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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Susan Myra Geller Kirwan, Misc. Docket AG No. 52, September Term 2015, filed November 21, 2016. Opinion by Getty, J.

<http://www.mdcourts.gov/opinions/coa/2016/52a15ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission of Maryland (the “Commission”), Petitioner, through Bar Counsel, filed a Petition for Disciplinary or Remedial Action with the Court of Appeals alleging multiple violations of the Maryland Lawyers’ Rules of Professional Conduct (“MLRPC”). The Commission charged Ms. Kirwan with violations of MLRPC 1.1 (Competence), 1.3 (Diligence), 1.4(a)(2)-(3) and (b) (Communication), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) and (d) (Misconduct) arising out of her representation of Ms. T.S. (“Ms. S.”) and her minor child T.N. The Court referred the Petition to Judge Cynthia H. Jones of the Circuit Court for Baltimore City to conduct an evidentiary hearing concerning the alleged violations and make findings of fact and recommended conclusions of law.

The hearing judge’s findings of fact were uncontested. Ms. Kirwan was admitted to the Maryland Bar on December 30, 1983, and maintained a law practice in Baltimore City. On October 7, 2013, Ms. S. retained Ms. Kirwan to represent T.N., Ms. S.’s minor child. Ms. Kirwan was to pursue a claim against Baltimore City Public Schools because T.N. suffered a broken wrist on a Baltimore City elementary school playground. Ms. S. signed a retainer agreement and forms authorizing Ms. Kirwan to have access to T.N.’s school and medical records. After the retainer was signed, Ms. Kirwan maintained contact with Ms. S. for two months regarding T.N.’s case, and Ms. Kirwan received a copy of T.N.’s medical records from Ms. S. However, beginning in December 2013, Ms. Kirwan became unresponsive to her client. Ms. S. tried to contact Ms. Kirwan numerous times to no avail by telephone and through her answering service. In June 2014, Ms. S. emailed Ms. Kirwan and Ms. Kirwan indicated that she would call Ms. S. However, Ms. Kirwan did not follow through on that promise, and Ms. S.

continued her attempts to get in touch with Ms. Kirwan until September 2014, when Ms. S. filed a complaint with the Commission.

The Commission sent three letters to Ms. Kirwan dated October 9, 2014, December 1, 2014, and January 22, 2015, regarding Ms. S.'s complaint and requesting a response. Ms. Kirwan received all three letters and failed to respond. The Commission's final attempt to reach Ms. Kirwan was by telephone. An investigator from the Commission called Ms. Kirwan to confirm that she received the Commission's letters and requested a response. Ms. Kirwan did not respond. The Commission's Petition for Disciplinary or Remedial Action followed.

On June 26, 2015, the Collins Legal Group LLC, through its counsel Ms. Tiffani S. Collins, Esq., sent a letter to Ms. Kirwan stating that it had been retained by T.N., through her mother Ms. S. The letter stated that the firm was representing T.N. in a legal malpractice claim against Ms. Kirwan and requested Ms. Kirwan's malpractice insurance information. The letter also asked Ms. Kirwan to forward the letter to her malpractice carrier. Ms. Kirwan did not respond.

After a hearing, the Baltimore City Circuit Court judge recommended conclusions of law. The hearing judge found by clear and convincing evidence that Ms. Kirwan violated MLRPC 1.1, 1.3, 1.4(a)(2)-(3) and (b), 1.16(d), 8.1(b), and 8.4(a) and (d).

On October 11, 2016, oral arguments were presented to the Court of Appeals by Ms. Kirwan and the Commission, which primarily focused on the appropriate sanction. The Court of Appeals indefinitely suspended Ms. Kirwan from the practice of law on November 21, 2016.

Held: Indefinite suspension is the appropriate sanction.

