rogers") through an advertisement on the website Craig's List. Rogers represented that he was an experienced immigration attorney who had been practicing law for sixteen years. Eventually, Respondent and Rogers established The Immigration Law Group ("ILG") by executing a joint venture master agreement. Under the agreement, Respondent was to be "primarily responsible for . . . [the] practice of law[,]" and Rogers was to provide "advice and legal expertise" and to research "legal issues that will arise in the conduct of the law practice." Under the agreement, Respondent and Rogers were to equally share ILG's profits.

In 2009, the District of Columbia Metropolitan Police Department ("the MPD") sought an immigration attorney to assist in securing permanent residency for its employee, Dr. Laurie Samuel ("Dr. Samuel"), a Canadian citizen working pursuant to a work visa, through the completion of the EB-2 Permanent Residency process. On November 4, 2009, only three months after forming ILG, Respondent, on behalf of ILG, answered the MPD's request by submitting a request for quotation, proposal, her résumé, and Rogers's résumé. In the proposal, Respondent stated that she was "well-versed" in, and had a "good knowledge of[,] the immigration laws." In her résumé, Respondent stated that she had represented "immigration clients in documentary immigration processes and litigation" and had "handled Family petitions and Citizenship applications." Significantly, though, Respondent had never: (1) represented clients in the "documentary immigration processes"; (2) represented clients in immigration litigation; or (3) "handled Family petitions and Citizenship applications."

The MPD retained ILG. Shortly after the MPD selected ILG, Respondent traveled to India, where she remained for approximately two months. Respondent was "largely unavailable"

during the time that she was in India. For example, Respondent did not participate in a conference call held on December 10, 2009. Later, between February 1, 2010, and March 15, 2010, Respondent, Rogers, and Dr. Samuel prepared multiple paper drafts of Form 9089, the Application for Permanent Employment Certification. On March 23, 2010, Respondent mailed an incomplete and incorrect version of Form 9089 to the Department of Labor ("the DOL"). In a letter dated May 3, 2010, the DOL advised the MPD that it was denying certification of Form 9089. Almost all the reasons for denial by the DOL were the result of Respondent's failure to: (1) adequately inform the MPD of the requirements of the recruitment process; (2) obtain the necessary information to complete Form 9089; and (3) file the correct version of Form 9089 with the information she had obtained. On May 12, 2010, Respondent, for the first time, filed Form 9141, a form the DOL requires to be completed prior to, and as a part of, the submission of Form 9089. On May 27, 2010, Respondent submitted a handwritten Form 9089 that Dr. Samuel had completed. On June 3, 2010, Respondent filed a typewritten Form 9089, and on June 8, 2010, Respondent mailed a letter to the DOL requesting review of the May 3, 2010, denial of certification. On June 21, 2010, Respondent mailed another letter to the DOL regarding the refiled Form 9089 and request for review.

On June 15, 2010, and July 14, 2010, the MPD and Dr. Samuel, respectively, requested information from ILG about obtaining a one-year extension to Dr. Samuel's current work visa. Neither the MPD nor Dr. Samuel received a response from Respondent or Rogers. On July 14, 2010, the MPD and Dr. Samuel requested a conference call to receive an update on the status of the case and to discuss the appeals process. The requested conference call never occurred, and neither Dr. Samuel nor the MPD was provided with the requested information concerning the appeals process. On July 20, 2010, the MPD sent an e-mail terminating ILG's representation. In September 2010, the DOL gain denied Dr. Samuel's certification. On November 15, 2011, the Board of Labor Certification Appeals affirmed denial of the certification.

Before the hearing judge, the Commission called an expert in immigration law. The expert opined that, with a reasonable degree of professional certainty, that Respondent lacked the necessary and required legal knowledge, skill, thoroughness, and preparation to represent the MPD. The expert further opined that the MPD was unable to make informed decisions regarding the permanent residency process due to Respondent's failure to adequately explain the representation and the residency process. The hearing judge credited the expert's opinions.

Based on the above facts, the hearing judge concluded that Respondent violated MLRPC 1.1, 1.3, 1.4(a) and (b), 7.1, 8.4(a), 8.4(c), and 8.4(d).

The Commission did not except to any of the hearing judge's findings of fact or conclusions of law. Respondent excepted to certain findings of fact and the hearing judge's conclusions that she violated MLRPC 1.3, 1.4(a) and (b), 7.1, and 8.4(c) and (d). The Commission recommended an indefinite suspension. Respondent requested a reprimand.

Held:

The Court of Appeals overruled Respondent's exceptions, and upheld all of the hearing judge's findings of fact and conclusions of law. The Court determined that Respondent violated MLRPC 1.1, 1.3, 1.4, 7.1, 8.4(c), 8.4(d), and 8.4(a) by failing to competently and diligently represent the MPD, by failing to promptly and fully respond to and advise the MPD, and by making misrepresentations in her résumé and job proposal as to her immigration law experience. The Court noted one aggravating factor: that Respondent violated several MLRPC in her representation of the MPD, *i.e.*, that she committed multiple offenses. The Court noted two mitigating factors: absence of a prior disciplinary record and Respondent's inexperience in the practice of law. The Court held that, although Respondent violated many MLRPC over a course of time and although her actions reflected negatively on the legal profession, a sixty-day suspension from the practice of law was the appropriate sanction given Respondent's inexperience in the practice of law and the lack of a prior disciplinary record, coupled with the hearing judge's finding that Respondent did not intend to defraud her client.

Troy Sherman Nash v. State of Maryland, No. 60, September Term 2013, filed June 20, 2014. Opinion by Harrell, J.

Battaglia, Adkins, and McDonald, JJ., dissent in part.

http://www.mdcourts.gov/opinions/coa/2014/60a13.pdf

CRIMINAL LAW – ALLEGATIONS OF JUROR MISCONDUCT – *VOIR DIRE* –

CRIMINAL LAW – JURY INSTRUCTIONS – MODIFIED *ALLEN* CHARGE –

CRIMINAL LAW – MARYLAND RULES – ADEQUACY OF RESPONSE TO A JURY NOTE

Facts:

On Tuesday, 30 August 2011, a criminal trial of Troy Sherman Nash commenced in the Circuit Court for Prince George's County. The case went to the jury for deliberations in the afternoon of Friday, 2 September 2011, the day before Labor Day weekend. At 5:02 PM that Friday evening, the court received a note from the jury (the "Note"), which read literally: "I dont believe the defendant is being give a fair verdict based on one of the juror stating out loud that she will vote guilty because she want to go home and not return! When she previously said no guilty." The Note was signed by the foreperson and dated "9/2/11."

Following receipt of the Note, the court met with counsel for the parties to discuss how the court might respond. Nash moved for a mistrial. His counsel argued that the Note confirmed that a juror was going to vote for a guilty verdict based on "convenience and expediency" rather than the evidence presented during the trial. The State disagreed, and the court denied the mistrial. Interpreting the Note as a signal that at least one of the jurors was tired after sitting through four long days of trial, the court determined that the jury should be sent home for the holiday weekend and return the following Tuesday morning to continue deliberations. Defense counsel requested that the court give a modified *Allen* instruction before releasing the jury, which request the court denied. Prior to releasing the jury for the long weekend, the Court reiterated an earlier instruction reminding the jurors of their duty to refrain from conducting any investigation concerning matters related to the trial, and included the following direction: "As I've instructed you, your decision must be based upon what has been presented here during the course of the trial. I expect that you will comply with my instructions. It's the only way this process works."

On the following Tuesday, 6 September 2011, all of the jurors returned as instructed. Court recessed at 9:39 AM to await a verdict. At 10:45 AM, court reconvened to receive the jury's verdict. Before the jury was brought back into the courtroom, defense counsel renewed Nash's earlier mistrial motion based on the contents of the Note. The court denied the motion. After the jury was re-seated, the foreperson announced that the jury found Nash guilty of murder in the

first degree. At defense counsel's request, the courtroom clerk polled the jury. Each juror agreed with the verdict. The court dismissed the jury. Defense counsel renewed Nash's mistrial motion and stated his intent to file a motion for a new trial. The court reserved ruling on the mistrial and set a date for a hearing on the anticipated motion for a new trial. Following argument at that hearing, the Court denied defense counsel's motions.

Nash filed timely an appeal to the Court of Special Appeals. In an unreported opinion, the intermediate appellate court affirmed the judgment of the Circuit Court. Nash filed a Petition for Writ of Certiorari with the Court of Appeals, which the Court granted, *Nash v. State*, 432 Md. 466, 69 A.3d 474 (2013), to consider the following question:

> Did the trial court commit reversible error when, after receiving a jury note stating that one juror indicated a willingness to change her vote from not guilty to guilty "because she want[ed] to go home and not return," it (1) denied the defendant's mistrial motion without first conducting voir dire of the jury, (2) refused defense counsel's request to give a modified Allen instruction, and, (3) chose to recess over a three-day weekend and have the jurors return to continue deliberations?

Held: Affirmed.

