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# COURT OF APPEALS

*CashCall, Inc., and J. Paul Reddam v. Maryland Commissioner of Financial Regulation*, No. 80, September Term 2015, filed June 23, 2016. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2016/80a15.pdf

COMMERCIAL LAW – MARYLAND CREDIT SERVICES BUSINESS ACT – DEFINITION OF "CREDIT SERVICES BUSINESS"

**Facts**:

The Commissioner of Financial Regulation of the Department of Labor, Licensing, and Regulation ("the Commissioner") brought an administrative enforcement action against Petitioners, CashCall, Inc. ("CashCall"), a California corporation, and John Paul Reddam ("Reddam"), the corporation's president and owner, for violating various Maryland consumer protection laws, including the Maryland Credit Services Business Act ("MCSBA"). Petitioners argued that CashCall was not a "credit services business because it did not meet the "direct payment" requirement established by the Court of Appeal's holding in *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128, 46 A.3d 443 (2012).

CashCall marketed loans with interest rates that greatly exceeded the interest rates permitted by Maryland law to Maryland consumers. CashCall had partnered with federally insured banks exempt from state usury caps to arrange these loans. Pursuant to contracts between CashCall and these banks, CashCall was required to purchase a loan three days after the loan was originated and the funds dispersed to the consumer. Upon CashCall's purchase of the loan, CashCall received the right to collect, from the consumer, payments of the principal, interest and other fees. Maryland consumers who obtained loans through CashCall dealt primarily with CashCall. The consumers communicated with CashCall, and made all loan payments whether it be for principal, interest, or any other fees directly to CashCall.

In Commissioner Kaufman's "Opinion and Final Order" ("Final Order"), he factually distinguished *Gomez* from the instant case and stated that the "direct payment" requirement established by "*Gomez* applies [only] to tax preparers who were marketing refund anticipation loans in the context of tax preparation services." He noted that even if the "direct payment" requirement applied to CashCall, Maryland consumers did, in fact, make direct payments to

CashCall. Thus, he concluded that CashCall was a "credit services business" and subject to the requirements of the MCSBA. CashCall, but not Reddam filed a petition for judicial review of the Final Order in the Circuit Court for Baltimore City. The Circuit Court reversed the Final Order. Petitioners appealed the Circuit Court's reversal to the Court of Special Appeals, which affirmed the decision of the Commissioner.

**Held**: Affirmed.

In *Gomez*, Jackson Hewitt, a provider of tax preparation services, had an agreement with a lender, Santa Barbara Bank & Trust ("SBBT"). *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128, 134, 46 A.3d 443, 447 (2012). Jackson Hewitt facilitated these loans by informing its customers of the availability of a RAL and providing a loan application developed by SBBT. *Gomez*, 427 Md. at 135, 46 A.3d at 448. Alicia Gomez alleged violations of the MCSBA after Jackson Hewitt prepared her federal income tax return and helped her obtain a RAL through the SBBT program. *Gomez*, 427 Md. at 133–34, 46 A.3d at 447. In *Gomez* the link between the fees paid by Ms. Gomez to SBBT and the independent payments SBBT made to Jackson Hewitt as part of the SBBT program was tenuous and thus, could only be characterized as "indirect." Concluding that a "direct payment" requirement existed under the circumstances present in *Gomez* was appropriate because to conclude otherwise "would lead to absurd results in applying the statute to tremendous numbers of retailers throughout Maryland who have never registered under the [M]CSBA." *Gomez*, 427 Md. at 138, 46 A.3d at 449. Furthermore, in *Gomez*, we conducted a thorough analysis of the MCSBA's legislative history to confirm that "the most logical reading of the [M]CSBA as a whole is that it was not intended to regulate RAL facilitators who do not receive compensation directly from the consumer." 427 Md. at 159, 46 A.3d at 462. Therefore, the "direct payment" requirement, as discussed by *Gomez*, is limited to the factual boundaries of that case.

CashCall is subject to the requirements of the MCSBA. Md. Code (1975, 2013 Repl. Vol., 2015 Cum. Supp.), § 14-1901(e)(1) of the Commercial Law Article provides in pertinent part that a "credit services business" is:

> [A]ny person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that such person can or will sell, provide, or perform, any of the following services in return for the payment of money or other valuable consideration:
>
> (i) Improving a consumer's credit record, history, or rating or establishing a new credit file or record;
>
> (ii) Obtaining an extension of credit for a consumer; or
>
> (iii) Providing advice or assistance to a consumer with regard to either subparagraph (i) or (ii) of this paragraph.

It is undisputed and the facts in the record establish that CashCall "provid[ed] advice or assistance to a consumer with regard to . . . obtaining an extension of credit." CL § 14-1901(e).

However, to be a "credit services business" the services must be provided "in return for the payment of money or other valuable consideration." CL § 14-1901(e). "In return" means "in reciprocation, compensation, or repayment." MERRIAM WEBSTER COLLEGIATE DICTIONARY 1066 (11th ed. 2003). CashCall was compensated for its loan operation. This is evident when we look at the fact that CashCall directly received payment from the consumer for the "origination fee."[1] Although the lending bank originally charged the origination fee, "[t]he bank never received payment of that fee from the consumer but, as noted, CashCall did." *CashCall, Inc.*, 225 Md. App. at 334, 124 A.3d at 682. Furthermore, CashCall's business model revolved around the lucrative profits it generated by purportedly providing advice and assistance to consumers in obtaining loans from the banks it had partnered with so that it would receive, "in reciprocation" the legal right to receive payments from consumers. MERRIAM WEBSTER COLLEGIATE DICTIONARY 1066 (11th ed. 2003). Because CashCall provided consumers with "advice or assistance" in the obtention of an "extension of credit by others," and was compensated for doing so, we hold that CashCall engaged in a credit services business. CL § 14-1901(e).

Moreover, there was substantial evidence in the record before Commissioner Kaufman to support his finding that "there was a direct payment from the consumer to CashCall." In his Final Order, Commissioner Kaufman explained that based on the evidence in the record, namely, contracts between CashCall and the bank, and the representative promissory note and disclosure statement, "the consumer paid CashCall for the principal, interest, and *fees* on the loan. Therefore, we also hold that there was substantial evidence in the record to support the Commissioner's finding that by collecting the full value of the loan, including the origination fee paid by the consumer, CashCall engaged in a "credit services business."

[1] An "origination fee" is "[a] fee charged by a lender for preparing and processing the loan." BLACK'S LAW DICTIONARY 732 (Bryan A. Gardner ed., 10th ed. 2014).

*Beverly Annetta Hall v. State of Maryland*, No. 50, September Term 2015, filed June 23, 2016. Opinion by Battaglia, J.

Barbera, C.J., and McDonald, J., concur.
Greene, Watts and Hotten, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/50a15.pdf

CRIMINAL LAW – CHILD NEGLECT STATUTE – SUFFICIENCY OF THE EVIDENCE

**Facts**:

Beverly Hall was charged in the Circuit Court for Montgomery County with one count of neglect of her minor son A., in violation of Section 3-602.1 of the Criminal Law Article, for having, over a two day period in February of 2012, left A. under the supervision of his fourteen-year-old sister, D. Ms. Hall filed a motion to dismiss the charge, arguing, among other things, that Section 3-602.1 was unconstitutionally vague, because the statute failed to inform an ordinary person of the conduct prohibited and failed to specify at which point personal parenting choices rise to the level of neglect, thereby subjecting the statute to arbitrary and discriminatory enforcement. The motion was denied, as the circuit court judge determined that the statute was not vague. After an initial trial in which the jury had failed to reach a unanimous verdict, the State retried Ms. Hall. A second jury did convict Ms. Hall, after which the Judge imposed a sentence of 20 days' incarceration. Ms. Hall then appealed to the Court of Special Appeals, contending that Section 3-602.1 of the Criminal Law Article was void for vagueness and that the evidence was insufficient to support her conviction. The Court of Special Appeals affirmed.

**Held**: Reversed.

The Court of Appeals held that the evidence presented in the circuit court, even when viewed in a light most favorable to the State, was not sufficient to support Hall's conviction under the criminal child neglect statute. Section 3-602.1 of the Criminal Law Article requires that the parent's conduct be such that it creates a substantial risk of harm to the physical health of the child and that a reasonable parent would not engage in such conduct. Applying this objective standard to Ms. Hall's conduct did not support the conclusion that she created a "substantial risk of harm" to the physical health of A. Ms. Hall left her three year-old son, A., a child who was, admittedly, difficult to handle, in the overnight care of his fourteen year-old sister, D., after ensuring that he had been fed and was ready to go to bed. The fact that A. was in the care of a fourteen year-old was objectively reasonable taking into consideration that, statutorily, a thirteen year-old is deemed an appropriate caretaker for a child under eight years of age. Although Ms. Hall had agreed not to leave A. under the supervision of D., her accord did not convert her agreement to the level of one which had criminal consequences. The Court noted that while it is

beyond dispute that Ms. Hall was negligent in not responding to telephone calls from D. and the authorities, her conduct did not rise to the level of criminal child neglect.