The Court of Appeals held that clear and convincing evidence supported the hearing judge's conclusions of law that Ms. Kirwan violated MLRPC 1.1, 1.3, 1.4(a)(2)-(3) and (b), 1.16(d), 8.1(b), and 8.4(a) and (d). The Court stated that Ms. Kirwan failed to competently and diligently represent her client. Ms. Kirwan did not pursue T.N.'s claim or take any meaningful action towards pursuing the claim, and abandoned her client after failing to communicate over a span of ten months despite the client's numerous attempts. Ms. Kirwan also failed to communicate with the client's new attorney and Bar Counsel's numerous requests for information during its investigation. Therefore, the Court imposed an indefinite suspension with the right to apply for reinstatement in the future. However, the Court declined to set a minimum length for the indefinite suspension.

Attorney Grievance Commission of Maryland v. Willie James Mahone, Misc. Docket AG No. 82, September Term 2015, filed December 19, 2016. Opinion by Adkins, J.

McDonald and Watts, JJ., concur and dissent

<http://www.mdcourts.gov/opinions/coa/2016/82a15ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

On February 29, 2016, the AGC, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent Willie James Mahone. Bar Counsel charged Mahone with violating the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), Maryland Rules governing attorney trust accounts, and a statutory provision regarding misuse of trust money. Specifically, Bar Counsel alleged that Mahone violated the following provisions: (1) MLRPC 1.1 (Competence); (2) MLRPC 1.4 (Communication); (3) MLRPC 1.15(a), (c), and (d) (Safekeeping Property); (4) MLRPC 8.1(b) (Bar Admission and Disciplinary Matters); (3) MLRPC 8.4(a), (c), and (d) (Misconduct); (4) Maryland Rule 16.606.1 (Attorney Trust Account Record-Keeping); (5) Maryland Rule 16-607 (Commingling of Funds); (6) Maryland Rule 16-609 (Prohibited Transactions); and (7) Maryland Code (1957, 2010 Repl. Vol.), § 10-306 of the Business Occupations and Professions Article ("BP") (Misuse of Trust Money). The hearing judge made the following findings of fact by clear and convincing evidence:

In February 2014, an overdraft in the amount of \$86.48 occurred in Mahone's attorney trust account. On March 10, 2014, Bar Counsel sent Mahone a letter requesting an explanation of the overdraft and client ledgers, monthly bank statements, deposit slips, and canceled checks. Mahone responded but did not provide the requested client ledgers or deposit slips. Bar Counsel sent Mahone follow-up letters requesting the client ledgers and deposit slips on April 10, 2014, November 18, 2014, and December 10, 2014. Mahone never responded.

Due to Mahone's failure to provide the requested information, Bar Counsel subpoenaed Sandy Spring Bank for Mahone's attorney trust account records. The records indicated: (1) negative balances in nine client trust accounts; (2) earned attorney's fees deposited into nine client trust accounts; (3) remaining balances in five client trust accounts; (4) 11 electronic transfers; and (5) a \$1,500 cash withdrawal. Bar Counsel requested additional information related to these transactions, but Mahone failed to address these requests.

On June 23, 2016, Bar Counsel deposed Mahone. During his deposition, Mahone admitted that he failed to create and maintain proper records, failed to create records associated with electronic transactions, and commingled funds.

From these facts, the hearing judge found by clear and convincing evidence that Mahone violated MLRPC 1.1, 8.1(b), and 8.4(a), (c), and (d). The hearing judge also found that Mahone violated Maryland Rules 16-606.1, 16-607, and 16-609, and BP § 10-306. Mahone took exception to multiple conclusions in the hearing judge's Findings of Fact and Conclusions of Law. Bar Counsel filed no exceptions.

First, Mahone excepted to the hearing judge's finding that he "failed to respond" to Bar Counsel's letters sent on April 10, 2014, November 18, 2014, and December 10, 2014. He asserted that he did not receive these letters because he had changed office locations. Mahone also took exception to the hearing judge's findings that he created negative account balances, deposited earned attorney's fees into his attorney trust account, improperly maintained client and third party funds in his trust account, and failed to maintain and provide records identifying whose money was withdrawn from the trust account. Mahone argued that these findings are erroneous and unsupported by the record evidence. Additionally, Mahone excepted to any conclusions of law based on these factual findings.