The Court of Appeals concluded that the Circuit Court did not abuse its discretion in denying Nash's motion for a mistrial without conducting first *voir dire* of the jurors, *sua sponte*, for three reasons. First, the Court determined that the circumstances of Nash's case are different from prior cases in which the Court applied a presumption of prejudice to alleged juror misconduct. The Court distinguished Nash's case on the grounds that the allegations of misconduct in his case: (1) involved a statement that juror misconduct might occur in the future, as opposed to cases where juror misconduct had occurred already prior to a mistrial motion; (2) involved a discussion between jurors, as opposed to a discussion between jurors and defendants, witnesses, or third parties; and, (3) did not involve the introduction of extrinsic evidence into the deliberations. Because the Note did not raise a presumption of prejudice, the burden of requesting *voir dire* of the jury following the Note did not shift from Nash to the State, and, by default, the trial judge. Second, the Court distinguished Nash's case from prior cases where *voir dire sua sponte* by the trial judge was necessary to resolve factual questions in order to determine whether the presumption of prejudice was applicable or whether the judge had sufficient information upon which to exercise her discretion in ruling on the mistrial motion. The Court concluded that the unresolved questions in Nash's case were not the type of "alarming" factual questions that went unresolved in prior cases. Therefore, the Court determined that the trial judge did not lack sufficient information upon which to base her denial of Nash's mistrial motion. Third, the Court held that it was not an abuse of discretion for the trial judge to deny Nash's mistrial motion without conducting *voir dire sua sponte* for the purpose of obtaining assurance from the jurors that they could reach a fair and impartial verdict. The Court reasoned that Nash's case was not one where *voir dire* was the only way to ensure a fair and impartial verdict, and that the trial judge's assessment of the import of the content of the Note was more

likely the reflection of fatigue was reasonable in light of the Court's opinion in *Butler v. State*, 392 Md. 169, 896 A.2d 359 (2006).

The Court of Appeals rejected also Nash's argument that the trial court abused its discretion by refusing defense counsel's request to give a modified *Allen* instruction. The Court reasoned that trial judges are afforded a wide berth of discretion in determining whether to give a modified *Allen* instruction, and that Nash failed to demonstrate that a trial judge's refusal to give an *Allen* instruction after deliberations begin, but before a jury deadlock is confirmed, constitutes an abuse of discretion.

Finally, the Court of Appeals concluded that the trial court did not violate Maryland Rule 4-326(d) by opting to release the jury for the holiday weekend with additional instruction reminding them of their duties rather than responding directly to the statements in the Note. The Court reasoned that the trial judge's actions constituted a "response" to the note within the plain meaning of the Rule, and, considering the circumstances, the response was not an unreasonable one.

Claudia Natalie Cabrera v. Cecilia R. Penate, et al., No. 110, September Term 2013, filed June 20, 2014. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2014/110a13.pdf

ELECTION LAW – JUDICIAL RELIEF

ELECTION LAW – CANDIDATE'S PARTY AFFILIATION

Facts:

Claudia Natalie Cabrera, Appellant, filed a certificate of candidacy with the State Board of Elections, expressing her intention to seek the nomination of the Democratic party for the office of delegate representing District 47B in the June 2014 gubernatorial primary election. A resident and registered voter in District 47B, Cecilia R. Penate, one of the Appellees before the Court of Appeals (along with the State Board of Elections and the Prince George's County Board of Election Supervisors), filed a petition in the Circuit Court for Prince George's County challenging Appellant's certificate of candidacy. The petition alleged, *inter alia*, that Appellant was not a registered Democrat at the time she filed the certificate of candidacy and therefore did not satisfy the party affiliation requirement set forth in Maryland Code (2002, 2010 Repl. Vol.), § 5-203 of the Election Law Article ("EL"). Appellant was a registered Republican on February 25, 2014, the day she filed the certificate of candidacy—the deadline to do so—but changed her party affiliation to Democratic two days later.

At the Circuit Court hearing on Penate's petition, Appellant argued that Penate did not have standing to bring the party affiliation claim. Specifically, Appellant asserted that (1) there is no private cause of action provided for by the Election Law Article for challenging a putative candidate's party affiliation, and (2) the section of the Election Law Article providing a judicial remedy for any unlawful act or omission "relating to an election," EL § 12-202, did not apply, because a putative candidate's qualifications do not relate to an election. Appellant also argued that her change of party affiliation was not untimely, asserting that she did not need to be affiliated with the Democratic primary until three weeks before the primary election, under EL § 3-303.

The Circuit Court ruled first that Penate had standing under EL § 12-202 to challenge Appellant's qualifications, then declared Appellant's candidacy invalid, as she was not a registered Democrat at the time she submitted her certificate of candidacy.

Held: Affirmed.

The Court of Appeals first addressed Appellant's argument that Penate did not have standing to bring the party affiliation claim. Rejecting the argument that a candidate's qualifications do not

"relate to" an election, the Court held that EL § 12-202 grants standing to challenge the qualifications of a putative candidate for office.

Next, the Court addressed Appellant's claim that her change of party affiliation was not untimely. The Court held that, under the plain meaning of EL § 5-203, a putative candidate for office must satisfy the requirements of that office at the time of filing the certificate of candidacy. EL § 3-303, the Court clarified, permits a registered voter to change party affiliation up to three weeks before a primary election, but does not speak to the qualification requirements of a candidate for office, contrary to Appellant's assertion.

Rainford G. Bartlett v. Portfolio Recovery Associates, LLC, No. 64, September Term 2013, and *James Townsend v. Midland Funding, LLC*, No. 76, September Term 2013, filed May 19, 2014. Opinion by Greene, J.

Adkins and McDonald, JJ., concur and dissent.
Watts, J., concurs.

http://www.mdcourts.gov/opinions/coa/2014/64a13.pdf

SMALL CLAIM ACTIONS – JUDGMENT ON AFFIDAVIT – ASSIGNED CONSUMER DEBT CASES

Facts:

Respondents Portfolio Recovery Associates, LLC ("PRA") and Midland Funding, LLC ("Midland") are companies that purchase charged-off debts from original creditors at low prices and then collect the account balance from the debtors. These entities are referred to as "debt buyers." Both Respondents in these consolidated cases filed small claim actions in the District Court of Maryland sitting in Baltimore City, seeking a judgment on affidavit pursuant to Maryland Rule 3-306.

Respondent PRA sued Petitioner Rainford G. Bartlett ("Bartlett") on October 3, 2012, to recover $2897.88, arising from a delinquent credit card account that PRA purchased from Chase Bank USA, N.A. ("Chase"). Along with its complaint, PRA filed a form affidavit and Assigned Consumer Debt Checklist with supporting exhibits, including Bartlett's credit card statements and a bill of sale. Bartlett filed a notice of intention to defend and the case proceeded to a trial on the merits. PRA prevailed and Bartlett filed an appeal, which was heard de novo in the Circuit Court for Baltimore City on April 24, 2013. At the de novo trial in that court, Bartlett's counsel argued that Maryland Rule 3-306(d) applied to the present case and therefore all documents introduced as evidence were required to meet the business records exception to the hearsay rule. The trial judge, on the other hand, maintained that in this small claim case, he retained discretion to decide whether the evidence was reliable and probative. Following the conclusion of the trial, the trial judge admitted the evidence and entered judgment in favor of PRA. Bartlett filed a petition for certiorari, which this Court granted on July 3, 2013.

Respondent Midland filed suit against Petitioner James Townsend ("Townsend") on December 22, 2011, to recover $1,905.21 plus interest, arising from an unpaid balance on a consumer credit card account that Midland purchased from Chase. With its complaint and request for judgment on affidavit, Midland submitted an affidavit, copies of credit card statements, and a bill of sale to prove that it owned the debt owed by Townsend. Townsend filed a notice of intention to defend but did not appear at trial. Counsel for Townsend, however, appeared at trial and argued that the case should be dismissed because Midland provided insufficient evidence to prove its claim. The District Court judge found in favor of Midland, and Townsend appealed to the Circuit Court.

At the de novo trial in the Circuit Court, Townsend's counsel objected to the admission of Midland's documents based on Maryland Rule 3-306, hearsay, and lack of personal knowledge. Midland argued that the Rules of Evidence did not apply and therefore its documents were admissible to prove its claim. The Circuit Court granted judgment in favor of Midland. Townsend filed a petition for certiorari with the Court of Appeals, which was granted on August 14, 2013.

Held: Affirmed.

Maryland Rule 3-701 governs small claim actions. The Rule provides that small claims proceed informally and that the Rules of Evidence do not apply. Maryland Rule 3-306 governs the procedure for judgment on affidavit. In 2011, Rule 3-306 was amended to include a special provision related to assigned consumer debt ("debt buyer") cases. The new Rule 3-306(d) contemplates that a debt buyer plaintiff must produce certain documents that are sufficient to pass muster under the business records exception to the hearsay rule in order to obtain a judgment on affidavit. The Court held that in a small claim debt buyer action, once a notice of intention to defend is filed and the case proceeds to trial, Rule 3-701 controls and the Rules of Evidence do not apply. That is, in the context of a small claim debt buyer case, hearsay evidence need not pass muster under the business records exception in order to be admissible at trial. Rather, the evidence must satisfy the trial court that it is probative and possesses sufficient indicia of reliability to be admitted. The Court concluded that in these small claims cases, the trial judges did not abuse their discretion in admitting the evidence submitted by the Respondents. Finally, the Court held that there was no clear error in entering judgment for the Respondents in both cases, where the trial judges properly considered the evidence before them and found the Petitioners to be liable to the Respondents for the debts sued upon.

Marshall Thompkins, et ux. v. Mountaineer Investments, LLC, No. 43, September Term 2013, filed June 23, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/43a13.pdf

SECONDARY MORTGAGE LOAN LAW ("SMLL") – Liability of Assignee under SMLL for Violation of SMLL by Lender in the Origination of the Loan.

MORTGAGES – SECONDARY MORTGAGE LOAN LAW ("SMLL") – UNIFORM COMMERCIAL CODE ("UCC") – Derivative Liability of Assignee under UCC for Violation of SMLL by Lender in the Origination of the Loan.

MORTGAGES – SECONDARY MORTGAGE LOAN LAW ("SMLL") – ASSIGNMENTS – Derivative Liability of Assignee under Common Law for Violation of SMLL by Lender in the Origination of the Loan.