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*Steven Blair Jackson v. State of Maryland*, No. 71, September 2015 Term, filed June 23, 2016. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2016/71a15.pdf

CRIMINAL PROCEDURE – DNA EVIDENCE – POSTCONVICTION REVIEW – MD. CODE ANN., CRIM. PROC. § 8-201 (2008 Repl. Vol.)

APPLICATION OF RES JUDICATA

**Facts**:

Steven Blair Jackson entered an Alford plea to a second degree rape charge in 1994. Thereafter, Jackson filed numerous petitions for DNA testing, including a petition in 2005, which was granted; the results of DNA testing done pursuant to the 2005 Petition yielded inconclusive results. Jackson then filed another petition for DNA testing in 2008, which the Circuit Court denied. In 2009, Jackson filed a petition for post-conviction relief pursuant to the Uniform Postconviction Procedure Act, in which he alleged that he was actually innocent of the crime of rape; that the State withheld exculpatory evidence; that his guilty plea was not knowing, intelligent and voluntary; and that his trial counsel rendered ineffective assistance of counsel. Although Jackson's Petition was denied, he was permitted to file a belated Motion for Reconsideration of Sentence.

Jackson again filed a petition for DNA testing in 2013, which the Circuit Court denied. In his 2013 Petition, Jackson sought to have the victim's underwear tested using a number of testing procedures that conformed with "the 13 core CODIS loci used by the FBI." He argued that advances in DNA testing made since the previous tests were done "give rise to a reasonable probability that additional testing will yield exculpatory evidence supporting Petitioner's claim of innocence." Though Jackson noted an appeal from the denial of his 2013 petition, he later withdrew his appeal.

In June of 2015, Jackson filed another Petition for DNA Testing, in which he alleged that DNA testing "has the potential to show that Petitioner's DNA is not on the complainant's underwear, evidence that would have been inconsistent with her undisclosed statements that he ejaculated and that she had not showered or douched since then" and "would also clarify this issue by producing exculpatory or mitigating evidence." Jackson's Petition also requested that Touch DNA be utilized, because it could "provide exculpatory evidence that was not available in 2006." Judge Vicki Ballou-Watts of the Circuit Court for Baltimore County denied the Petition.

**Held**: Affirmed.

The Court of Appeals held that Jackson's 2015 petition for DNA testing, under Section 8-201 of the Criminal Procedure Article and the Maryland Rules, was not barred by the doctrine of *res judicata* but that the denial of the petition was appropriate as the petition did not set forth a sufficient basis to support the allegation that "a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction."

*Austria Kponve v. Allstate Insurance Company*, No. 91, September Term 2015, filed June 22, 2016. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2016/91a15.pdf

INSURANCE – BURDEN OF PROOF – REDUCTION OF JUDGMENT

**Facts**:

Petitioner Austria Kponve was involved in a motor vehicle accident with Douglas Mendoza, an underinsured motorist. Kponve had an uninsured/underinsured motorist insurance policy with Respondent, Allstate Insurance Company.

Kponve sued Mendoza in the Circuit Court for Montgomery County for negligence. Allstate intervened in that suit. Prior to the start of trial, Mendoza's insurance carrier, settled Kponve's claim against Mendoza, for its policy limits of $25,000. At this point, Allstate, as an intervening party, remained the only defendant. At the start of trial, the parties stipulated that at the time of the accident, Kponve had a policy with Allstate that afforded her uninsured/underinsured motorist coverage. The amount of the policy was discussed out of the jury's presence, but no stipulation was made as to the policy limits.

The jury returned a verdict in favor of Kponve for $374,000 against Allstate. Allstate filed a post-trial motion, labelled as a "Motion to Alter or Amend Judgment" asserting that Kponve's uninsured/underinsured policy had a limit of $50,000. Because Kponve settled with Mendoza for $25,000, Allstate argued it was entitled to a credit for that amount and should only be required to pay Kponve the remaining $25,000 under her policy.

Kponve refused to acknowledge whether Allstate's contentions about the amount of her coverage were correct. She contended that it was Allstate's burden to prove the terms of her policy and because this was not done prior to the conclusion of the jury trial, Allstate should be required to pay Kponve $374,000. The trial court ruled in favor of Kponve. Allstate appealed to the Court of Special Appeals.

The Court of Special Appeals reversed the judgment of the Circuit Court, concluding that, because Allstate intervened in a tort suit against an uninsured/underinsured motorist, it did not have any burden of proof in that suit as to the coverage limits of its policy. The Court of Special Appeals held that when an uninsured/underinsured motorist is sued by a plaintiff who has uninsured/underinsured motorist coverage and plaintiff's carrier intervenes in the tort suit, absent consent by the parties, no judgment in that tort suit should be entered against the carrier that intervened even if: a) the uninsured/underinsured motorist is found by the trier of fact to be solely responsible for the accident; and b) the verdict exceeds the policy limits of the underinsured motorist.

The Court of Appeals granted Kponve's Petition for a Writ of Certiorari to consider the following question: Is *Allstate Ins. Co, v. Miller*, 315 Md. 182 (1989) still good law?

**Held**: Affirmed

The Court of Appeals adopted the opinion and reasoning of the Court of Special Appeals. In answering the question presented to it, the Court of Appeals made clear that *Allstate Ins. Co. v. Miller*, 315 Md. 182, 553 A.2d 1268 (1989) remains the law in Maryland. Because the Court of Special Appeals was asked to answer a different question, its conclusion did not diminish the strength of the *Miller* holding.

In this case, where the Petitioner's uninsured/underinsured insurer (Allstate) intervened in its insured's tort action against the tortfeasor, from which the judgment in favor of the insured and against Allstate was entered after the insured and tortfeasor settled the insured's claim for the tortfeasor's policy limit, the insurer did not have the burden of proving its policy limits in the tort action because: (1) the insurer had not been sued by its insured in a contract action (as contemplated by *Miller* as a vehicle to achieve the adjustment); (2) the subject of the policy limit had been discussed in the tort action (but the amount of coverage was not put on the record); and, (3) the amount of coverage was not in dispute on the record by the insured in the tort action. The Court of Appeals concluded that the disposition of the case by the Court of Special Appeals placed the matter on remand on a proper *Miller* track for resolution between insured and insurer.

*Peninsula Regional Medical Center v. Tracey L. Adkins*, No. 68, September Term 2015, filed May 26, 2016. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2016/68a15.pdf

EMPLOYMENT LAW – MARYLAND FAIR EMPLOYMENT PRACTICES ACT – FAILURE TO ACCOMMODATE – REASSIGNMENT OR TRANSFER – DISABILITY DISCRIMINATION

**Facts**:

Tracey Adkins ("Adkins") began her career at Peninsula Regional Medical Center ("PRMC") in 2005. She was first employed as a storekeeper, which is, in part, responsible for inventorying and stocking medical supplies and equipment. Six months later, she was transferred to Inventory Control as an inventory control assistant. Adkins held this position until 2010, when the position was eliminated. She then transferred back to the storekeeper position, which she held until her termination on February 25, 2012.

In April 2011, Adkins went to the emergency room after experiencing and took a few days off from work. Adkins was ultimately diagnosed with a tear in the joint of her left hip as well as a deformation in her hip socket. She was scheduled to have surgery in August 2011 and notified her supervisors. She also filled out paperwork to obtain leave under the Family and Medical Leave Act ("FMLA"). The FMLA paperwork indicated that her leave would begin on August 25, 2011 and that she would return to work on or about October 6, 2011. In a letter dated August 11, 2011, PRMC approved Adkins's FMLA leave request. In this letter PRMC explained that her 12-week leave under the FMLA would expire on November 17, 2011 and that so long as she returned by that date, she would be returned to her job or an equivalent one. PRMC also advised Adkins in this letter that she would have to obtain a work evaluation from the Employee Health Office before resuming work. Adkins continued working full-time until she underwent surgery in August 2011. In the months leading up to her surgery, Adkins began applying for other positions at PRMC, including Patient Services Rep – Medical Group.

Following the surgery, Adkins's pain intensified and her doctors advised her that the time for recovery could range from six months to a year. On October 3, 2011, while still out on FMLA leave, Adkins met with a supervisor. She informed him that she was meeting her surgeon on October 10 for a follow-up appointment and that she hoped to learn, at that time, when she could return to work. After the October 10 appointment, Adkins received a letter from her physician advising her that she would be unable to return to work until November 7, 2011. Adkins then delivered this documentation to PRMC's Employee Health Office.

On November 7, 2011, Adkins returned to work as scheduled and met with a nurse in the Employee Health Office. She told the nurse that she was still in pain and would be unable to fulfill her job responsibilities on that day. She explained that she experienced increased pain

when bending, lifting, and squatting, and that she would not be able to stand for long periods of time. An "Employee Charting Note" for this date stated that all parties agreed that Adkins could not return to work.