Lastly, Mahone took exception to the hearing judge's conclusion that he violated MLRPC 8.4(c). He argued that Bar Counsel had not presented any evidence that he acted with dishonesty, fraud, deceit, or misrepresentation.

Held: Indefinite suspension is the appropriate sanction.

The Court of Appeals held that clear and convincing evidence supported the hearing judge's conclusion that Mahone violated MLRPC 1.1, MLRPC 8.1(b), MLRPC 8.4(a) and (d); Maryland Rules 16.606.1, 16-607, 16-609; and BP § 10-306. It did not find, however, that Mahone violated MLRPC 8.4(c).

Mahone violated MLRPC 1.1 and Rule 16-606.1 when he failed to maintain records for his attorney trust account. He violated Rule 16-607 when he commingled his personal funds with client funds. When Mahone used trust account funds for an unauthorized purpose, withdrew cash from the account, and created negative balances within multiple client accounts, Mahone violated Rule 16-609 and BP § 10-306. Additionally, Mahone's failure to respond to Bar Counsel's requests for information completely and in a timely manner constitute a violation of MLRPC 8.1(b). Taken together, these violations result in a breach of MLRPC 8.4(a). Lastly, Mahone's overall mismanagement of client funds constitutes conduct prejudicial to the administration of justice in violation of MLRPC 8.4(d).

The Court agreed with Mahone that Bar Counsel had not presented clear and convincing evidence that he acted with dishonesty, fraud, deceit, or misrepresentation in violation of MLRPC 8.4(c). Therefore, it sustained Mahone's exception to the finding that he violated 8.4(c). The Court overruled Mahone's remaining exceptions.

In determining the appropriate sanction, the Court weighed Mahone's disciplinary history against the lack of any intent to deceive or dishonesty. It denied Bar Counsel's request for disbarment and imposed an indefinite suspension.

Attorney Grievance Commission of Maryland v. Jerome P. Johnson, Misc. Docket AG No. 68, September Term 2015, filed December 14, 2016. Opinion by Watts, J.

<http://www.mdcourts.gov/opinions/coa/2016/68a15ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS – ONE-YEAR SUSPENSION

Facts:

On the Attorney Grievance Commission (“the Commission”)'s behalf, Bar Counsel filed in the Court of Appeals a “Petition for Disciplinary or Remedial Action” against Jerome P. Johnson (“Johnson”), charging him with violating Maryland Lawyers’ Rules of Professional Conduct (“MLRPC”) 1.3 (Diligence), 1.4(a)(2), 1.4(a)(3), 1.4(b) (Communication), 1.5(b) (Communication of Fees), 1.16(d) (Terminating Representation), 8.1(b) (Disciplinary Matters), 8.4(d) (Conduct that Is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC).

A hearing judge found the following facts. A client retained Jerome P. Johnson (“Johnson”), Respondent, a member of the Bar of Maryland, to represent him in a child support case in the Circuit Court for Anne Arundel County (“the circuit court”). Despite having advised in open court at a hearing before a magistrate that he would enter his appearance in the child support case, Johnson neither filed his appearance with the circuit court’s Civil Department nor paid the appearance fee. After the hearing, the magistrate issued a Report and Recommendations, and Johnson’s client asked him to file exceptions. Johnson agreed to do so, and charged an additional fee for the exceptions. Johnson failed to timely file the exceptions; instead, he mailed the exceptions to the circuit court on or after the due date. The circuit court closed the child support case, and the Civil Department returned the exceptions to Johnson. Johnson did not make any attempt to rectify the consequences of his failure to file his appearance or pay the appearance fee, such as refunding the fee for the exceptions. Johnson did not inform his client that he had failed to pay the appearance fee, that he had mailed the exceptions late, and that the circuit court’s Civil Department had returned the exceptions. Additionally, Johnson failed to respond to his client’s requests for updates about the child support case. Johnson’s client ultimately filed a complaint against him with Bar Counsel.