Facts:

Marshall and Antoinette Thompkins obtained a loan by taking out a second mortgage, secured by a deed of trust, on their residence. On the day that the loan closed, the lender sold the loan to another entity. Several years later, the purchaser of the Thompkinses' loan sold the loan to Mountaineer Investments, LLC ("Mountaineer"). This transfer was effected by an assignment of the loan instruments. Mountaineer thus became the "assignee" of the Thompkinses' promissory note and the deed of trust that secured the note. A few years after the Thompkinses had paid off the note and Mountaineer had released the deed of trust, the Thompkinses sued the original lender and Mountaineer for violations of the Secondary Mortgage Loan Law ("SMLL"). They alleged that the lender had, among other things, charged them excess fees at the loan origination. The Thompkinses advanced several different theories to argue that Mountaineer was liable for the lender's actions at the loan closing, but they ultimately relied on two theories: (1) that Mountaineer was liable for those violations pursuant to the interaction of the Maryland Uniform Commercial Code ("UCC") with the SMLL, unless Mountaineer could establish that it was a holder in due course of the loan; and (2) that, under Maryland common law, an assignee is liable for a violation of the SMLL by its assignor.

The Circuit Court and the Court of Special Appeals held that the Thompkinses' effort to hold Mountaineer responsible for the sins of the original lender was legally untenable under the SMLL, and under the other legal theories the Thompkinses advanced to extend the reach of the SMLL.

Held: Affirmed.

The Court of Appeals addressed each of the Thompkinses' contentions in turn.

The Court began its analysis by noting that the SMLL is a consumer protection measure designed to protect borrowers who secure a loan with a second mortgage. The SMLL regulates the origination of second mortgage loans and regulates some of the terms under which a second mortgage loan is repaid.

The SMLL does not provide that an assignee of a lender is liable for the lender's violations of that statute at the time the loan was made, although it may regulate an assignee of the loan in certain respects. The Court of Appeals held that an assignee of a second mortgage loan is not liable for violations of the SMLL committed by the lender when the loan was originated, even though the assignee may be liable for any violation of the SMLL that the assignee itself commits in connection with the repayment of that loan.

The Court then considered the Thompkinses' contention that, pursuant to the interaction of the UCC with the SMLL, Mountaineer was liable for the lender's actions at the loan origination. Contrary to the argument of the Thompkinses, the Court found that Commercial Law Article ("CL"), §3-306 does not extend derivative liability to an assignee of a second mortgage loan for a violation of the SMLL committed by a lender in the origination of the loan. However, a borrower who has such a claim against a lender may be permitted to reduce any amount still owed to an assignee under the promissory note by the amount of the claim, under the provisions of CL §3-305, unless the assignee is a holder in due course.

Finally, the Court found that, under Maryland common law, no "delegation presumption" applies with respect to the type of liability at issue in this case: an assignee of a second mortgage loan is not derivatively liable under the common law for a violation of the SMLL by the lender during the origination of the loan, unless the assignee has expressly assumed the lender's or other assignor's liability.

Return to ToC

David Springer v. Erie Insurance Exchange, No. 79, September Term 2013, filed June 24, 2014. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2014/79a13.pdf

INSURANCE – POLICY INTERPRETATION – EXCLUSIONS – "BUSINESS PURSUITS" EXCLUSION

Facts:

David Springer, Appellant, filed suit against Erie Insurance Exchange, Appellee ("Erie"), in which Mr. Springer sought declaratory relief and damages for breach of contract, after Erie refused to provide him with a legal defense when he was sued by a third party, J.G. Wentworth Originations, LLC ("J.G. Wentworth"). J.G. Wentworth, a business specializing in purchasing structured settlements and annuities from individuals, filed suit against Mr. Springer for, *inter alia*, defamation and false light. The Complaint alleged that Mr. Springer was the CEO of Sovereign Funding Group, a company engaged in a similar business to J.G. Wentworth, and that Mr. Springer spread defamatory information about J.G. Wentworth on the internet in an attempt to lure its customers away. Mr. Springer then requested that Erie provided him with a legal defense pursuant to the personal injury clause of his homeowner's insurance policy; Erie refused, however, citing a provision in the policy that excluded from coverage "personal injury arising out of business pursuits of anyone we protect."

Mr. Springer subsequently brought suit against Erie, seeking a declaratory judgment that Erie had a duty to defend him in the J.G. Wentworth action and also seeking damages for breach of contract. Erie counterclaimed, seeking its own declaratory judgment that it had no duty to defend. The parties filed cross-motions for summary judgment; the Circuit Court granted judgment in favor of Erie and issued a declaratory judgment in which it declared that Erie had no duty to defend the J.G. Wentworth claim and that Erie was not responsible for the costs of defending the suit. The Circuit Court reasoned that coverage was excluded by the "business pursuits" exclusion contained in the policy. Mr. Springer noted a timely appeal and the Court of Appeals granted *certiorari* on its own initiative prior to any decision by the Court of Special Appeals.

Held:

The Court of Appeals reversed the judgment of the Circuit Court, reasoning that to determine whether an activity qualifies as a "business pursuit", insurance providers and courts should look to two variables—continuity and profit motive. The Court, relying on the oft-cited *Appleman on Insurance*, defined continuity as "a continued or regular activity for the purpose of earning a livelihood" and profit motive as "the showing that the activity was undertaken for a monetary

gain." Applying the principles of continuity and profit motive, the Court of Appeals concluded that the allegations in the J.G. Wentworth Complaint were inadequate to trigger the business pursuits exclusion, because it contained little information as to Mr. Springer's involvement with Sovereign Funding Group and contained no information pertaining to profit motive. Accordingly, the Court remanded the case to the Circuit Court for further proceedings to explore the continuity of Mr. Springer's interests in Sovereign Funding Group and any profit motive on his part at the time of the alleged defamatory statements against J.G. Wentworth.

Edward J. Makowski v. Mayor and City Council of Baltimore, No. 81, September Term 2013, filed June 24, 2014. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2014/81a13.pdf

PROPERTY – CONDEMNATION – "QUICK-TAKE" CONDEMNATION – IMMEDIATE NECESSITY – "HOLD-OUT"

Facts:

As part of a massive revitalization effort in the East Baltimore community called the Eastern Baltimore Development Initiative ("EBDI"), the Mayor & City Council of Baltimore ("the City"), appellee, filed a Petition for Condemnation in the Circuit Court for Baltimore City, seeking to acquire property owned by Edward Makowski, appellant, located at 900-902 N. Chester Street ("the Property"). During the course of the condemnation proceedings, the City filed a "Petition for Immediate Possession and Title", seeking acquisition of the Property pursuant to Section 21-16 of the Code of Public Local Laws of Baltimore City, which authorizes the City to acquire property via "quick-take"—an expedited condemnation process by which the City acquires property before the issue of just compensation is litigated. The City alleged that immediate possession of the Property was necessary because, *inter alia*, the City had effectively acquired title to all other properties located on Mr. Makowski's block and the City's inability to acquire the Property was inhibiting development of the EBDI project. Mr. Makowski challenged the City's right to use quick-take proceedings to condemn his property, asserting, among other things, that the City failed to prove why immediate possession of the Property was necessary. The Circuit Court granted the petition, reasoning that pursuant to the Court of Appeals's prior decision in *Segall v. Mayor & City Council of Baltimore City*, 273 Md. 647, 331 A.2d 288 (1975), Mr. Makowski was a "hold-out", and thus, the quick-take was warranted.

Held:

The Court of Appeals affirmed the judgment of the Circuit Court. The Court explained that, pursuant to its earlier decision in *Segall*, "quick-take" condemnations are permitted to combat a "hold-out" situation. A "hold-out" occurs in projects involving property assemblages, i.e., when multiple properties are assembled for a single project, where "one or more property owners resist selling, wanting to be the last owner of a parcel or among the last, in order to be able to demand higher prices for their property because they are holding up a large project." The Court then reasoned that the Circuit Court properly concluded that Mr. Makowsi was a "hold-out"; Mr. Makowski was the only property owner on his block who was unwilling to sell to the City, thereby inhibiting development of the EBDI project. Accordingly, Mr. Makowski retained leverage to hold a hammer over the City in order to gain financial advantage, justifying the City's use of its "quick-take" authority.

Department of Public Safety and Correctional Services v. John Doe, Misc. No. 1, September Term 2013, and *Gregg Hershberger v. John Roe*, No. 103, September Term 2013, filed June 30, 2014. Opinion by Greene, J.

Harrell, J., concurs.

http://www.mdcourts.gov/opinions/coa/2014/1a13m.pdf

STATUTORY INTERPRETATION – SEX OFFENDER REGISTRATION AND NOTIFICATION ACT ("SORNA")

Facts:

Appellee John Doe pled guilty to and was convicted in the Circuit Court of Washington County of a single count of child sexual abuse in 2006. Although Doe's plea agreement did not address registration as a sex offender as one of the conditions of probation, Doe was ordered at sentencing to register pursuant to then-newly instituted SORNA registration requirements implemented by Maryland in 2009 and 2010. He contested that registration requirement, and in *Doe v. Department of Public Safety & Correctional Services*, 430 Md. 535, 62 A.3d 123 (2013) ("*Doe I*") the Court in a plurality opinion held that the retroactive application of Maryland's sex offender registration statute to Doe violated the ex post facto prohibition contained in Article 17 of the Maryland Declaration of Rights. Upon remand from this Court, the Circuit Court entered judgment, ordering the Department of Public Safety and Correctional Services ("DPSCS"), in pertinent part, to remove Doe's sex offender registration from "all federal databases." The State sought to amend this judgment, which the Circuit Court denied. The State noted an appeal to the Court of Special Appeals, but that court presented a certification to the Court of Appeals requesting that the Court make a determination on the applicability of the Doe I decision to federal sex offender registration databases. The Court of Appeals granted the certification.