Adkins returned to her doctor on November 10 and received a medical report indicating she could return to work under light duty. That same day, she brought the form to PRMC's Employee Health Office. The form stated that she was restricted to sedentary work. The Employee Health Office told Adkins that her unit could not accommodate her restrictions. After her surgery and before her termination, Adkins applied for several different positions, including Patient Services Rep – Medical Group and Core Technician. She also emailed Scott Phillips, director of the Materials Management Department, and Laura McIntyre, Operations Room Materials Manager, asking to be considered for an inventory control coordinator position. She was not hired for any of these positions.

On or around November 17—the day Adkins's 12-week FMLA leave was set to expire—PRMC granted her an additional 14 weeks of leave until February 2012. PRMC encouraged her to apply to open positions, but did not identify any specific positions. During this time, Adkins learned that her storekeeper position had been filled. On January 12, 2012, Adkins went back to her doctor for an appointment and received another medical report form, which maintained the "light duty" work restrictions. Adkins testified in her deposition that she also gave this note to PRMC.

On February 25, 2012, at the end of the 14-week extended leave, Adkins was terminated. Adkins applied to four more positions after her termination, but was not hired for any of these positions.

In February 2013, Adkins filed a three-count complaint against PRMC under FEPA, alleging intentional disability discrimination based on actual disability, intentional disability discrimination based on being regarded as having a disability, and failure to accommodate. PRMC thereafter filed a motion for summary judgment. The Circuit Court issued an order and opinion granting summary judgment in favor of PRMC. Adkins appealed the Circuit Court's ruling as to disability discrimination based on actual disability and failure to accommodate, but did not challenge the trial court's decision on disability discrimination based on being regarded as having a disability. The Court of Special Appeals reversed the Circuit Court's grant of summary judgment on Adkins's disability discrimination based on actual disability claim and her reasonable accommodation claim. The intermediate appellate court ruled that the evidence contained in the record reflected genuine disputes of material fact as to these claims. PRMC appealed.

**Held**: Affirmed.

The Court set forth the elements to establish a prima facie case for a failure to accommodate claim: (1) that the employee is an individual with a disability; (2) that the employer had notice of

the employee's disability; and (3) that with reasonable accommodation, the employee could perform the essential functions of the position (i.e., the employee was a qualified individual with a disability). Addressing the first element, the court noted that PRMC did not contest that Adkins's hip injury constituted a disability. Turning to the second element, the Court stated that the burden on an employee to provide notice of a disability is not a great one and that a request for an accommodation need not be in writing. Based on Adkins's communication with the Employee Health Office and her supervisor, the Court determined that a reasonable jury could find that Adkins told PRMC of her disability and her desire for an accommodation.

Regarding the third element, the Court determined that there was a genuine dispute of material fact as to whether Adkins was a qualified individual with a disability. The Court asserted that PRMC deeply misunderstood this element of the prima facie case. The Court rejected PRMC's contention that an employee could be a qualified individual with a disability only if he or she could perform the essential functions of their currently held position. Citing federal case law, the Court made clear that an employee could be a qualified individual with a disability if he or she could perform the essential functions of a reassignment position. The Court then determined that there were material disputes of fact as to the essential functions of the Inventory Control Coordinator position. Without a determination of the essential functions of the Inventory Control Coordinator position, it was unclear whether Adkins could perform the essential functions of this position. On the other hand, the Court determined that Adkins was not a qualified individual with a disability when it came to the Core Technician Patient Services Rep positions.

The court also rejected PRMC's argument that it accommodated Adkins by providing her additional leave after her FMLA leave expired. The Court stated that providing leave does not constitute a reasonable accommodation where a reasonable accommodation remains necessary when an employee returns to work. Because Adkins presented sufficient evidence to create a factual dispute as to whether the additional leave was a reasonable accommodation, the Court rejected PRMC's argument that the Court of Special Appeals placed reassignment as the reasonable accommodation of first resort. Following this analysis, the Court held that summary judgment on Adkins's failure to accommodate claim was inappropriate. Lastly, the Court ruled that summary judgment was also inappropriate on Adkins's intentional disability discrimination claim.

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*Brutus 630, LLC v. Town of Bel Air, Maryland*, No. 67, September 2015 Term, filed June 23, 2016. Opinion by McDonald, J.

Watts and Hotten, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/67a15.pdf

LOCAL GOVERNMENT LAW – TAXES, FEES, AND OTHER CHARGES – REFUND CLAIMS.

**Facts**:

Brutus 630, LLC ("Brutus 630") is a real estate developer that developed a parcel of land in the Town of Bel Air, Maryland ("Town") as a community of 274 condominiums. As part of that project, Brutus 630 sold lots to NVR, Inc., a builder. As a condition of obtaining building permits from the Town, NVR paid the Town a total of $1,186,627 in sewer connection charges. NVR assigned its interest in the sewer connection charges to Brutus 630.

Brutus 630 filed an application for a refund of the sewer connection charges with the Town's Director of Finance under Section 20-113 of the Local Government Article ("LG"), the local government refund statute which authorizes a person to apply for a refund of a tax, fee, interest, charge, or penalty paid to a county or municipality. The Town's Director of Finance denied the refund application.

Brutus 630 filed an appeal with the Maryland Tax Court ("Tax Court") pursuant to LG §20-117, which allows a party to appeal a decision made under LG §20-113 to the Tax Court. The Tax Court granted the Town's motion to dismiss, agreeing that it lacked jurisdiction because the sewer connection charges were not regarded as taxes or charges "in the nature of taxes" and therefore did not come within the purview of LG §20-113. The Tax Court based its conclusion on language from a decision of the Court of Special Appeals, *West Capital Assoc., LP v. City of Annapolis*, 110 Md. App. 443, 677 A.2d 655 (1996). The Tax Court also concluded that, even if the sewer connection charges were illegal or miscalculated, Brutus 630 would be barred from seeking a refund by the common law "voluntary payment doctrine" because there was no statutory remedy available permitting a party to seek a refund for sewer connection charges.

The Circuit Court and the Court of Special Appeals, in an unreported decision, affirmed the Tax Court.

**Held**: Reversed.

LG §20-113 provides that a claimant may seek a refund when the claimant either (1) erroneously pays to a county or municipality a greater amount of tax, fee, charge, interest, or penalty than is

properly payable; or (2) pays to a county or municipality a tax, fee, charge, interest, or penalty that is erroneously, illegally, or wrongfully assessed or collected in any manner. In construing the statute, the Court of Appeals examined the statute's text and legislative history, as well as its own prior opinions interpreting the statute.

As for the statute's text, the Court noted that the statute specifically provided that a claimant may seek a refund for a "fee, charge, interest, or penalty," as opposed to limiting a refund application to either taxes or payments in the "nature of a tax." The Court explained that a sewer connection charge would qualify under the ordinary dictionary definitions of either a "charge" or "fee."

The legislative history also confirmed that the General Assembly did not intend to limit the refund statute to taxes. At one time, the local government refund statute provided claimants only an opportunity to seek a refund for overpayment of "ordinary taxes." However, in 1971, the General Assembly expanded the refund statute to permit other claims, including those made for special taxes or other fees or charges. In the Court's view, this expansion of the refund statute indicated that the General Assembly intended for the refund remedy to be available for a broad variety of payments.

The Court noted that its prior decisions interpreting the refund statute had held that license fees assessed against landlords and service of process fees charged by sheriffs could be recovered under the refund statute, indicating that it applied to more than taxes. None of these cases required that a fee or charge be tax-like in nature in order to qualify under the refund statute.

Thus, the Court reasoned that under the statute's text and legislative history, as well as prior cases interpreting the refund statute, Brutus 630 could seek a refund of the sewer connection charges. As a corollary, because there was a statutory refund remedy available, the voluntary payment doctrine did not bar a claim.

The Court rejected the argument that the *West Capital* case governed the resolution of this case for two reasons: (1) the payment in dispute in *West Capital* was not a "tax, fee, charge, interest, or penalty" imposed by a municipality, but rather a contractual payment to the City of Annapolis acting in a proprietary capacity; and (2) even if language in the *West Capital* decision could be construed to exclude the sewer connection charges from the purview of the refund statute, such an interpretation would be at odds with the broad construction that the Court of Appeals had consistently given to the current version of the refund statute.

The Court rejected the Town's argument that the principle of *ejusdem generis* required that the terms "fee" and "charge" in the statute be construed as references to taxes because that principle cannot be used to contradict legislative intent. Moreover, the Court pointed out it has interpreted a similar list of terms in Article 14 of the Maryland Constitution as encompassing five distinct types of payments.

The Court also concluded that the grant of general jurisdiction to the Tax Court in Section 3-103 of the Tax-General Article did not limit the scope of LG §20-113. The Court explained that a limiting interpretation would render LG §20-117 superfluous, contrary to this Court's prior

cases. In any event, the legislative history of the Tax Court and the refund statute confirmed that the Tax Court's appellate jurisdiction is co-extensive with the various types of refunds authorized by the refund statute.