Bar Counsel sent two letters to Johnson and granted a request by Johnson for an extension before Johnson provided a response to his client’s complaint. Afterward, in a total of six letters, Bar Counsel requested documents and additional information from Johnson. Additionally, during a conversation on the telephone, Johnson requested an extension, which Bar Counsel granted. Nevertheless, Johnson never provided the documents and additional information that Bar Counsel had requested, and never otherwise responded to Bar Counsel’s six letters.

After Bar Counsel filed the Petition for Disciplinary or Remedial Action, Johnson failed to file an answer by the due date. Bar Counsel filed with the hearing judge a Motion for Order of Default. Subsequently, Johnson filed with the hearing judge a “Motion to Extend Time to Answer Complaint,” which the hearing judge granted. Johnson failed to file an answer by the court-ordered deadline. Bar Counsel mailed discovery requests to Johnson, and Johnson filed with the hearing judge a “Motion for Leave to Petition Court of Appeals for Remand” in which he requested leave to file a “motion for relief” with the Court of Appeals. In the motion for leave, Johnson did not make clear the basis for the “motion for relief,” and did not address his failure to file an answer. The hearing judge denied the motion for leave and issued an order of default against Johnson for the failure to file an answer. Johnson filed with the hearing judge an untimely “Motion to Vacate Default Order and Reconsideration of Leave to Petition Court of Appeals for Remand.” The hearing judge conducted a hearing, heard arguments from the parties, and denied the motion to vacate. Bar Counsel offered, and the hearing judge admitted into evidence, a binder of exhibits. The hearing judge advised Johnson that he could not present evidence because of the order of default, but expressly gave Johnson the opportunity to present any mitigating factors. Johnson responded only that he had no prior attorney discipline.

The hearing judge concluded that Johnson violated MLRPC 1.3, 1.4(a)(2), 1.4(a)(3), 1.4(b), 1.16(d), 8.1(b), 8.4(d), and 8.4(a), but had not violated MLRPC 1.5(b).

Held: Suspended from the practice of law in Maryland for one year.

The Court of Appeals held that the hearing judge correctly denied the motion to vacate, stating that any one of the following three circumstances, when considered alone, provided a basis for denying the motion to vacate. First, the motion to vacate was untimely. Second, the motion to vacate did not establish that there was a substantial and sufficient basis for an actual controversy as to the merits of the attorney discipline proceeding. Third, the motion to vacate did not establish that it was equitable to excuse Johnson’s failure to file an answer.

Next, the Court held that a hearing judge in an attorney discipline proceeding may refrain from conducting an evidentiary hearing where the hearing judge has entered an order of default that has not been vacated. Thus, the Court concluded that, in the instant case, the hearing judge acted properly in refraining from conducting an evidentiary hearing beyond admitting into evidence Bar Counsel’s binder of exhibits and giving Johnson the opportunity to address mitigating factors.

The Court overruled Johnson’s exceptions to the hearing judge’s findings of fact because, due to the order of default, the averments in the Petition for Disciplinary or Remedial Action were deemed admitted under Maryland Rule 2-323(e). The Court further stated that, even if the averments in the Petition for Disciplinary or Remedial Action were not deemed admitted, the Court would overrule Johnson’s exceptions because, as to each of his exceptions, without

referencing any part of the record, Johnson simply made unsubstantiated factual allegations that were inconsistent with the hearing judge's findings of fact.

The Court overruled Johnson's exceptions to the hearing judge's conclusions of law, all of which the Court upheld.

The Court concluded that the appropriate sanction for Johnson's misconduct was a one-year suspension from the practice of law in Maryland. Johnson's misconduct in representing his client demonstrated a pattern of neglect and non-responsiveness; Johnson failed to diligently represent his client, failed to adequately communicate with his client, falsely advised his client that a motion for reconsideration had been filed in the child custody case when it had not, and failed to take steps to protect his client's interests after Johnson's representation ended. Among the many troubling aspects of Johnson's various instances of misconduct were his repeated failures to respond to Bar Counsel's numerous lawful demands for information. It took two letters from Bar Counsel and an extension for Johnson to provide a response to his client's complaint, and Johnson never responded to any of Bar Counsel's six letters requesting documents and additional information. Johnson's misconduct was aggravated by six factors, including refusal to acknowledge his misconduct's wrongful nature and indifference to making restitution or rectifying his misconduct's consequences. Johnson's misconduct injured his client by causing the circuit court to close the child support case without considering the exceptions to the magistrate's Report and Recommendations, and was mitigated only by the absence of prior attorney discipline.