In a separate case, Appellee John Roe pled guilty to and was convicted in the Circuit Court for Wicomico County of third degree sex offense in 1997. Upon orders from the Wicomico County Sheriff's Department, Roe registered as a child sex offender under Maryland's sex offender registration law in effect at that time and continued to register annually for a term that he believed would expire after ten years. Roe filed a complaint in the Circuit Court for Wicomico County, requesting removal from the registry and a declaration that the sex offender registration statute does not apply to him. The Circuit Court denied Roe's request, and Roe appealed to the Court of Special Appeals. The Court of Special Appeals vacated the lower court's judgment based on the Court of Appeals's holding in *Doe I* and remanded the case to the Circuit Court to enter an order in favor of Roe. The State filed a "Motion for Appropriate Relief," arguing that Roe had an independent obligation to register as a sex offender in Maryland pursuant to the federal Sex Offender Registration and Notification Act ("SORNA"). The Circuit Court entered an order in favor of Roe, and the State appealed. While the case was pending in the Court of

Special Appeals, but before any briefing or argument in that court, the State filed a petition for certiorari to the Court of Appeals, which was granted.

Held: Affirmed.

In *Doe I*, the Court of Appeals held that the retroactive application of Maryland's sex offender registration statute is unconstitutional. SORNA, 42 U.S.C. § 16901 et seq., includes both directions to jurisdictions to implement comprehensive registration programs and directions to individual sex offenders to register with the state in which they reside, work, or attend school. The Act also includes, however, a provision regarding the resolution of conflicts between the federal law and state constitutions, "as determined by a ruling of the jurisdiction's highest court." 42 U.S.C. § 15925(b). This section further provides that in that situation, "the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation [of SORNA.]" Accordingly, a state's implementation of SORNA should be consistent with the purpose of SORNA as well as with the state's constitution. Therefore, notwithstanding the registration obligations placed directly on individuals by SORNA, an individual to whom the registration requirement would be applied retroactively cannot be required to register involuntarily as a sex offender in Maryland when to do so would be unconstitutional as articulated in *Doe I*.

With regard to the certified question from the Court of Special Appeals, the Court concluded that the Circuit Court's order directing Doe's removal from "federal databases" was misleading. Nevertheless, due to the fact that the only relevant database is the Maryland registry, and that DPSCS's duties include communication with federal agencies regarding registration status, the Circuit Court's order, as modified by the Court of Appeals, was properly within its authority.

Christopher D. Hamilton, et al. v. Benjamin Kirson, et ux., No. 78, September Term 2013, and *Candace Renee Alston, et al. v. 2700 Virginia Avenue Associates, et al.*, No. 100, September Term 2013, filed June 20, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/78a13.pdf

NEGLIGENCE – LEAD-PAINT POISONING – CIRCUMSTANTIAL EVIDENCE

NEGLIGENCE – CIRCUMSTANTIAL EVIDENCE – EXPERT TESTIMONY

Facts:

Because both cases shared common questions of law and applicable legal precedents, the Court of Appeals consolidated these two cases for decision. In each case, plaintiffs brought a negligence action against landlords to recover for his or her injuries resulting from lead paint poisoning. No plaintiff adduced direct evidence that the respective demised premises were a substantial contributor to the injuries or that the interiors of the homes contained lead paint, but rather relied on circumstantial evidence in an effort to satisfy the causation element of a *prima facie* negligence claim. After discovery was conducted, the landlords filed motions for summary judgment, which the Circuit Court for Baltimore City granted. In both cases, the trial judges reasoned that the respective plaintiffs failed to produce sufficient evidence to present a *prima facie* negligence case with regard to the causation element and, on appeal, the Court of Special Appeals affirmed in two unreported opinions.

In both cases, the Plaintiffs-Petitioners filed Petitions for a Writ of Certiorari, which the Court of Appeals granted. In *Alston*, the questions presented for our consideration were:

> (1) By following its decision in *West v. Rochkind*, 212 Md. App. 164, 66 A.3d 1145 (2013), did [the] CSA [Court of Special Appeals] [here] improperly undermine the common law principle that the law makes no distinction between the weight to be given to circumstantial evidence and direct evidence and that no greater degree of certainty is required of circumstantial evidence than of direct evidence?
>
> (2) Did [the] CSA's decision in *West* improperly change a Plaintiff's burden of proof in a circumstantial evidence case from "preponderance of the evidence" to greater than "beyond a reasonable doubt?"
>
> (3) Does [the] CSA's holding improperly require a Plaintiff in a lead-paint case to prove that a given property was "the only possible explanation" for a Plaintiff's injuries in order to make a circumstantial case?

In *Hamilton*, the questions presented were similar to those in *Alston*, but were phrased differently as follows:

> (1) Did the trial court err by refusing to allow plaintiffs' expert witnesses to testify that the defendant's property was a substantial contributing cause to plaintiffs' injurious lead exposure on the grounds that they did not sufficiently rule out other potential sources of lead exposure?
>
> (2) Did the trial court err by granting summary judgment for defendant on the grounds that there was insufficient evidence as to causation?
>
> (3) Is a *Dow* analysis applicable to a lead paint claim involving possible exposure at multiple properties?

Held: Affirmed.

The Court of Appeals reiterated that, in a negligence case, a plaintiff may prove causation in fact through circumstantial evidence, as well as direct evidence or a mixture of the two. When a plaintiff relies on circumstantial evidence to explain the cause of the injury or accident, however, the plaintiff relies entirely on the validity of an inference or inferences. The conclusion that an inference is not valid due to a lack of supporting facts or an articulable logical relationship does not mean that the courts place greater weight on direct evidence than on circumstantial evidence. Rather, that conclusion means that the courts require inferences to be sound logically, and that courts refuse to allow a jury of laymen to engage in guesswork, speculation, and conjecture.

Turning to causation in fact in the context of lead paint cases, the Court noted that, in the typical lead paint case, the theory of causation may have multiple analytical layers. The causation link at issue in the present cases concerned the link between the defendant's property and the plaintiff's exposure to lead. To connect the dots between a defendant's property and a plaintiff's exposure to lead, the plaintiff must tender facts admissible in evidence that, if believed, establish two separate inferences: (1) that the property contained lead-based paint, and (2) that the lead-based paint at the subject property was a substantial contributor to the victim's exposure to lead. At times, these separate inferences may be drawn from the same set of facts. For example, in *Dow v. L & R Properties, Inc.*, 144 Md. App. 67, 796 A.2d 139 (2002), the lead-poisoned plaintiff established both inferences by eliminating every other reasonable possibility as an alternative source of lead. The Court cautioned that parties would do well to remember that these two inferences are separate and often may require different evidentiary support. Moreover, Plaintiffs bear the initial burden of proving circumstantially a prima facie negligence case. Part of that burden is to advance a viable theory of causation.

In the present cases, the Plaintiffs argued a *Dow* theory of causation, but failed to present sufficient evidence to support the necessary inference that the property contained lead-based paint because the evidence did not reach the same quantum or quality as that in *Dow*. The Court, however, rejected explicitly the contention that *Dow* defines the only set of circumstantial facts

that may satisfy a plaintiff's burden to establish a *prima facie* negligence case for lead paint poisoning. Rather, the pertinent question to be asked is whether the particular circumstantial evidence permits an inference or inferences of the desired ultimate fact or facts as a "reasonable likelihood or probability," and not a mere "possibility."

Next, the Court held that an expert's testimony may not bridge the causation gap without a sufficient factual basis for his or her ultimate opinion testimony. In the present cases, the lead-poisoned plaintiffs' experts reached the conclusion that the subject house contained lead-based paint on a presumption that houses built during a certain time period contain typically lead-based paint. The Court held that such a factual basis is insufficient for an expert to reach the conclusion that the interior of a specific property contained lead-based paint during the relevant time period when a plaintiff lived or frequented there.

Wilhelmina Bradford v. Jai Medical Systems Managed Care Organization, Inc., No. 30, September Term 2013, filed June 19, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/30a13.pdf

VICARIOUS LIABILITY – APPARENT AGENCY – MANAGED CARE ORGANIZATIONS AND NETWORK PHYSICIANS

Facts:

Wilhelmina Bradford suffered a partial amputation of her foot as a result of negligence of a physician, who was an independent contractor in the network of Jai Medical Systems Managed Care Organization ("Jai MCO"), a managed care organization that finances health care for Medicaid participants. Ms. Bradford sued, among others, Jai MCO, seeking to hold Jai MCO vicariously liable for the negligence of the physician and arguing that the negligent physician was an apparent agent of Jai MCO.

Because the negligent physician never responded to Ms. Bradford's complaint and the Circuit Court had entered an order of default against the physician, the physician's liability was not at issue at the trial. The jury was asked to determine only the amount of damages, and whether Jai MCO and another defendant, a professional association, were also liable under the theory that the negligent physician was the apparent agent of either or both of those entities. The jury awarded damages to Ms. Bradford, and found that Jai MCO was liable under the theory of apparent agency. The trial judge denied Jai MCO's motion for judgment notwithstanding the verdict and for a new trial. Jai MCO appealed.

The Court of Special Appeals reversed, holding that the Circuit Court should have granted Jai MCO's motion for judgment notwithstanding the verdict. Ms. Bradford filed a petition for a writ of certiorari, which the Court of Appeals granted.

Held:

The Court held that an MCO may be held liable for the negligence of an independent-contractor physician in its network under the doctrine of apparent agency. The Court noted that it had previously applied the doctrine of apparent agency, as described in Restatement (Second) of Agency § 267, to determine whether a hospital could be held liable for the malpractice of an independent-contractor physician. There is no reason to preclude application of the theory in the context of an MCO and a network physician.

The Court held that an independent-contractor physician who participates in the network of an MCO may be found to be the apparent agent of the MCO if (1) the MCO makes representations that create the appearance of an employment or agency relationship; (2) the plaintiff believes that

an employment or agency relationship exists and relies on that belief to the plaintiff's detriment; and (3) the plaintiff's belief is reasonable under the circumstances.