*Cynthia Keller-Bee v. State of Maryland*, No. 73, September Term 2015, filed June 22, 2016. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2016/73a15.pdf

JUDICIAL IMMUNITY — PROXIMATE CAUSE

**Facts**:

On April 16, 2010, Petitioner, Cynthia Keller-Bee, appeared in the District Court of Maryland sitting in Harford County pursuant to a show cause order requested by a judgment creditor. For an unknown reason, the judgment creditor did not appear at that hearing, causing the court to dismiss the show cause order. Nine months later, the judgment creditor filed a motion requesting that Petitioner be found in contempt for her alleged failure to appear at the hearing and seeking a body attachment against her. The Administrative Judge for the District Court signed the body attachment and Petitioner was taken into custody on January 27, 2011. She was brought before a Court Commissioner later that day and released on her own recognizance. On February 4, 2011, Petitioner went to the District Court Clerk's Office to ask why she had been arrested and detained. Following that office's investigation, Petitioner was advised that she should not have been arrested because she had appeared at the hearing as ordered.

On December 27, 2013, Petitioner filed in the Circuit Court for Baltimore City a two-count complaint against the State of Maryland, alleging that an unnamed clerk was negligent in preparing the body attachment and submitting it to the judge for signature, and that such negligence violated Petitioner's rights under Article 24 of the Maryland Declaration of Rights. The State moved to dismiss the complaint on the ground that Petitioner's claims were barred by absolute judicial immunity. The Circuit Court denied the motion, reasoning that it was unclear whether the unidentified clerk was acting under the supervision of a judge at the time the body attachment was submitted to the judge. Upon the State's interlocutory appeal, the Court of Special Appeals reversed, reasoning that the act that proximately caused Petitioner's injury was the judge's act of signing the body attachment, which is protected by absolute judicial immunity.

**Held**:

The Court held that Petitioner's complaint was barred by absolute judicial immunity. The Court reasoned that the issuance of a body attachment is a judicial act that is protected by absolute judicial immunity. Although Petitioner attempted to shift the blame from the judge to the unidentified clerk who generated the body attachment, that body attachment would not have led to Petitioner's arrest absent the judge's signature. The judge's issuance of the body attachment was therefore the operative act that caused Petitioner's wrongful arrest, not whatever action by a clerk preceded the judge's signature. Because the application of absolute judicial immunity

concerns the act complained of rather than the actor who performed it, it matters not that Petitioner chose to bring an action against the clerk rather than the judge. The act that caused Petitioner to be wrongfully arrested is a judicial act that is entitled to absolute judicial immunity. Consequently, Petitioner's complaint failed to state a claim upon which relief could be granted because the act complained of—the clerk's forwarding the request for a body attachment to the judge—did not proximately cause Petitioner's injury.

*Patrick Long v. Injured Workers' Insurance Fund, et al.*, No. 90, September Term 2015, filed June 22, 2016. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2016/90a15.pdf

WORKERS' COMPENSATION – MD. CODE ANN., LABOR & EMPL. (1991, 2008 REPL. VOL.) §§ 9-602(a), 9-637(a) – CODE OF MARYLAND REGULATION 14.09.03.06 – AVERAGE WEEKLY WAGE – SOLE PROPRIETOR – NET PROFIT – GROSS RECEIPTS/GROSS INCOME

**Facts**:

Patrick Long ("Long"), Petitioner, is the self-employed sole proprietor and owner of Long's Floor Works ("the Employer"). Before 2011, Long elected to obtain workers' compensation coverage as a covered employee. In 2011, Long was working as a subcontractor for Ryan Floors, Incorporated, which paid the Employer based on the number of hours that Long worked. In July 2011, injured his back while installing carpet during the course of his employment.

Long later filed with the Workers' Compensation Commission ("the Commission") a claim seeking workers' compensation benefits. After conducting a hearing, the Commission awarded compensation to Long and, in pertinent, found that Long's average weekly wage ("AWW") was $1,500. Long filed with the Commission a "Request for Document Correction," asking that the Commission amend the AWW from $1,500 to $1,737.11 in accordance with an attached "Wage Statement." The Commission issued an amended award changing Long's AWW from $1,500 to $1,737.11.

Thereafter, the insurer, the Injured Workers' Insurance Fund ("IWIF"), Respondent, filed a motion for a rehearing on the AWW amount, stating that Long's AWW should be $225.90. The Commission conducted a rehearing on the amount of Long's AWW. During the rehearing, IWIF argued that Long's AWW should be based on the Employer's net profit, or the money that Long received after subtracting his business expenses from his gross receipts. Long responded that a calculation of his AWW had to be based on the Employer's gross receipts, not net profit, because gross receipts are the equivalent of gross wages for a sole proprietor. Long further asserted that IWIF based its insurance premiums on the Employer's gross receipts, not on the Employer's net profit. The Commission issued an order finding that Long's AWW was $496.44. The Commission explained that the best evidence of the correct AWW was Long's 2011 federal individual tax returns, which showed that he earned a total net profit of $16,879 in 2011 over thirty-four weeks. Long requested a rehearing, which was denied.

Long filed a petition for judicial review in the Circuit Court for Montgomery County ("the circuit court"). The parties filed cross-motions for summary judgment. Following a hearing, the circuit court issued an order granting IWIF's motion for summary judgment, thereby affirming the Commission's decision, and denying Long's motion for summary judgment. Long appealed

and, in a reported opinion, the Court of Special Appeals affirmed the circuit court's judgment granting IWIF's motion for summary judgment and affirming the Commission's decision. *See Long v. Injured Workers' Ins. Fund*, 225 Md. App. 48, 72, 123 A.3d 562, 577 (2015). Long thereafter filed a petition for a writ of *certiorari*, which this Court granted. *See Long v. Injured Workers' Ins. Fund*, 446 Md. 218, 130 A.3d 507 (2016).

**Held**: Affirmed.

The Court of Appeals held that the AWW of a sole proprietor who elects coverage under the Act is to be calculated based on the sole proprietorship's net profit, not on the sole proprietorship's gross receipts or gross income. The sole proprietorship's net profit is the best approximation of the earnings that a sole proprietor actually takes home because net profit does not include the sole proprietorship's business costs and expenses. The Court of Appeals determined that its holding was consistent with a number of cases from other jurisdictions that have determined that a self-employed individual's AWW is to be calculated based on net profit.

The Court of Appeals explained that, generally, a covered employee's AWW is calculated based on the provisions of Md. Code Ann., Lab. & Empl. (1991, 2008 Repl. Vol.) § 9-602(a) and Code of Maryland Regulation ("COMAR") 14.09.03.06. COMAR 14.09.03.06A directs the Commission to determine a covered employee's AWW "from gross wages, including overtime[.]" The Court of Appeals observed that, significantly, neither the Workers' Compensation Act ("the Act") nor COMAR defines the term "gross wages," and neither specifies whether, in the case of a sole proprietor, "gross wages" refers to the sole proprietorship's gross receipts, net profit, or some other figure.

The Court of Appeals disagreed with Long that the term "gross wages" is synonymous with "gross receipts" or "gross income." According to the Court of Appeals, from the plain language of the Act and COMAR 14.09.03.06, as well as the plain and commonsense meaning of the terms, "gross wages" and "wages," in the context of calculating AWW, refer to an individual's earnings, and not a business entity's earnings, even if that business entity is a sole proprietorship. Indeed, the relevant provisions of the Act and COMAR 14.09.03.06 specifically reference the "covered employee" or "claimant," not a covered employee's or claimant's business. By contrast, "gross income" and "gross receipts" are broader terms that may include not only an individual's earnings, but also a business entity's earnings. And, a business entity's "gross income" or "gross receipts" includes the business's costs and expenses. Net profit, however, does not include a business's costs and expenses that often have little or nothing to do with an employee, such as advertising, depreciation, vehicle rentals, supplies, and utilities.

The Court of Appeals stated that Long determined his self-employment tax liability for the 2011 tax year by using the Employer's net profit of $16,879; and, on his 2011 federal income tax return, Long claimed income consisting of the Employer's net profit of $16,879 and a taxable refund or credit of $369. The Court of Appeals concluded that, in other words, by his own admission, Long's take-home earnings in the year of his injury were $16,879, not the Employer's

gross income of $44,606. The Court of Appeals determined that using the Employer's net profit—which Long himself identified as his income and used for purposes of determining his self-employment tax liability—as the basis for the calculation of Long's AWW was reasonable and logical under the circumstances of the case.

The Court of Appeals explained that, to hold otherwise—that Long's AWW should be based on the Employer's gross receipts—would lead to a slippery slope and result in the problem that, conceivably, a worker who is injured might be entitled to receive much more by reason of their injuries than they could possibly earn at work. According to the Court of Appeals, using a sole proprietorship's net profit instead of its gross income or gross receipts avoids the pitfall of a possible windfall to the sole proprietor whereby the sole proprietor would receive more compensation by being injured than by working.