Attorney Grievance Commission of Maryland v. Andrew Ndubisi Ucheomumu,
Misc. Docket AG No. 27, September Term 2015, filed December 15, 2016.
Opinion by Hotten, J.

<http://www.mdcourts.gov/opinions/coa/2016/27a15ag.pdf>

ATTORNEY GRIEVANCE COMMISSION – DISCIPLINE – SUSPENSION

Facts:

Petitioner, Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Andrew Ndubisi Ucheomumu. Petitioner alleged that Respondent violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") arising out of his representation of David C. Jackson and Jackson's companies, Jalin Realty Capital Advisors ("Jalin") and American Capital Holdings.

The retainer agreement between Respondent and Jackson stated that there was to be a \$10,000 non-refundable retainer. The retainer further stated that legal work for Jalin was to be billed at an hourly rate of \$195.00 per hour and charged against the retainer. The retainer further provided that the attorney will bill monthly for legal services. Respondent charged flat fees for work that was also billed on an hourly basis.

During Respondent's representation of Jackson and his companies, the Respondent failed to maintain an attorney trust account. Respondent deposited funds received from his client into his general bank account at Bank of America. Respondent failed to sufficiently maintain contemporaneous records of payments made to him. Additionally, Respondent failed to hold fees intended for third-parties in trust.

According to an FBI Agent, Respondent was advised during a meeting on June 6, 2011, that Jackson was under criminal investigation for fraud. The agent wanted to interview Jackson. Respondent, on Jackson's behalf, requested transactional immunity from prosecution, which the Government was not willing to provide.

In October 2010, Respondent represented Jalin in a dispute with A Better Wireless, LLC ("ABW"). ABW had sought funding through Jalin, paying an advance fee of \$37,500.00. Jalin failed to provide funding and refused to refund the fee. On January 21, 2011, Respondent filed a complaint on behalf of Jalin in the United States District Court for the District of Minnesota. Respondent failed to appear for a pre-trial conference and motions hearing in the ABW matter. Based on Respondent's conduct during discovery, the presiding federal magistrate judge sanctioned Respondent, personally, to pay \$1,610 in attorneys' fees to ABW. The magistrate judge ordered an additional discovery sanction preventing Jalin from relying on or offering into evidence any information, documents, or other materials not provided in response to ABW's

original sets of discovery requests. The U.S. District Court further warned Respondent that one of Respondent's arguments, in favor of a motion to dismiss, violated Federal Rule of Civil Procedure 11 because it lacked factual support. The court granted ABW's motion for summary judgment on all of Jalin's claims, and denied ABW's motion for summary judgment on ABW's counterclaim for fraud. The suit was ultimately settled.

On January 30, 2012, Respondent filed a complaint on behalf of Jackson's business, American Capital Holdings, against Brightway Financial Group for allegedly issuing bogus standby letters of credit from a dummy company known as RBS Alliance. The lawsuit was ultimately dismissed based upon a decision upholding a mandatory arbitration clause in the parties' contract.

On September 29, 2015, a jury in the United States District Court for the District of Connecticut found Jackson guilty of conspiracy to commit wire fraud and substantive counts of wire fraud.

Held:

The Court of Appeals sustained Respondent's exceptions to the hearing judge's finding of facts and conclusions of law pertaining to Respondent's knowledge and assistance of Jackson's criminal activity. The Court ruled that, based on a review of the record, there was no competent material evidence to find that Respondent had sufficiently particularized knowledge of, or reckless disregard for, Jackson's criminal activity. Accordingly, there was no competent material evidence of record to support the hearing judge's finding that Respondent's representation and lawsuits aided and abetted Jackson in his criminal efforts.