In the case before it, the Court held that regardless of whether Ms. Bradford subjectively believed that the negligent physician was an employee of Jai MCO and relied on that belief in seeking medical care from the negligent physician, there was insufficient evidence to hold the MCO vicariously liable for the negligence of a physician in its network because the MCO's representations concerning its relationship with the physician did not create an appearance of an agency relationship and Ms. Bradford's subjective belief that the physician worked for the MCO was not reasonable under any circumstances. The Court, however, declined to subscribe to the Court of Special Appeals' reasoning that there is a "common knowledge" that MCOs are the equivalent of insurance providers and that MCOs are not providers of medical services.

COURT OF SPECIAL APPEALS

William Westray v. State of Maryland, No. 1836, September Term 2012, filed June 25, 2014. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2014/1836s12.pdf

CRIMINAL LAW– WAIVER OF COUNSEL

CRIMINAL PROCEDURE– APPOINTMENT OF COUNSEL

CRIMINAL PROCEDURE– SEARCH AND SEIZURE

Facts:

On May 15, 2012, appellant appeared before the circuit court to address assigned counsel's concerns that "he's had difficulty speaking with [appellant]." Reminding appellant that he was scheduled to go to trial in August, the court indicated that it wanted "to make sure that [appellant] was represented." Appellant voiced his dissatisfaction with assigned counsel. The District Public Defender was also present at the hearing and explained to the court that the Public Defender's Office "can't assign any lawyer of [a defendant's] choosing," and if appellant did not want the assigned public defender, it was the Office's policy not to assign a different lawyer. Appellant stated that he would seek private counsel. The court reviewed the charges with appellant and warned him that the charges exposed him to substantial penalties, so that an attorney would be helpful at trial and potentially sentencing. The court reiterated that if appellant discharged assigned counsel, it was the policy of the Public Defender's Office not to provide a different public defender. The court postponed the hearing so appellant could think about his decision.

On June 8, appellant appeared before the circuit court and again wished to discharge assigned counsel. The circuit court explained that discharging counsel would mean that appellant would have to either represent himself or retain private counsel. The court indicated that self-representation was ill-advised, and that his reasons for discharging counsel were without merit, but it granted appellant's wish.

Before the case went to trial, appellant filed a motion for the appointment of *pro bono* counsel and a postponement. At a hearing on the motion, the court explained that it had informed appellant that if he discharged his assigned counsel, he would not be assigned "another free attorney" from the public defender's office, and it was not sure it had the power to appoint a *pro*

bono attorney for appellant. The court then denied appellant's request for a postponement and said "you really sort of have the choice of representing yourself or hiring a private attorney, which I understand you're not able to do. . . . So here we are." Appellant responded "So be it, man. I represent myself, I don't need, I don't need it[.]"

Appellant was convicted on nine counts of first degree burglary, ten counts of theft, and two counts of attempted first degree burglary.

Held:

The trial court erred by failing to determine and announce on the record that appellant had "knowingly and voluntarily" waived his right to counsel in accordance with Md. Rule 4-215(b). Md. Rule 4-215 "was drafted and implemented to protect both the right to the assistance of counsel and the right to self-representation." *Pinkney v. State*, 427 Md. 77, 92 (2012) (citing *State v. Brown*, 342 Md. 404, 412 (1996)). Embodied within the Rule, however, is "the principle . . .that an unmeritorious discharge of counsel and request for new counsel, in an apparent effort to delay the trial, may constitute a waiver of the right to counsel." *Fowlkes v. State*, 311 Md. 586, 603 (1988). To protect both the constitutional guarantees of the right to counsel and the right to proceed without representation, Maryland Rule 4-215 imposes an order to be followed. The Court of Appeals has made clear that "the requirements [of] Md. Rule 4-215 'are mandatory and must be complied with, irrespective of the gravity of the crime charged, the type of plea entered, or the lack of an affirmative showing of prejudice to the accused.'" *Broadwater v. State*, 401 Md. 175, 182 (2007) (quoting *Taylor v. State*, 20 Md. App. 404, 409 (1974)).

Here, the discharge of counsel on June 8 would invoke the provisions of Rule 4-215(e), which, in turn, refers to subsections (a)(1)-(4), and subsection (4) requires a waiver inquiry pursuant to subsection (b) of the rule. Additionally, if appellant's appearance without counsel on the date set for trial and the rejection of appellant's desire to have counsel appointed by the court is to be understood as a finding that appellant's discharge of counsel was unmeritorious, coupled with a determination by the court that appellant had waived his right to counsel by inaction, section (d) of the rule applies. Section (d), like section (e), requires compliance with section (a) of the rule and the need to "[c]onduct a waiver inquiry pursuant to section (b) of [the] Rule." Section(b) requires an examination on the record and a determination by the court and announcement on the record of a knowing and voluntary waiver of the right to counsel. The record, here, does not reflect a determination or an announcement during the various proceedings or even substantial compliance through the use of synonyms for "knowingly" or "voluntarily" but, more importantly, even a pointed inquiry directed at that aspect of the Rule. Nor was appellant clearly informed that the "trial will proceed" as scheduled without him being represented, if he does not engage new counsel and that appearing without counsel may be deemed a waiver of counsel. The fact that the court denied appellant's request for *pro bono* counsel and he proceeded without counsel did not indicate a voluntary decision to proceed without counsel or that he discharged counsel with full knowledge of the possible consequences. That a defendant clearly understands when he or she discharges counsel that the trial may go on if he appears without counsel and that

his appearance can be considered as an implied waiver of the right to counsel is essential to a knowing and voluntary discharge of counsel. To proceed without counsel because one has discharged counsel with the hope of engaging private counsel may not be knowing and voluntary in the sense that a defendant has made a decision to proceed without counsel, but the discharge of counsel may still be voluntary and knowing in the sense that the defendant chooses to discharge counsel fully aware of that possible outcome.

The Court of Appeals decision in *Valonis v. State*, 431 Md. 551 (2013) addressed jury trial waivers governed by Rule 4-246(b). That Rule, like Rule 4-215(b), provides that the court must announce on the record that the waiver is made knowingly and voluntarily. The Court held that the trial court had "committed reversible error in failing to comply with the determine and announce requirement of Rule 4-246(b) and thereby failed to demonstrate a valid waiver of [the appellants'] right to a trial by jury. *Valonis*, 431 Md. at 570. Just as a jury trial is a fundamental constitutional right, so is the right to counsel and its waiver also requires a knowing and voluntary decision. Confronted with the same language and the Court's reasoning in *Valonis*, we cannot say that the requirement of a determination and announcement on the record of a knowing and voluntary waiver of counsel is any less essential than it is in the case of a jury trial waiver. It follows that the "determinate and announce" provision added to the waiver of counsel provisions in Rule 4-215(b) serves the same purpose and thus requires no less compliance than the language did in Rule 4-246(b).

We note that generally, for an appellate court to review an issue on appeal, the issue must have been raised and decided by the trial court. *See* Md. Rule 8-131(a). Here, appellant did not make contemporaneous objection that the court did not determine and announce on the record that he knowingly and voluntarily waived his right to counsel. The purpose of this rule, however, is to provide a proper inquiry and colloquy to ensure appellant was making a knowing and voluntary decision to waive his constitutional right to counsel with a full understanding of the consequences of his decision. Under the circumstances of this case, we are persuaded that preservation is not governed by the contemporaneous objection requirement.

We reject appellant's contention that the trial court erred by refusing to appoint a panel attorney or *pro bono*. There are in Maryland, "two options available for defendants in criminal cases who are financially unable to retain their own counsel. The first option is representation by the Public Defender's Office." *Davis v. State*, 100 Md. App. 369, 380 (1994). The second option, "[i]f the Public Defender's Office determines it is unable to represent a defendant due to his or her income, the court must conduct its own inquiry as to whether the defendant qualifies for a court-appointed counsel." *Id*. Here, the Office of the Public Defender did not decline to represent appellant. In *Fowlkes v. State*, the Court of Appeals stated that "unless the defendant can show a meritorious reason for the discharge of counsel, the appointment of substitute counsel is simply not an option available to defendant." 311 Md. 586, 605-06 (1988). Appellant discharged his assigned public defender without a meritorious reason; therefore, he limited his options to hiring private counsel or representing himself.

Appellant also asserts that the search warrants that authorized the seizure of evidence found at his grandmother's residence and in a vehicle operated by him were based on false or incorrect

facts. Appellant acknowledges that this argument was not raised during a formal suppression motion, but asks for a "limited remand" to "explore the issue," or in the alternative, he blames his failure to bring this to the trial court's attention on his *pro se* status. In the event of a new trial, a challenge to the search warrant may be raised, but it is not preserved for review in this appeal.

Antomar Jones v. State of Maryland, No. 1106, September Term 2013, filed June 27, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/1106s13.pdf

CLOSING ARGUMENTS – PERMISSIBLE SCOPE

CLOSING ARGUMENTS – MATTERS OF COMMON KNOWLEDGE

CLOSING ARGUMENTS – IMPROPER REMARKS

CLOSING ARGUMENTS – IMPROPER REMARKS – HARMLESS ERROR

WITNESS IMPEACHMENT – PRIOR CONVICTIONS

WITNESS IMPEACHMENT – PRIOR CONVICTIONS – ATTEMPTED SECOND-DEGREE MURDER

Facts:

On the night of February 1, 2012, Anthony Taylor was shot and Corey Alexander killed while inside Mr. Alexander's vehicle. The following day, Mr. Taylor identified Antomar Jones as the shooter. On February 3, the police arrested Mr. Jones and searched his home, but found nothing of evidentiary value. Inside the vehicle, the police found two cell phones and five dollars, among other items. Mr. Jones was charged with felony murder of Mr. Alexander, attempted first-degree murder of Mr. Taylor, and related crimes.