The Court of Appeals rejected Long's contention that this AWW should have been based on the Employer's gross receipts because IWIF based insurance premiums on the Employer's gross receipts. The Court of Appeals stated that adopting the position that a sole proprietor's AWW should be based on a sole proprietorship's gross receipts because insurance premiums are based on gross receipts would result in an injured sole proprietor's being able to recover an AWW that is greater than the sole proprietor's AWW when he or she is working. In other words, the sole proprietor would receive a windfall by virtue of being injured. The Court of Appeals declined to adopt such a general rule that would, in effect, permit a sole proprietor to receive a windfall for being injured.

The Court of Appeals concluded that the Commission was correct in calculating Long's AWW based on the Employer's net profit in 2011, the year in which Long sustained his injury. The 2011 Schedule C identified a net profit of $16,879, which was the sole proprietorship's gross income of $44,606 less total expenses of $27,727. The net profit was the amount that Long identified on his 2011 federal individual income tax return as business income, and was the amount that Long identified as net profit for purposes of self-employment tax liability. The Commission determined that, in 2011, Long worked from January 1, 2011 to August 19, 2011, a period of thirty-four weeks. Accordingly, Long's AWW was calculated by dividing the net profit of $16,879 by thirty-four, arriving at an AWW of $496.44. The Court of Appeals concluded that the evidence in the record supports that figure, and that the calculation was correctly based on the Employer's net profit.

# COURT OF SPECIAL APPEALS

*State of Maryland v. William Braverman, et al.*, No. 429, September Term 2015, filed June 1, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/0429s15.pdf

CIVIL PROCEDURE – ATTORNEY'S FEES – THE COMMON FUND DOCTRINE
CIVIL PROCEDURE – ATTORNEY'S FEES – §12-106 OF THE REAL PROPERTY ARTICLE
CIVIL PROCEDURE – ATTORNEY'S FEES – MD RULE 1-341 AND STATE ACTION

**Facts**:

In 2007, the General Assembly unanimously passed two laws that altered the ground-rent system in Maryland. Chapter 290 mandated that lessors record ground leases in a central registry or lose their right of reentry and have fee-simple title vest in the lessees. Chapter 286, the provision at issue in this case, substituted the action for ejectment in rent defaults with a lien-and-foreclosure remedy, under which a tenant would not lose their equity in a property if the proceeds of the foreclosure sale exceeded the unpaid rent and the recoverable costs.

On November 1, 2007, William Braverman, Stanley Goldberg, and 47 other plaintiffs filed suit against the State in the Circuit Court for Anne Arundel County to challenge the laws. The State removed the case to federal court, but it was remanded to the circuit court. On January 6, 2011, the circuit court denied the parties' cross-motions for summary judgment on the basis that the evidence presented genuine and novel questions of law about the legislation.

On October 25, 2011, the Court of Appeals held in *Muskin v. State Dep't of Assessments and Taxation*, 422 Md. 544 (2011), a 5-2 decision, that Chapter 290 was invalid under Maryland's Constitution. Although the *Muskin* majority implied that landowners' rights of reentry were vested rights, it also recognized "an exception" to the "general prohibition" against abrogating vested rights, under which "the Legislature has the power to alter the rules of evidence and remedies, which in turn allows states and evidentiary statutes to affect vested property rights." The *Muskin* Court left unsettled whether this exception included the lien-and-foreclosure remedy under Chapter 286.

On December 20, 2011, the circuit court granted the plaintiffs' renewed motion for partial summary judgment on the claim that Chapter 286 violated the Maryland Constitution. The plaintiffs secured a final judgment by having the court dismiss all remaining claims. That

judgment was then affirmed by the Court of Appeals in *Goldberg v. State*, 437 Md. 191 (2014), a 5-2 decision. The Court of Appeals held that the legislation unconstitutionally impinged upon a vested right to reenter the premises upon nonpayment. On remand, the State agreed not to enforce the unconstitutional statute and the court awarded no damages.

Following *Goldberg*, class counsel filed a fee petition in the circuit court. Class counsel purportedly had represented the class on a contingent fee-basis, under which no fee would be due or payable unless the action were successful. Counsel agreed that if the lawsuit were certified as a class action, they would "apply to the court for any success fee." No formula or method was presented in the retainer agreements or otherwise. In the petition to the circuit court, counsel requested over $5,560,000.00 in fees, $109,925.45 in costs, $103,180.00 for local counsel, and a "fee multiplier" of 1.5 times the fee award.

After an evidentiary hearing, the circuit court ordered the State to pay $5 million in fees. The court based its award on four theories: (1) 42 U.S.C. §1988, which authorizes an award of attorneys' fees in an action to enforce the provisions of a number of federal statutes; (2) the common-fund doctrine, under which class counsel may receive a fee from the monetary recovery that they generate for the class; (3) Md. Code (1974, 2015 Repl. Vol.), §12-106 of the Real Property Article, which allows a court to award reasonable legal fees that a prevailing "defendant" has "actually incurred" in a condemnation action; and (4) Md. Rule 1-341, which allows a court to award the "reasonable expenses, including reasonable attorneys' fees," that a party has "incurred" because the opposing party has maintained or defended a case in bad faith or without substantial justification.

The State appealed.

**Held**: Reversed.

The Court of Special Appeals held that the circuit court had no legal authority to award any amount of attorneys' fees, reversing on all four of the proposed legal theories.

First, the circuit court erred when it ruled that plaintiffs were entitled to fees under 42 U.S.C. §1988 because they had brought a "substantial claim" under 42 U.S.C. §1983. A claim under §1983 must be brought against a "person" acting under color of state law, and the State—the sole named defendant—is not a "person" within the meaning of §1983. Thus, plaintiffs could not have alleged a §1983 claim upon which to base an award under §1988.

Second, the common fund doctrine did not apply in this case for at least two reasons. Primarily, there was no fund—the judgment invalidated the statute but provided no monetary recovery. Even assuming that the invalidation of the statute restored the claimed $60 million dollars in value to landowners, this intangible value was not a fund. In extending the doctrine, the circuit court erred by relying on *Brewer v. School Bd. of Norfolk*, a 1972 Fourth Circuit decision that used an ad-hoc approach to fee awards that the Supreme Court later repudiated in *Alyeska Pipeline Service Co. v. Wilderness Society*. In addition, the common fund doctrine allocates

costs between plaintiffs and their counsel, not among the parties. In Maryland, no statutory or common law rule exists to require the State pay the class's attorney's fees.

Third, the circuit court erred in ruling that §12-106 of the Real Property Article supported the fee award. The plain language of that statute shifts costs from a defendant to a plaintiff, not vice versa. The statute only applies where the State or an associated entity exercises a power of eminent domain. The plaintiffs' argument that Chapter 286 constitutes inverse condemnation of property by the State was irrelevant because it nevertheless did not invoke the State's power of eminent domain. Moreover, no fees were "actually incurred" by any plaintiff nor did the plaintiffs have any contractual liability for fees.

Fourth, the circuit court erred in awarding fees under Md. Rule 1-341. The court was clearly erroneous in concluding that the State lacked substantial justification or proceeding in bad faith in defending this proceeding.

A claim or defense lacks substantial justification when (a) there is no reasonable basis that claims generate an issue of fact or (b) counsel is unable to make a good faith argument on the merits. The State was justified in defending the case when the circuit court had denied the parties' first cross-motions for summary judgment, noting "the evidence presents genuine and novel questions of law," class counsel justified the $5 million fee by acknowledging that "[t]his case presented novel and difficult constitutional questions," and *Muskin* was decided by a divided court, with two judges voting to uphold the statute.

The circuit court incorrectly determined that the *Muskin* decision rendered Chapter 286 indefensible when that opinion explicitly left open whether the lien-and-foreclosure remedy was an appropriate substitute for the right of reentry. Even had the *Muskin* Court not left the question open, two members of the *Goldberg* Court agreed with the State's position. As a matter of law, if two judges endorse the merits of a party's position, it is erroneous for a court to conclude that the party lacked a substantial justification to advocate that position.

The circuit court also erroneously concluded that the State acted in bad faith. A party acts in bad faith when it acts "vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons." The court improperly found bad faith based on the comments of three legislators made prior to the passage of the bill. Statements by legislators, commenting on pending legislation, are not party admissions by the State, and courts should not pry into the legislature's motives to find bad faith because of the doctrine of separation of powers.

The court also erred when it ignored the Attorney General's legal duty to defend a duly enacted statute even where the Attorney General believes that the statute may be held unconstitutional. While the Attorney General might not need to defend an undeniably unconstitutional law, Chapter 286 was not undeniably unconstitutional. The genuine issues of law present in this case were cited by the court in denying the parties' cross motions for summary judgment and by class counsel in their fee petition. Further, both the *Muskin* and *Golberg* decisions featured dissents endorsing the State's positions. When the Court of Appeals settled the question of Chapter 286's

constitutionality, the State accepted the decision. Nothing in the State's litigation conduct suggested bad faith.