The Court found by clear and convincing evidence that Respondent committed violations of MLRPC: 1.1, 1.4(b), 1.5(a), 1.15(a) and (c), 1.16(d), 3.1, 3.4(a) and (d), 8.4(a) and (d), Maryland Rules 16-604 (now Maryland Rule 19-404) and 16-606.1 (now Maryland Rule 19-407), and Maryland Code (Repl. Vol. 2010), § 10-306 of the Business Occupations & Professions Article.

The Court found in mitigation that Respondent expressed remorse and responsibility for erroneously relying on local counsel and failing to appear at the Minnesota proceedings. Moreover, Respondent was a newly admitted attorney at the time of his representation of Jackson and Jackson's companies. Further, the Court noted the hearing judge expressly credited the witness who testified regarding Respondent's character. Notwithstanding the mitigating circumstances, Respondent engaged in serious misconduct, and violated numerous MLRPC, two Maryland Rules, and one provision of the Maryland Code. The Court ordered that Respondent be indefinitely suspended from the practice of law with the right to apply for reinstatement after 90 days. As a condition of reinstatement, upon application, Respondent must provide the Attorney Grievance Commission and Bar Counsel with appropriate documentation showing the existence and maintenance of an attorney trust account.

Roderick Colvin v. State of Maryland, No. 8, September Term 2016, filed December 15, 2016. Opinion by Barbera, C.J.

<http://www.mdcourts.gov/opinions/coa/2016/8a16.pdf>

CRIMINAL LAW – SENTENCING – CORRECTING ILLEGAL SENTENCE

Facts:

Petitioner Roderick Colvin was convicted in 1989 of crimes related to the murder of Charles Reese and attempted murder of Jeanette Coleman. When the jury returned its verdict, the foreperson announced the verdicts on all counts, and defense counsel requested a poll of the jury. The clerk then polled each member of the jury, except for the foreperson. Last, the clerk hearkened the jury to the verdicts, and all members of the jury, including the foreperson, assented. Defense counsel did not object and no direct appeal was filed challenging this process.

In 2013, Colvin filed a motion to correct an illegal sentence pursuant to Maryland Rule 4-345(a). He argued that the verdicts supporting his convictions were not unanimous, as required by Maryland Rule 4-327(a), because the jury foreperson was not polled individually after she announced the jury's verdicts. The circuit court disagreed, ruling that this claim was not cognizable under Rule 4-345(a). Colvin appealed, and the Court of Special Appeals held that the claim was cognizable because a lack of unanimity would render the verdicts unconstitutional, but that Colvin lost on the merits.

Held: Vacated.

The Court of Appeals reiterated that the scope of Rule 4-345(a), which allows collateral and belated attacks on a sentence and excludes waiver as a bar to relief, is narrow. The Rule provides a limited exception to the general rule of finality, and sanctions a method of opening a judgment otherwise final and beyond the reach of the courts.

Colvin's claim alleged only that the polling process was done incorrectly. The Court noted that in Maryland, it is not necessary for trial courts both to poll and to hearken the jury. Performing only one of these processes is sufficient to ensure the unanimity of the verdict. A lack of unanimity was the lynchpin of Colvin's argument that the verdict was substantively illegal, but since his jury was hearkened to the verdict, the Court concluded there was no substantive allegation of a lack of unanimity. Because Colvin's claim did not implicate the substantive legality of the sentence, it was not cognizable under the Rule.

Accokeek, Mattawoman, Piscataway Creeks Community Council, Inc. v. Public Service Commission of Maryland, et al., No. 26, September Term 2016, filed December 16, 2016. Opinion by Wilner, J.