When the case proceeded to trial, Mr. Taylor and Mr. Jones offered conflicting accounts of what occurred on the night of the shooting. Mr. Taylor testified that he and Mr. Alexander picked up Mr. Jones that night to give him a ride. According to Mr. Taylor, Mr. Jones pulled out a gun shortly after entering the vehicle and demanded everything out of their pockets. Mr. Taylor and Mr. Alexander each threw money and a cell phone into the back seat. Soon after, Mr. Taylor tried to exit the car, but Mr. Jones shot him in the face. As Mr. Taylor ran to a nearby hospital, he heard another gunshot. Mr. Jones testified that Mr. Taylor and Mr. Alexander came to his house on February 1 to sell him marijuana. According to Mr. Jones, he entered the vehicle, asked if he could charge his phone using Mr. Alexander's car charger, spoke with the victims for a few minutes, purchased the marijuana, and went back inside his house for the night.

Mr. Jones attempted to impeach Mr. Taylor's testimony with evidence of a prior conviction for attempted second-degree murder, but the trial judge precluded him from doing so. Later, during closing arguments, the prosecutor argued that the phone charger in Mr. Alexander's car, pictured in an exhibit produced by the State, was an iPhone charger. In the State's view, this fact disproved Mr. Jones's story because he could not have plugged his phone (which was not an

iPhone) into an iPhone charger. Mr. Jones objected, arguing that the type of charger in Mr. Alexander's car was a fact not in evidence, but the trial judge overruled the objection.

After trial, the jury found Mr. Jones guilty of felony murder of Mr. Alexander and attempted first-degree murder of Mr. Taylor, among other crimes. The court sentenced him to life in prison, along with multiple consecutive and concurrent prison terms. Mr. Jones appealed.

Held: Reversed and remanded.

On appeal, Mr. Jones argued that insufficient evidence supported his conviction for robbery with a dangerous weapon and that the trial court erred by denying his attempt to impeach Mr. Taylor with a prior conviction for attempted second-degree murder and by overruling his objection to the State's remark during closing arguments regarding the phone charger.

Mr. Jones limited his evidentiary challenge to one of the four elements of robbery with a dangerous weapon—taking property from the victims. From the evidence, the Court observed that five dollars and two cell phones were found in the car and that the victims threw at least eighteen dollars, two cell phones, and a wallet into the back seat. The evidence therefore showed that at least thirteen dollars and a wallet were taken. In turn, the Court held that the evidence supported Mr. Jones's conviction for robbery with a dangerous weapon

As to witness impeachment, the Court recognized that under Rule 5-609 and *King v. State*, 407 Md. 682, 698-99 (2009), a witness may only be impeached with a prior conviction if that conviction is for either an infamous crime or a crime relevant to witness credibility. After concluding that the crime of attempted second-degree murder is not infamous, the Court relied on cases recognizing an overlap between that crime and assault with intent to murder, *see Hardy v. State*, 301 Md. 124, 129-30 (1984), and cases holding that the latter crime has no bearing on credibility, *see Fulp v. State*, 130 Md. App. 157, 167-68 (2000), to conclude the same for the crime of attempted second-degree murder. As a result, the Court held that the trial court correctly precluded Mr. Jones from impeaching Mr. Taylor with such a conviction.

Although the State conceded that the prosecutor's remark during closing regarding the charger related to a fact not in evidence, it argued that a juror applying common knowledge could reasonably conclude that the white cord seen in the State's exhibit was an iPhone charger. But the Court observed that even if iPhones can only be charged by white-corded chargers, the State failed to establish that other brands of phones could be charged only by non-white charger cords. Because the fact was neither in evidence nor of common knowledge, the Court found the remark improper. *See Donaldson v. State*, 416 Md. 467, 489 (2010); *Wilhelm v. State*, 272 Md. 404, 438 (1974). And because no physical evidence tied Mr. Jones to the crime and the trial hinged on witness credibility, the Court concluded that the prosecutor's remark was not harmless, and reversed Mr. Jones's convictions and remanded for further proceedings.

Harold Albert Norton, Jr. v. State of Maryland, No. 2382, September Term 2008, filed June 24, 2014. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2014/2382s08.pdf

CRIMINAL LAW – CONFRONTATION CLAUSE – EXPERT TESTIMONY

Facts:

Appellant, Harold Albert Norton, Jr. ("Norton"), was convicted in the Circuit Court for Baltimore County of attempted first degree murder, witness intimidation, assault, armed robbery, and use of a handgun. On appeal to the Court of Special Appeals, Norton's convictions were reversed. The Court held that Norton had been denied his Sixth Amendment right of confrontation when a DNA analyst was permitted to testify regarding the work of another DNA analyst. *See Harold Albert Norton, Jr. v. State*, No. 2382, Sept. Term 2008 (filed Nov. 21, 2011) (unreported opinion) ("*Norton I*"). The Court's original opinion was based upon the holding of the Court of Appeals in *Derr v. State*, 411 Md. 740 (2009) ("*Derr I*").

Following the Court of Special Appeals's opinion in *Norton I*, *Derr I* was vacated by the United States Supreme Court and "remanded to the Court of Appeals of Maryland for further consideration in light of *Williams v. Illinois*, 567 U.S.___, 132 S. Ct. 2221, 183 L. Ed.2d 89 (2012)." *Maryland v. Derr*, 133 S. Ct. 63 (2012). The Court of Appeals subsequently issued an opinion in *Derr v. State*, 434 Md. 88 (2013) ("*Derr II*"). Thereafter, on October 21, 2013, the Court of Appeals vacated the Court of Special Appeals's opinion in *Norton I* and remanded this case to this Court "for further reconsideration in light of [*Derr II*], 434 Md. 88, 73 A.3d 254 (2013) and *Williams v. Illinois*, 132 S. Ct. 2221, 183 L. Ed.2d 89 (2012)." *State v. Norton*, 435 Md. 266 (2013).

On remand, the Court of Special Appeals considered whether Norton's right to confrontation was violated when the circuit court permitted one DNA analyst to testify regarding the work of another DNA analyst and admitted the report of the non-testifying DNA analyst. At trial, DNA evidence was introduced through the testimony of Michael Cariola ("Cariola"), vice-president of forensic operations and technical leader at Bode Technology Group. The specific DNA evidence the State introduced demonstrated a match between Norton's DNA and a black ski mask which linked Norton to the crime. A different DNA analyst, Rachel Cline ("Cline"),had actually conducted the DNA testing and prepared the report. Over defense counsel's objection, the circuit court permitted the introduction of the DNA evidence through Cariola.

Held: Reversed.

The Court of Special Appeals applied the standard set forth in Justice Thomas's concurrence in *Williams*, *supra*, 567 U.S. at ___, 132 S. Ct. 2221 and *Derr II*, *supra*, 434 Md. at 114-117. The Court considered whether the challenged report had "the solemnity of an affidavit or deposition" and "attest[ed] that its statements accurately reflect[ed] the DNA testing processes used or the results obtained." *Williams*, *supra*, 567 U.S. at ___, 132 S. Ct. at 2260 (Thomas, J., concurring in judgment)

Applying the *Williams* standard, the Court of Special Appeals discussed the evidence at issue. The Court noted that the report was a three-page document. The first page listed identification numbers and descriptions for two pieces of evidence. A paragraph at the bottom on the first page provided that "[t]he DNA profiles reported in this case were determined by procedures that have been validated according to standards established by the Scientific Working Group on DNA Analysis Methods (SWGDAM) and adopted as Federal Standards."

The report set forth its conclusions on page two. The report stated that "[t]he major component male DNA profile matches the DNA profile obtained from the reference item from Harold Norton (2S06-062-01)." The report set forth the probability of randomly selecting an unrelated individual with the same DNA profile, and provided the following conclusion: "Therefore, within a reasonable degree of scientific certainty, Harold Norton (2S06-062-01) is the major source of the biological material obtained from evidence item 2S06-062-02." Two signatures appeared at the bottom of the page. On page three, a table sets forth a "Summary of Short Tandem Repeat Results" comparing the reference sample from Norton and the cutting from the ski mask.

The Court of Special Appeals emphasized that the report included language guaranteeing, "within a reasonable degree of scientific certainty," that Norton "is the major source of the biological material obtained from" the ski mask. The Court further observed that the report's conclusions were located directly above the signatures of Rachel E. Cline and Susan Bach. The Court explained that the inclusion of such formalities in the report made it significantly different from that at issue in *Williams*, *supra*, which Justice Thomas emphasized did not "attest that its statements accurately reflect the DNA testing processes used or the results obtained." 567 U.S. at ___, 132 S. Ct. at 2260. The Court further explained that the report at issue in *Williams* did not "certify the accuracy of those who [performed the DNA testing]." *Id.* The Court of Special Appeals emphasized that unlike the report in *Williams*, which "in substance, certifie[d] nothing," the report explicitly provided that the results were accurate "within a reasonable degree of scientific certainty." Accordingly, the Court held that the report was sufficiently formalized to be "testimonial" for purposes of the Confrontation Clause.

The Court of Special Appeals further held that the circuit court erred by permitting Cariola's testimony regarding the DNA report and by admitting the report though the testimony of Cariola. The Court noted that Cariola acknowledged that he did not perform any analysis of Norton's DNA sample but merely reviewed the report prepared by Cline and associated lab notes and data after the analysis was performed. The Court of Special Appeals held that such surrogate testimony was plainly insufficient under *Bullcoming v. New Mexico*, 564 U.S. at ___, 131 S. Ct. 2705, 2710 (2011)("[S]urrogate testimony of that order does not meet the constitutional

requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.”), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009)("Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.”).

Scott Shader et ux. v. Hampton Improvement Association, Inc., No. 845, September Term 2013, filed June 26, 2014. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2014/0845s13.pdf

STANDARD OF REVIEW – DENIAL OF A MOTION FOR SUMMARY JUDGMENT

COLLATERAL ESTOPPEL – OFFENSIVE NONMUTUAL COLLATERAL ESTOPPEL

RESTRICTIVE COVENANTS – WAIVER BY ABANDONMENT

Facts:

This case involved the set of restrictive covenants applicable to the residential subdivision of Hampton in Baltimore County. One restriction contained in the covenants, set forth in Paragraph C, prohibited the construction of more than one dwelling per lot as shown on the 1930 plat for Section 1 of the Hampton community.