Finally, both §12-106 of the Real Property Article and Md. Rule 1-341 authorize fee awards only for fees that are actually incurred by the plaintiffs. Because no fees were "actually incurred" by any plaintiff, and the plaintiffs apparently had no contractual liability to pay fees, the award could not stand.

*Shania Miller v. Department of Public Safety & Correctional Services*, No. 2076, September Term, 2014, filed June 29, 2016. Opinion by Friedman, J.

http://www.mdcourts.gov/opinions/cosa/2016/2076s14.pdf

DPSCS – CORRECTIONAL OFFICER CERTIFICATION – REVOCATION OF CERTIFICATION

**Facts**:

Shania Miller was a correctional officer at the Maryland Reception, Diagnostic & Classification Center. In 2010, the Warden of MRDCC terminated Miller's employment after he learned that Miller was engaged in a sexual relationship with an inmate. Miller appealed her termination to the Office of Administrative Hearings and, following a hearing, an Administrative Law Judge ordered that the notice of termination be rescinded.

Miller was reinstated to her position and was assigned to non-inmate-related tasks pending her recertification. During the recertification process, the Correctional Training Commission discovered that Miller had failed to disclose a prior employment on her application. As a result, the Commission refused to recertify Miller and she was again terminated. Miller appealed her second termination. Following a hearing, an ALJ ordered that Miller's Second Termination be rescinded and that she be reinstated "with no further examination or condition."

Following Miller's second reinstatement, the Commission convened a hearing to determine if Miller's certification should be revoked due to her alleged sexual relationship with an inmate. The Commission considered the investigation by the Internal Investigation Unit of the Department of Public Safety and Correctional Services and concluded that Miller was indeed involved in a sexual relationship with the inmate. Based on that conclusion, the Commission issued a decision ordering that Miller's certification be revoked and, as a result, she was again terminated. Miller filed a petition for judicial review in the Circuit Court for Baltimore City. Following an unfavorable decision in the circuit court, Miller appealed to this Court.

**Held**: Affirmed.

There are two chains of command through which a correctional officer may be terminated. The correctional officer may be directly terminated by the Warden of the institution at which he or she is employed through a disciplinary action. SP §§ 11-104; 11-106. Or, the Commission may revoke the correctional officer's certification CS § 8-209.2(a), the result of which is that the officer may no longer perform his or her job functions and must be terminated. COMAR 12.10.01.06D(2).

The Court of Special Appeals held that the Maryland Correctional Training Commission may revoke a correctional officer's certification "in conjunction with" the Warden taking disciplinary action, but the Commission may also act independently to revoke a certification and to fulfill its mandate to assure that all correctional officers are fit and prepared for their duties.

There was substantial evidence on the record to determine that the Department complied with the Second ALJ Order to reinstate Miller without further examination or condition. Further, the Commission did not violate the Second ALJ Order by subsequently revoking Miller's certification because the Commission may revoke a correctional officer's certification on its own initiative.

*Douglas Ford Bey II v. State of Maryland*, No. 413, September Term 2015, filed June 29, 2016. Opinion by Harrell, J.

Friedman, J., concurs.

http://www.mdcourts.gov/opinions/cosa/2016/0413s15.pdf

CRIMINAL LAW – RIGHT OF DEFENDANT TO COUNSEL OF HIS/HER CHOICE – REQUEST TO DISCHARGE COUNSEL

CRIMINAL LAW – EVIDENCE – CHAIN OF CUSTODY

CRIMINAL LAW – CHILD SEXUAL ABUSE – CONTINUING COURSE OF CONDUCT – BURDEN OF PROOF

CRIMINAL LAW – CHILD SEXUAL ABUSE – CONTINUING COURSE OF CONDUCT – UNIT OF PROSECUTION

CRIMINAL LAW - SENTENCING AND PUNISHMENT - IMPROPER AND ILLEGAL SENTENCE

**Facts**:

Appellant, Douglas Ford Bey, II, stood before the Circuit Court for Frederick County accused of sexual abuse of a minor, involving multiple sex acts spread over a span of approximately four years. After the victim disclosed ultimately the conduct, forensic evidence was collected, in the form of oral and genital swabs from Bey and the victim, and fetal tissue from the victim's abortion. Detective Dement, the police officer assigned to the investigation, testified that Bey asked him to tell the victim that he "was sorry for everything that he had done."

During his trial, the court had an on-the-record conversation with Bey and his counsel regarding Bey's concerns about his counsel's trial strategy. Bey first brought up his concerns between the conclusion of the direct examination and before potential cross examination of the victim. Bey's counsel told the court that he was electing not to cross-examine the minor and instead planned to focus on the DNA evidence, but Bey wanted to question the girl about suggested lapses in her testimony as to when certain acts occurred. Bey never said explicitly he wanted to discharge his counsel, but complained that he felt that his attorney was "winging" it at trial.

Some of the DNA evidence that Bey's counsel was attempting to discredit included fetal tissue from the abortion. The fetal tissue was retrieved by a law enforcement officer from Melissa Sheriff, a pathology assistant at the University of Maryland Medical Center, in a sealed package, and transported to a sheriff's office evidence locker. After Detective Dement secured the container, it was transported to Bode Technology by Camille Moore, a forensic services analyst employed by the Frederick County Sheriff's Office. When Sarah Shields, a DNA analyst at

Bode Technology, received the container, the seal was still intact. Sheriff was unable to recall the name of the law enforcement officer who picked up the tissue and Bey argued that this broke the chain of custody, but no evidence was presented to show that the seal had been tampered with or broken before it was delivered.

The jury convicted Bey of seventeen of eighteen charged counts: five counts of specific sexual abuse acts with a minor, ten counts of a continuing course of conduct against a child, and two counts of third degree sexual offense. The court sentenced Bey cumulatively to 390 years in prison.

In his appeal to the Court of Special Appeals, Bey argued that he was entitled to a new trial because of procedural errors, including the implicit denial of his alleged request to discharge his counsel and the admission of demonstrative evidence and testimony regarding the DNA match. He argued further that his sentence for continuing course of conduct with a minor under Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article § 3-315 ("Crim. Law") was improper.

**Held**: Affirmed in part and vacated in part.

Judgment of the Circuit Court for Frederick County affirmed in part and vacated in part. Case remanded for a new sentencing proceeding.

On the first two questions, the Court of Special Appeals held that there was no error. Bey's contention that the circuit court abused its discretion in not granting his request to discharge counsel was found to be without merit. Because any alleged request was done during trial, disposition of the request was not governed strictly by Maryland Rule 4 215(e), which provides mandatory considerations to be made by the circuit court. Thus, the request was left to the sound exercise of discretion by the circuit court. The Court of Special Appeals found no abuse of discretion here because it was clear from the record that Bey was given a reasonable opportunity to air his grievances. It was within the discretion of the circuit court to find that Bey's concerns went only to his attorney's trial strategy and a discharge was not warranted.

The second procedural issue raised by Bey involved the DNA evidence linking the fetal tissue and the swabs taken from Bey. A chain of custody is required for such evidence to assure the court that the item is in the same condition as when it was collected. Agreeing with the circuit court, the Court of Special Appeals held that there was no reasonable opportunity that tampering occurred. The State set forth a chain of custody for the fetal tissue DNA evidence, based on the testimony of Detective Dement and Melissa Sheriff, showing the packages were sealed the entire time with no reasonable opportunity for tampering to have occurred. The Court of Special Appeals noted that, based on the strength of the other testimony, a tangential lapse in Sherriff's memory as to the name of the law enforcement officer to whom she delivered the tissue specimen was not enough to discount the chain of custody established by the State and the fetal tissue DNA evidence and related testimony was admissible.

The third question raised on appeal dealt with Bey's sentencing on the ten convictions under Crim. Law § 3-315 for continuing course of conduct against a minor. The State indicted Bey in one year increments of the four year span of misconduct, distinguishing further by the specific sexual act committed during each year, resulting in multiple convictions and sentences. Crim. Law § 3-315 was enacted in response to confusion in the legal community regarding how to charge individuals suspected of a continuing course of conduct with a minor, and avoid a duplicitous verdict. Noting some potential ambiguity as to the unit of prosecution, the Court of Special Appeals concluded that Bey was entitled to a new sentencing proceeding, on either of two analytical bases.

The first alternative interprets the statute as allowing only one conviction for a continuing course of conduct with a singular victim because, under Crim. Law § 3-315, the trier of fact need only find that at least three acts of the kind included in the statute occurred over a span of 90 days or more with a victim who was under the age of 14 at some point during the charged timeframe. It was viewed as a benefit accruing to the State of charging a defendant under Crim. Law § 3-315 because the prosecutor was not required to prove specifically the occurrence of each act included under the statute.