<http://www.mdcourts.gov/opinions/coa/2016/26a16.pdf>

PUBLIC UTILITIES – JUDICIAL REVIEW OF FINAL DECISIONS

PUBLIC UTILITIES LAW – ELECTRIC GENERATION FACILITY PLANNING – CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Facts:

PSC granted a Certificate of Public Convenience and Necessity (CPCN) that authorized Dominion Cove Point LNG (Dominion) to build an electric generating station to support an expansion of its liquefied natural gas facility at Cove Point, in Calvert County. In deciding whether to grant the CPCN, PSC was required to consider the economic and environmental impact of the generating station on the State and county. The CPCN was subject to nearly 200 Conditions imposed by PSC designed to ameliorate adverse economic and environmental effects that may result from the construction and operation of the generating station.

In a judicial review action, Accokeek claimed that (1) two of the Conditions, which required Dominion to make contributions to State programs designed to reduce greenhouse gas emissions and to assist low-income families in meeting utility bills, constituted an unauthorized tax, (2) the failure of PSC to specify the precise dollar value of the positive economic benefit to the State and county of the generating station deprived Accokeek of due process, and (3) there was insufficient evidence to support PSC's findings regarding the positive economic benefit of the generating station.

Held: Affirmed.

Affirming judgments of the Circuit Court for Baltimore City and the Court of Special Appeals, the Court of Appeals rejected Accokeek's complaints and held that (1) the two conditions complained of were not in the nature of a tax but were regulatory measures within the authority of PSC to impose, (2) PSC made appropriate findings regarding economic benefit based on the record, and (3) the evidence was sufficient to support those findings.

COURT OF SPECIAL APPEALS

Young Electrical Contractors, Inc. v. Dustin Construction, Inc., No. 226, September Term 2014, filed December 28, 2016. Opinion by Reed, J.

<http://www.mdcourts.gov/opinions/cosa/2016/0226s14.pdf>

CONTRACTS – CONSTRUCTION AND OPERATION – PLACE AND TIME – TIME OF PAYMENT OF COMPENSATION

Facts:

In July 2010, Dustin Construction, Inc. (“Dustin”) entered into a general contract with George Mason University (“GMU”) to renovate and construct an addition to one of its buildings. Needing a subcontractor to perform the electrical work that would be required to complete the job, Dustin entered into a subcontract with Young Electrical Contractors, Inc. (“Young”). The electrical subcontract contained multiple “pay-when-paid” provisions, which provided that Dustin’s payment to Young was contingent upon, as a condition precedent, Dustin receiving payment from GMU.

The deadline for substantial completion under the general contract was November 30, 2010. However, Young did not achieve substantial completion of the electrical work until March 8, 2011, prompting it to submit three “change requests.” Only two of the change requests were at issue in this appeal: Change Request Nos. 1066 and 1067. The former sought an additional \$259,034.99 for “extended overhead costs associated with [GMU]’s extension of the contract,” while the latter sought an extra \$274,812.33 for “owner initiated . . . design changes, design errors, unforeseen conditions and additions/deletions of the work originally required.” After reducing the amount sought in Change Request No. 1066 to \$180,010.21, Dustin submitted both change requests to GMU. When GMU denied the requests, Dustin, citing the pay-when-paid provisions of the subcontract, refused to pay Young the extra amount.

Instead of suing the owner for inappropriately denying the change requests, Young filed a Complaint against Dustin in the Circuit Court for Montgomery County on September 3, 2013, alleging breach of contract for Dustin’s decision to utilize the pay-when-paid clauses and not pay for the costs associated with the extra work. Dustin responded with an Answer to the Complaint and a Motion for Summary Judgment. The Motion argued, among other things, that Dustin was not liable for the requested amounts by operation of the pay-when-paid provisions of the subcontract.

The circuit court entered summary judgment in favor of Dustin.

Held: Affirmed.

Pay-when-paid provisions generally are valid under Virginia law, which governed this case per the choice of law provision of the subcontract. Moreover, in light of their language and placement, the particular pay-when-paid provisions at issue in this case were also valid. Thus, because there was no genuine dispute as to any material fact regarding whether Young's change requests were the product of "owner-initiated changes," the circuit court's entry of summary judgment in favor of Dustin was appropriate.