In 2004, Appellants Scott and Anna Shader ("the Shaders"), homeowners in Hampton, sought to reconfigure the lots comprising their property located at 606 East Seminary Avenue—Lot 59 and a portion of Lot 75—to create two separately addressed properties: 606 East Seminary Avenue and 606A East Seminary Avenue. Later, in 2009, the Shaders listed their home on 606 East Seminary Avenue for sale and, at the same time, listed the 606A East Seminary Avenue property for sale as a buildable lot. In response to this listing, Appellee Hampton Improvement Association ("HIA") sent a letter to the Shaders and their real estate agents advising them of the restrictive covenants applicable to their property, including the restriction prohibiting more than one dwelling per lot.

In 2012, the Shaders filed a Complaint for Declaratory Judgment against the HIA in the Circuit Court for Baltimore County, seeking a declaration that the covenants do not prohibit the building of a home on 606A East Seminary Avenue. Shortly thereafter, the Shaders filed a motion for summary judgment, arguing that the circuit court should apply the doctrine of collateral estoppel based on the prior ruling in *Cortezi v. Duval Four-A, LLC*, No. C-07-02587 (Cir. Ct. Balt. Cnty. 2008) ("*Duval*"). In this motion, the Shaders claimed that the *Duval* judgment precluded the HIA from re-litigating whether it waived Paragraph C of the covenants by abandonment. A motions judge denied the motion. When the case proceeded to trial, the Shaders renewed their motion for summary judgment and the court deferred ruling on the motion, holding the matter *sub curia*.

After trial, the court issued a memorandum opinion that denied the Shaders' motion for summary judgment based on its conclusion that collateral estoppel did not apply because the issues in the instant case and the *Duval* case were not identical. The opinion also concluded that the HIA did not waive the restriction in Paragraph C prohibiting more than one house per lot by abandonment

and held that the covenants prohibit the construction of a dwelling on 606A East Seminary Avenue. An appeal to the Court of Special Appeals ensued, challenging the circuit court's denial of the Shaders' motion for summary judgment and its conclusion that the HIA did not waive Paragraph C of the covenants by abandonment.

Held: Affirmed.

The Court of Special Appeals first clarified the standard of review applicable to a court's post-trial denial of a motion for summary judgment. After reviewing *Metropolitan Mortgage Fund, Inc. v. Basiliko*, 288 Md. 25 (1980), and *Presbyterian University Hospital v. Wilson*, 99 Md. App. 305 (1994), *aff'd*, 337 Md. 541 (1995), the Court concluded that except in certain circumstances, such as when a summary judgment motion raises a jurisdictional issue that operates essentially as a motion to dismiss, an appellate court generally reviews a trial court's denial of a motion for summary judgment under an abuse of discretion standard. The Court determined that this deferential standard of review does not extend to the court's post-trial decision to deny a motion for summary judgment. An appellate court must determine whether a trial court's legal conclusion of whether the doctrine of collateral estoppel should apply was "legally correct" under a de novo standard of review.

In applying this standard, the Court addressed whether the circuit court erred in denying the Shaders' motion for summary judgment that raised the doctrine of collateral estoppel. The Court agreed with the circuit court that the first prong of the four-part test for collateral estoppel—that the issues in each case are identical—was not satisfied. The Court then addressed the third prong requiring mutuality of parties. Specifically, the Court focused on whether Maryland case law permits a plaintiff to invoke offensive nonmutual collateral estoppel, because in this case, plaintiff was asserting collateral estoppel based on a prior action in which the defendant, and not the plaintiff, was a party. Based on the decisions in *Burruss v. Board of Commissioners of Frederick County*, 427 Md. 231 (2012) and *Culver v. Maryland Insurance Commissioner*, 175 Md. App. 645 (2007), the Court concluded that Maryland courts may apply offensive nonmutual collateral estoppel so long its application does not impede judicial economy and is not unfair to the defendant, according to the factors established by the Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The Court also addressed the sub-issue of whether a plaintiff's use of nonmutual collateral estoppel in a declaratory judgment action, when the plaintiff's position is substantively defensive in nature, should be treated as offensive or defensive. The Court concluded that regardless of the type of action, a plaintiff's claim of nonmutual collateral estoppel remains offensive insofar as it demands analysis under the *Parklane* factors. Accordingly, the Court concluded that the circuit court did not err in denying the Shaders' motion for summary judgment.

Next, turning to the Shaders' argument that the court erred in failing to find that the HIA waived the one-house-per-lot restriction by abandonment, the Court reviewed the evidence presented at trial and concluded that the circuit court did not err in concluding that the HIA did not waive the restriction. Although the evidence presented at trial demonstrated violations of another

restriction contained in the covenants, no evidence was presented to document more than one dwelling per lot. The Court further concluded that the HIA's abandonment of one restriction contained in the covenants does not automatically result in the abandonment of every restriction when the overall intent of the covenants remains sustainable.

Frank Larocca, et al., v. The Creig Northrop Team, P.C., et al., No. 766, September Term 2013, filed June 25, 2014. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2014/0766s13.pdf

STATUTES – CONSTRUCTION – PARTICULAR CLASSES OF STATUTES, CONSTRUCTION OF – COMMERCIAL STATUTES

Facts:

In 2006 and 2007, appellants, three married couples, obtained financing to purchase new homes through appellees, several realtors, mortgage agencies, banks, and their employees. Appellants alleged that the Realtor Appellees assured appellants that they could obtain financing for their new homes through a "Bridge Loan Program," which would require that appellants obtain a Home Equity Line of Credit ("HELOC"), in order to use the funds to purchase the new homes. Appellants did not know that the Program likely violated the underwriting policies of the Banking Appellees. Appellants maintained that because this particular Bridge Loan Program was not legitimate, appellees committed fraudulent acts designed to conceal appellants' true income levels and that appellants still owned their old homes and were using the HELOC's to finance their new homes. Appellants asserted that as a result, they were forced to keep their homes on the market for a considerably longer period of time, which resulted in them incurring additional fees and selling their old homes below market value.

Several years after the closings, counsel revealed to appellants that they had been victims of appellees' alleged mortgage fraud scheme. Appellants filed a class action lawsuit in 2011, asserting a number of claims including violations of the Maryland Secondary Mortgage Loan Law ("SMLL"). Appellees moved for summary judgment, asserting statute of limitations. The circuit court granted the motion, except as to the SMLL count, on statute of limitations grounds. It also denied class certification on grounds of insufficient numbers. Later in the proceedings, appellees moved for summary judgment as to the SMLL count, which alleged a violation of Commercial Law §12-403, the prohibition against false advertising. The court granted that motion.

Held: Affirmed in part and reversed in part.

The Court of Special Appeals held that while a grant of judgment is appropriate where the statute of limitations has expired, the question of accrual may be one for the jury. Generally, limitations begin to accrue when a plaintiff knows of the wrong he or she sustained. However, the discovery rule provides that a cause of action accrues when a plaintiff knew or reasonably should have become aware of the wrong. If there are disputes about the material facts surrounding accrual, then the question is one for the jury. Additionally, the Court reversed the circuit court's

grant of summary judgment as to the SMLL count. The Court held that the communications between appellees and appellants could qualify under the SMLL as an advertisement. Also, it held that an employee of one of the Banking Appellees could be held liable under the SMLL, and that the Banking Appellees could be liable if they indirectly advertised by using the Realtor Appellees.

Lydia G. Wilcox, et al., v. Tristan J. Orellano, No. 1420, September Term 2012, filed June 24, 2014. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2014/1420s12.pdf

STATUTES – CONSTRUCTION – LIMITATIONS – RE-FILING OF MEDICAL MALPRACTICE CLAIMS

Facts:

Lydia G. Wilcox filed a medical malpractice claim against Tristan Orellano, M.D. Although she filed a certificate of a qualified expert with her claim, she failed to attach to the certificate a report of an attesting expert, and she never sought to correct that mistake. Wilcox subsequently filed a complaint against Dr. Orellano, and Dr. Orellano moved to dismiss that complaint because Wilcox had never filed the required report of her attesting expert. Before a hearing could be held on that motion to dismiss, a stipulation of dismissal was signed by the attorneys for both sides and filed. The stipulation stated: "The parties, by and through their respective attorneys, pursuant to Md. Rule 2-506(a), hereby stipulate and agree to the dismissal without prejudice of this action in its entirety against [Dr. Orellano.]"

Less than two weeks later, Wilcox filed another medical malpractice claim against Dr. Orellano and, this time, filed both a certificate of a qualified expert and a report from that expert. After Wilcox filed a complaint against Dr. Orellano, the doctor once again moved to dismiss, this time alleging that Wilcox's action was barred by the applicable statute of limitations.

The Prince George's County circuit court found that Wilcox could not re-file her action under section 5-119 of the Courts and Judicial Proceedings Article when her first action had been voluntarily dismissed by stipulation of the parties. To come within the meaning of section 5-119, concluded the court, Wilcox should have gone to the hearing on Dr. Orellano's first motion to dismiss and had the court dismiss her claim. The circuit court dismissed Wilcox's re-filed action, and Wilcox noted this appeal.

Held: Affirmed.

Subsection 5-119(b) of the Courts and Judicial Proceedings Article permits a party, whose medical malpractice "action or claim" has been dismissed once without prejudice because of that party's failure to attach a report of an attesting expert to the certificate of a qualified expert, to re-file that "action or claim," so long as it is filed within 60 days from the date of dismissal, regardless of whether the statute of limitations has run. But this "savings provision" does not apply under subsection 5-119(a), or the "preclusion provision," which precludes the re-filing of a

claim or action under the savings provision when the dismissal of the first claim or action is a "voluntary dismissal of a civil action or claim by the party who commenced the action or claim."