The second alternative assumes a theory that the legislature intended to allow the State to determine the unit of prosecution, as long as the course of conduct exceeded the 90-day minimum. This would allow, assuming the victim's testimony as to her memory of events was sufficient, the State to prove four units of prosecution (one for each year) for as long as the conduct continued, or until the victim turned 14 years old. Because of ambiguity in the statute, the sentences on the continuing course of conduct convictions must be merged pursuant to the rule of lenity.

*Richard L. Blanks v. State of Maryland,* No. 1050, September Term 2015, filed June 2, 2016, Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/1050s15.pdf

CRIMINAL LAW – PROBATION VIOLATION – RIGHT TO CONFRONT WITNESSES

**Facts**:

In the Circuit Court for Dorchester County, Richard Blanks, the appellant, was charged with violating his probation by using marijuana and for failing to report to his probation agent as directed. At the probation revocation hearing, the State presented testimony from the director of the laboratory that had tested Blanks's urine sample. The lab director had not personally handled the urine sample, but had certified the test results showing the presence of marijuana as accurate. He testified generally about the lab procedures and how test results are verified. When the State sought to admit the lab report certified by the lab director, Blanks's counsel objected on confrontation grounds. The court admitted the lab report over Blank's counsel's objection and ultimately found that Blanks violated his probation both by using marijuana and by failing to report. The court revoked his probation and ordered him to serve the remainder of his sentence.

**Held**: Affirmed.

Under the Sixth Amendment, an accused in a criminal proceeding has the right to confront witnesses against him. A probation violation hearing is a civil, not a criminal, proceeding, and therefore the Sixth Amendment Confrontation Clause does not apply. Probationers have a right to confront witnesses in a violation proceeding, however, pursuant to the Due Process Clause of the Fourteenth Amendment. That right is not co-extensive with the Sixth Amendment confrontation right. The Supreme Court's holding in *Crawford* and its progeny that under the Confrontation Clause of the Sixth Amendment testimonial hearsay is not admissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him does not apply to probation violation proceedings.

The lab director's testimony, coupled with other testimony, established that the lab test results were reliable and that they were otherwise admissible as a business record. It also was apparent from the record and implicit in the court's ruling that there was good cause to dispense with additional live testimony from other employees of the lab. For these reasons, the due process right to confrontation was satisfied in this case.

*State of Maryland v. Michael M. Johnson*, No. 189, September Term 2015, filed June 29, 2016. Opinion by Wright, J.

Friedman, J., dissents.

http://www.mdcourts.gov/opinions/cosa/2016/0189s15.pdf

EQUITY – NATURE AND SOURCE OF JURISDICTION

CRIMINAL LAW – VERDICT OR JUDGMENT OF ACQUITTAL

DOUBLE JEOPARDY – ACQUITTAL

DOUBLE JEOPARDY – CHARACTER, CONSTITUTION, AND JURISDICTION OF COURT

**Facts**:

On April 25, 2012, a Baltimore City grand jury indicted appellee, Michael M. Johnson, for the murder of 16-year-old Phylicia Barnes. Johnson was tried by a jury in the Circuit Court for Baltimore City and was acquitted of first-degree murder but convicted of second-degree murder. Subsequently, Johnson filed a motion for a new trial, which the circuit court granted on March 20, 2013, based on a finding of a *Brady* violation. *See Brady v. Maryland*, 373 U.S. 83 (1963).

The case was reset for a new jury trial, which commenced on December 2, 2014. During the presentation of the State's case on Friday, December 19, 2014, Johnson moved for a mistrial. The court initially denied the motion for mistrial, but later indicated that it would take "the weekend to think about this." The State rested at the close of proceedings on that same day, and after the court excused one of the alternate jurors, Johnson made a motion for judgment of acquittal. Without objection from defense counsel, the trial judge suggested that the motion for judgment of acquittal be addressed on Monday "because . . . I've got this other issue to consider between now and then, too."

When trial resumed on Monday, December 22, 2014, the court announced at the outset of the proceedings that it was going to grant the motion for mistrial, then discharged the jury and rescheduled a retrial for March 9, 2015. On January 14, 2015, Johnson filed a "Motion to Dismiss Indictment on Ground of Double Jeopardy," which the court heard on January 20, 2015. At the close of that motions hearing, the court treated Johnson's motion to dismiss indictment as a motion for reconsideration and struck its previous grant of the mistrial, then proceeded to grant Johnson's motion for judgment of acquittal.

The State filed a new indictment on February 2, 2015, which Johnson moved to dismiss. Following a hearing on March 12, 2015, the circuit court granted Johnson's motion and dismissed the case. The State subsequently appealed.

**Held**: Reversed.

Jurisdiction refers to two distinct concepts: (i) fundamental jurisdiction, or the power of a court to render a valid decree, and (ii) proprietary jurisdiction, or the propriety of granting the relief sought. In this case, when the trial court declared a mistrial and discharged the jury in the second prosecution, the second prosecution became in the eyes of the law "no trial at all," and the trial court thereafter had no revisory power to revive the second prosecution and no fundamental jurisdiction to grant a judgment of acquittal in that proceeding. Without fundamental jurisdiction, the grant of a judgment of acquittal "is a nullity, for an act without such jurisdiction is not to act at all."

*United Food and Commercial Workers International Union, et al. v. Wal-Mart Stores, Inc., et al.*, No. 376, September Term 2015, filed June 1, 2016, Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/0376s15.pdf

LABOR & EMPLOYMENT – NATIONAL LABOR RELATIONS ACT – PREEMPTION

**Facts**:

Walmart employees are not unionized. Members of the United Food and Commercial Workers ("the Union"), the appellant, that advocates in favor of unionization held events at certain Walmart stores in Maryland consisting of "flash mobs," in which demonstrators entered the stores *en masse*, walked in circles, blew whistles, chanted, and passed out fliers. The demonstrators sometimes blocked access to cash registers and rest rooms. On occasion, they confronted employees directly and interfered with managers' meetings. They refused to leave the premises when asked.

Before the National Labor Relations Board, Walmart, the appellee, filed an unfair labor practices ("ULP") charge, asserting that some of the conduct by the Union at its stores violated section 7 of the National Labor Relations Act ("NLRA"), by coercing employees to refrain from exercising their right not to unionize, under section 8 of the NLRA. Walmart amended the ULP to remove all allegations about demonstrations in Maryland. It then filed suit in Circuit Court for Anne Arundel County for trespass and nuisance, seeking declaratory and injunctive relief.

The Union moved to dismiss the suit on the ground that the state law claims were preempted by the NLRA. The motion was denied. After discovery, the parties filed cross-motions for summary judgment. The court granted judgment in favor of Walmart, issuing a permanent injunction barring the Union from entering Walmart premises for any purpose other than shopping. On appeal, the Union's primary contention is that the court's preemption ruling was legally incorrect.

**Held**: Affirmed.

Under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), a state law claim based on conduct that is arguably prohibited by section 8 of the NLRA (or arguably protected by section 7 of the NLRA) is presumed to be preempted by the NLRA. Here, some of the conduct of the Union demonstrators was arguably prohibited by section 8 of the NLRA, as conduct to coerce employees into unionizing. There are exceptions to *Garmon* preemption, however, including when the conduct the state is regulating or sanctioning "touch[es] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional

direction, we c[an] not infer that Congress ha[s] deprived the States of the power to act[.]" *Garmon*, at 243-44. This "local interest exception" will apply when the State has a strong interest in regulating the conduct and the controversy presented to the court in the State law claim and the controversy that could be presented to the NLRB are not identical.

The conduct by the Union demonstrators in which they confronted Walmart employees in a coercive manner was arguably prohibited by the NLRA. Under *Garmon*, the state claims for trespass and nuisance would be preempted, unless an exception applies. Here, the local interest exception applies. The State of Maryland has a strong interest in protecting the safety and property rights of its citizens; and the controversy that the NLRB would have decided had Walmart continued to pursue its ULP charge was not identical to the controversy to be decided by the circuit court in the claims for trespass and nuisance.

*Robin Alstatt Scarborough, et al. v. Leslie B. Altstatt*, No. 1248, September Term, 2015. Opinion filed on June 30, 2016, by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2016/1248s15.pdf

LIMITATION OF ACTION – IGNORANCE OF CAUSE OF ACTION

**Facts**:

On December 4, 2014, Appellants, Appellee's children (collectively "Appellants"), filed a complaint against their father, Appellee, Leslie Altstatt ("Altstatt") alleging counts of intentional infliction of emotional distress, assault and battery, and negligence arising from alleged sexual abuses between 1964 and 1984. Altstatt filed a motion to dismiss the complaint, arguing that Appellants' claims were barred by the statute of limitations. Appellants argued that they suffered from dissociative amnesia. As such, Appellants maintained that the statute of limitations should be tolled until the time they began to remember the abuses in early 2014. The circuit court held a hearing on Alstatt's motion to dismiss, and at the conclusion of the hearing the court granted Alstatt's motion to dismiss.