To determine if the limitation imposed by the preclusion provision (§ 5-119(a)) on the savings provision (§ 5-119(b)) applies only to a unilateral voluntary dismissal and not one of a bilateral nature, such as a voluntary stipulation, we turn to the rules of statutory construction and first examine the language of the statute. It is not altogether clear from the plain language of the statute whether a stipulation of dismissal signed by the party who commenced the action as well as the opposing party constitutes a voluntary dismissal "by the party who commenced the action."

But this ambiguity is resolved when section 5-119 is read in conjunction with Maryland Rule 2-506(a), which states that a party who has filed a claim may voluntarily dismiss that claim in one of two ways: "unilaterally" by dismissing her claim before the adverse party files an answer, or "bilaterally" by filing a stipulation of dismissal signed by all parties to the claim being dismissed. Thus, a voluntary dismissal by stipulation is a voluntary dismissal by a party who has filed an action, and therefore is not entitled to the relief provided by the savings provision (§ 5-119(b)).

The legislative history of section 5-119 does not change this conclusion. When the proposed statute was first introduced, it applied to any "civil action" that was "dismissed or terminated in a manner other than by a final judgment on the merits." During the drafting process, the proposed statute was amended so that it would "not apply to a voluntary dismissal of a civil action by the party who commenced the action." There is no indication that the Legislature, with this amendment, intended to exclude from the proposed statute's purview only those claims that were voluntarily and unilaterally dismissed. It is clear to us that, when it is read in combination with Rule 2-506(a), the preclusion provision of section 5-119 clearly encompasses both unilateral and bilateral voluntary dismissals.

UBS Financial Services, Inc., et al. v. Nancy Lee Kathryn Thompson, et al., No. 352, September Term 2013, filed June 25, 2014. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2014/0352s13.pdf

CONVERSION AND CIVIL THEFT – ACTS CONSTITUTING AND LIABILITY THEREFOR – PROPERTY SUBJECT OF CONVERSION OR THEFT – MONEY AND COMMERCIAL PAPER – DEBT

CONVERSION AND CIVIL THEFT – ACTS CONSTITUTING AND LIABILITY THEREFOR – PROPERTY SUBJECT OF CONVERSION OR THEFT – INTANGIBLE AND INTELLECTUAL PROPERTY IN GENERAL

INSURANCE – AGENTS AND AGENCY – AGENTS FOR APPLICANTS OR INSUREDS – DUTIES AND LIABILITIES TO INSUREDS OR OTHERS – IN GENERAL

INSURANCE – PREMIUMS – PERSONS LIABLE – IN GENERAL

TRIAL – INSTRUCTIONS TO JURY – PROVINCE OF COURT AND JURY IN GENERAL – DETERMINATION OF QUESTIONS OF LAW – DUTY OF JUDGE

FRAUD – ACTIONS – DAMAGES – AMOUNT AWARDED

Facts:

Appellees Nancy Lee Kathryn Thompson ("Kathy") and Barbara Clements ("Barbara") were beneficiaries and owners of second-to-die life insurance policy taken out by their parents. The parents intended to set up this policy so that their children would receive "gifts" that would be used to fund the annual premiums. Therefore, the children, as nominal "owners," would never actually pay for the policy and would receive its full benefits when the parents died. However, for a number of years, the premiums were not paid. When this was discovered, Nancy and Barbara sued the parents' financial advisor, Gordon Witherspoon ("Mr. Witherspoon"), and his employer, UBS Financial Services ("UBS"), for failing to forward premium notices to them. Mr. Witherspoon, an insurance producer, was also married to Nancy and Barbara's sister. Nancy and Barbara alleged, *inter alia*, claims of conversion, constructive fraud, negligence, negligent misrepresentation, and deceit against Mr. Witherspoon and a claim of negligent supervision against UBS.

The case proceeded to an eleven-day jury trial, where Mr. Witherspoon and UBS were found liable for the aforementioned torts. The jury awarded Nancy and Barbara over a million dollars in compensatory damages. Additionally, it returned a $150,000 punitive damages award against Mr. Witherspoon. Mr. Witherspoon and UBS filed various post-trial motions, alleging defects in the trial and requesting that the award be vacated. All motions were denied.

Held: Reversed.

The Court of Special Appeals indicated that Nancy and Barbara's counts for conversion and constructive fraud did not present legally cognizable claims for either tort. The Court also held that the circuit court erred in (1) failing to correctly instruct the jury regarding the scope of Mr. Witherspoon and UBS' duty towards appellees and (2) in failing to correct an erroneously calculated jury award. The Court indicated that an inquiry into the scope of the duty that one owes to another is a question of law. The duty that Mr. Witherspoon and UBS owed to Nancy and Barbara was narrow and defined. However, the jury was not properly instructed on this point. Furthermore, the Court determined that the damages award contained numerous defects that should have been corrected by the trial court. Nancy and Barbara asserted throughout pleadings and trial that, had they known that the premiums were not being paid, they would have funded the premiums themselves. However, no evidence was presented to demonstrate their ability to make those payments. Additionally, any award should have been reduced to Nancy and Barbara's *pro rata* share. Nancy and Barbara's remaining claims for negligence, negligent misrepresentation, negligent supervision, and deceit were therefore remanded for a new trial.

The Mayor and City Council of Baltimore v. Agnes Stokes, et al., No. 333, September Term 2013, filed June 25, 2014. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2014/0333s13.pdf

MUNICIPAL CORPORATIONS – TORTS – NOTICE OR PRESENTATION OF CLAIMS FOR INJURY – FORM AND SUFFICIENCY

Facts:

Appellees, Agnes and Bertha Stokes, were the driver and passenger in an automobile which was involved in an accident with a third party, Dorethea Maynor ("Ms. Maynor"). Ms. Maynor and appellees collided after approaching a four way traffic intersection at the same time. Appellees asserted that they had the right-of-way. Ms. Maynor contended that the Mayor and City Council of Baltimore ("the City") were to blame because the stop sign governing her direction was on the ground and therefore, not visible. Ms. Maynor's insurance company submitted timely notice to the City, seeking damages, pursuant to the Local Government Tort Claims Act ("LGTCA"), Maryland Code, (2006, Repl. Vol. 2013), Courts & Judicial Proceedings Article [hereinafter Cts. & Jud. Proc.] §5-304(b)-(c)(3)(i), which requires that a claimant file notice within 180 days of the date of an alleged tort in order to recover damages. Appellees did not provide notice to the City.

Appellees brought suit against Ms. Maynor, and Ms. Maynor filed a third-party complaint against the City. Appellees then filed cross-complaints against the City. The City moved for summary judgment, or in the alternative, to dismiss appellees' lawsuit, contending that they had failed to comply with the LGTCA's notice requirement. Two separate motions courts denied the motions as to each appellee, finding that appellees had substantially complied as a result of the third party notice of Ms. Maynor's insurance company. Alternatively, the court found that the City had not suffered any prejudice by appellees' failure to give notice. Following a jury trial, the jury found the City liable.

Held: Reversed.

The Court of Special Appeals held that the circuit court erred in denying the City's motions to dismiss because appellees had not substantially complied with the notice requirement. Neither appellee made any effort to provide the City with notice that they were seeking damages. The Court held that without some effort on the part of appellees to provide notice, they could not claim substantial compliance with the notice requirement. Appellees argued that Cts. & Jud. Proc. §5-304 permits a court to waive a party's failure to comply with the notice requirement if there is good cause. The Court held that the test for good cause is two pronged. First, the party asserting good cause must demonstrate it. Second, the defendant must then show that it was

prejudiced by the lack of notice. The Court concluded that because appellees did not establish good cause, the motions court erred in considering whether the City was prejudiced.

Return to ToC

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated April 2, 2014, the following attorney has been disbarred by consent, effective June 2, 2014:

CHRISTOPHER MICHAEL MAY, JR.

*

By an Order of the Court of Appeals dated June 6, 2014, the following attorney has been suspended:

SANDY YEH CHANG

*

This is to certify that the name of

KENNETH MICHAEL ROBINSON

has been replaced upon the register of attorneys in this state as of June 18, 2014.

*

By an Opinion and Order of the Court of Appeals dated June 19, 2014, the following attorney has been reprimanded by consent:

MATTHEW JOHN McDOWELL

*

By an Opinion and Order of the Court of Appeals dated June 19, 2014, the following attorney has been reprimanded:

JOHN STEPHEN BURSON

*

*

By an Opinion and Order of the Court of Appeals dated May 23, 2014, the following attorney has been suspended for sixty days, effective June 23, 2014:

SUDHA NARASIMHAN

*

Return to ToC

JUDICIAL APPOINTMENTS

*

On May 22, 2014, the Governor announced the appointment of **WAYNE ALAN BROOKS** to the District Court – Howard County. Judge Brooks was sworn in on June 13, 2014 and fills the vacancy created by the retirement of the Hon. Neil E. Axel.

*

On May 22, 2014, the Governor announced the appointment of **STEPHAN MARTIN MOYLAN** to the District Court – Garrett County. Judge Moylan was sworn in on June 16, 2014 and fills the vacancy created by the retirement of the Hon. Leonard J. Eiswert.

*

On May 22, 2014, the Governor announced the appointment of **MELVIN JAMES JEWS** to the District Court – Dorchester County. Judge Jews was sworn in on June 20, 2014 and fills the vacancy created by the retirement of the Hon. John L. Norton, III.

*

Return to ToC

RULES ORDERS AND REPORTS

A Rules Order pertaining to Maryland Rule 1-322.2 was filed on June 17, 2014:

http://www.mdcourts.gov/coappeals/pdfs/rulesorder20140617rule13222.pdf