The order granting Altstatt's motion to dismiss was docketed on April 24, 2015. On May 4, 2015, Appellants filed a motion to alter or amend the order granting Alstatt's motion to dismiss. On June 9, 2015, the court issued an order which purported to deny Altstatt's motion to dismiss. The docket entry, however, indicated that Appellants' motion to alter or amend the judgment was denied. On July 16, 2015, the court issued an "Amended Order" which ordered that "[Appellants'] Motion to Alter or Amend . . . shall be, and hereby is, DENIED." On August 6, 2015, Appellants filed a notice of appeal to challenge the circuit court's order granting Altstatt's motion to dismiss. Altstatt moved to dismiss the appeal as untimely. The Court of Special Appeals denied Altstatt's motion, but permitted Altstatt to raise the issue in his brief along with addressing the merits of the appeal.

**Held**: Motion to dismiss appeal denied. Judgment of the circuit court affirmed.

The Court of Special Appeals first held that the June 9, 2015, order was not a final judgment because the order was not a "unqualified, final disposition" with respect to Appellants' motion to alter or amend. *Davis v. Davis*, 335 Md. 699, 710-11 (1994). Rather, the July 16, 2015, order constituted the final appealable judgment. As such, Appellants' notice of appeal was timely.

The Court of Special Appeals then held that the discovery rule does not toll the statute of limitations for claims arising out of childhood sexual abuse when the plaintiffs allegedly suffered from dissociative amnesia. The Court first observed that under Md. Code (1974, 1995 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article, the statute of limitations for a civil

action is three years beginning after the Appellants reached the age of majority. The Court then recognized that under the discovery rule the statute of limitations begins to run only upon the convergence of actual knowledge of the circumstances giving rise to the cause of action or knowledge of circumstances that would put a person of ordinary prudence on inquiry to investigate the existence of a cause of action. *Doe v. Maskell*, 342 Md. 684, 689 (1996).

The Court of Special Appeals, relying on the Court of Appeals's decision in *Maskell*, observed that "the mental process of repression of memories of past sexual abuse does not activate the discovery rule." *Id*. at 695. Notwithstanding the significant change and growth of empirical evidence surrounding the phenomena of dissociative amnesia, the court observed that respect for principles of stare decisis prevented the Court of Special Appeals from undermining the Court of Appeals's decision in *Maskell*. Accordingly, the Court of Special Appeals held that the circuit court did not err in granting Altstatt's motion to dismiss.

*Board of Education of Prince George's County v. James Brady*, No. 781, September Term 2015, filed June 30, 2016. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/cosa/2016/0781s15.pdf

WORKERS' COMPENSATION – OFFSETS – OTHER BENEFITS

WORKERS' COMPENSATION – SIMILAR BENEFITS - TEMPORARY TOTAL DISABILITY

WORKERS' COMPENSATION – OFFSETS – ALTERNATIVE BENEFITS

**Facts**:

In 2011, Appellee James T. Brady, employed as a mechanic by Appellant, the Board of Education of Prince George's County (the "Board of Education"), was injured on the job and became, as a result, unable to return to work in that capacity. Brady had worked under a collective bargaining agreement between the Board of Education and his union, Local 2250 of ACE/AFSCME. Article four of the contract contained specific provisions regarding leave benefits, including accrued leave and workers' compensation benefits. The contract included a provision that entitled Brady to full pay (in the form of temporary total disability ("TTD") leave) for an initial period of ninety working days. This leave was in lieu of any other benefits, including his accrued personal sick leave.

He received this disability pay for the requisite ninety days and, on 14 February 2012, when it expired, Brady was obliged to select how he would proceed as he was still unable to perform his job. He was presented with two options by the Board of Education: remain on leave with pay status, which would grant him his full wages and other current benefits, or pursue TTD benefits under the Maryland Workers' Compensation Act, which would yield presumably less money over the same period. He elected to remain on leave with pay status, which afforded him his full salary, but this option required him to use his accrued sick leave. He remained absent from his position for sixteen and a half months before he retired on accidental disability retirement on 1 July 2013.

On 1 April 2014, the Workers' Compensation Commission considered, in the context of Brady's claim for permanent partial disability benefits, the question of an offset pursuant to Maryland Code (1991, 2008 Repl Vol), Labor and Employment Article, § 9 610 ("L&E"). After a hearing, a Commissioner granted to the Board of Education the right under L&E § 9-610 to offset its payment to Brady of his full wages under his accrued sick leave against a permanent partial disability award. On 22 April 2014, the Workers' Compensation Commission issued its order finding that "as a result of the accidental injury sustained on April 8, 2011 the claimant was paid disability leave (in lieu of temporary total benefits) from September 26, 2011 to February 14,

2012 inclusive, and paid sick leave (in lieu of temporary total benefits) from February 15, 2012 to June 27, 2013."

Brady appealed to the Circuit Court for Prince George's County. A hearing was held on 29 May 2015 to consider cross-motions for summary judgment filed by the litigants. Brady argued that his decision to use his earned leave should not be considered as receiving benefits similar to the TTD benefits under Workers' Compensation laws. The Board of Education argued that it is settled that when there is a single cause such as the workplace accident here, which is the basis of the compensation such as an accidental disability retirement, it was entitled to an offset for the period of payment of those benefits.

On 2 June 2015, the circuit court entered an order granting judgment in favor of Brady, offering no explanation of its reasoning for this conclusion. The Board of Education appealed timely to this Court urging that it was error to reverse the offset it was granted by the Workers' Compensation Commission.

**Held**: Reversed and remanded.

Reversed and remanded to the circuit court with direction to enter an order remanding the case to the workers' compensation commission for entry of an amended order consistent with the Court of Special Appeals's opinion

The purpose of L&E § 9-610 is "to provide only a single recovery for a single injury for government employees covered by both a pension plan and workmen's compensation." *Blevins v. Baltimore Cnty.*, 352 Md. 620, 625, 724 A.2d 22, 24 (1999) (citing *Frank v. Baltimore Cnty.*, 284 Md. 655, 659, 399 A.2d 250, 253 (1979)). Since its enactment, this provision and its offset has been read broadly to include all similar benefits.

Because the objective of L&E § 9-610 is to prevent an employer from being required to pay an employee twice for the same injury, alternative benefits could fulfill the otherwise required TTD payments made to an employee. Permanent partial disability benefits are "lost earning capacity benefits," which are distinct from temporary total disability benefits as "wage loss" benefits. This distinction makes the two different for purposes of L&E § 9-610. Brady was awarded permanent partial disability under L&E § 9-630 from the Workers' Compensation Commission when his disability became permanent. Prior to this permanency determination, Brady was receiving his accrued sick leave, which equates to TTD benefits under workers' compensation laws.

The Court of Special Appeals held that, although Brady's sick leave, as a form of wage loss protection, was not a benefit similar to permanent partial disability, a lost-earning capacity benefit, an offset should apply nonetheless. Because the award for permanent partial disability is to be "paid in addition to and consecutively with compensation for a temporary total disability," Brady would not start to receive the permanent partial disability award until after he ceased receiving TTD benefits (or in this case, the similar sick leave benefits). Assuming Brady's

disability became permanent on 15 February 2012, then he would not be entitled to TTD benefits after that date. The Court of Special Appeals held that to refuse the Board of Education an offset of the funds paid by the employer up to 1 July 2012 would contravene the Legislature's intent that an injured employee is entitled to a single recovery for a single injury.

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# JUDICIAL APPOINTMENTS

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On June 1, 2016, the Governor announced the appointment of the **HONORABLE DONALD E. BEACHLEY** to the Court of Special Appeals. Judge Beachley was sworn in on June 20, 2016 and fills the vacancy created by the retirement of the Hon. Robert A. Zarnoch.

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On June 1, 2016, the Governor announced the appointment of the **HONORABLE MELANIE M. SHAW GETER** to the Court of Special Appeals. Judge Shaw Geter was sworn in on June 20, 2016 and fills the vacancy created by the elevation of the Hon. Michele D. Hotten.

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On June 1, 2016, the Governor announced the appointment of the **JOSEPH MICHAEL GETTY** to the Court of Appeals. Judge Getty was sworn in on June 27, 2016 and fills the vacancy created by the retirement of the Hon. Lynne A. Battaglia.

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On June 13, 2016, the Governor announced the appointment of **MAGISTRATE RICHARD SANDY** to the Circuit Court for Frederick County. Judge Sandy was sworn in on June 30, 2016 and fills the vacancy created by the retirement of the Hon. G. Edward Dwyer, Jr.

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# RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Seventy-Eighth Report (Parts I, II, and III, and Conforming Amendments) of the Standing Committee on Rules of Practice and Procedure was filed on June 6, 2016.

http://www.mdcourts.gov/rules/rodocs/178troparts1x2x3.pdf

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