Jamil Ali v. Department of Public Safety & Correctional Services, No. 1581, September Term 2013, filed November 30, 2016. Opinion by Woodward, J.

<http://www.mdcourts.gov/opinions/cosa/2016/1581s13.pdf>

CORRECTIONAL SERVICES – DIVISION OF CORRECTION – INMATE NOT ELIGIBLE FOR RELEASE ON MANDATORY SUPERVISION DURING PERIOD THAT INMATE NOT ELIGIBLE FOR PAROLE

Facts:

Jamil Ali, appellant, was an inmate serving a five-year term of confinement for armed robbery and a concurrent five-year term for use of a handgun in a crime of violence, the latter without the possibility of parole. Appellant earned diminution credits that, if applied to his sentence, would have required appellant's release on mandatory supervision prior to the end of his five-year term of confinement. The Maryland Division of Correction ("DOC") commitment staff, however, determined that appellant's diminution credits could not be applied to his sentence, because appellant was ineligible for parole during the five-year term of confinement on the handgun conviction.

Appellant challenged the determination of the DOC staff, but that decision was ultimately upheld by the Department of Public Safety and Correctional Services ("DPSCS"), appellee. Upon appellant's petition for judicial review, the Circuit Court for Washington County affirmed DPSCS's decision.

Held: Affirmed.

The Court of Special Appeals observed that under Section 7-501 of the Correctional Services Article ("CS"), DOC was required to release on mandatory supervision an inmate who served his or her term of confinement less diminution credits, unless the inmate was convicted of a violent crime and was ineligible for release on parole under CS §7-301.

Under CS §7-301, an inmate who has been sentenced to more than one term of imprisonment, including a term during which the inmate is eligible for parole and a term during which the inmate is not eligible for parole, the inmate is not eligible for parole until the inmate has served at least a period equal to the term during which the inmate is not eligible for parole. Here, appellant was eligible for parole on his five-year sentence for armed robbery but ineligible for parole on his concurrent five-year sentence on the handgun conviction. Thus, under CS §7-301, appellant was not eligible for parole until he had served the entire five-year sentence.

Nevertheless, appellant argued that CS §7-501 did not bar his release on mandatory supervision prior to the end of his five-year term on the handgun conviction. Specifically, appellant claimed that, because he would never become eligible for parole, Section 7-501 “does not apply, as the event specified in the law will not occur.” The Court rejected this argument, because under appellant’s interpretation of CS §7-501, he would be released on mandatory supervision even though he was *not* eligible for parole. Such interpretation would directly contradict the language of Section 7-501(b), which prevents inmates who are convicted of a violent crime from becoming eligible for release on mandatory supervision “until after the inmate becomes eligible for parole.” Because appellant’s maximum period of confinement was five years, and he was not eligible for parole during those five years, the Court of Special Appeals held that under the plain meaning of the statute, appellant was not eligible for release on mandatory supervision during those five years.

James A. Calhoun-El v. State of Maryland, No. 2768, September Term 2012, filed December 21, 2016. Opinion by Graeff, J.

<http://www.mdcourts.gov/opinions/cosa/2016/2768s12.pdf>

ADVISORY JURY INSTRUCTIONS – UNGER – WAIVER

Facts:

On November 3, 1981, a jury in the Circuit Court for Montgomery County convicted James A. Calhoun El, appellant, of first degree murder and related offenses. In 1985, after his convictions were upheld on direct appeal, appellant filed a motion for post-conviction relief, arguing, *inter alia*, that the trial court’s “advisory” jury instructions during the guilt/innocence phase of the trial were improper. The post-conviction court rejected this claim, finding that the contention was waived because defense counsel failed to raise the issue at trial and on appeal. On July 5, 2012, appellant filed a Motion to Reopen appellant’s post-conviction case, which the court denied.

Held: Affirmed.

In *Unger v. State*, 427 Md. 383, 411 (2012), the Court of Appeals held that the failure to object to advisory jury instructions in Unger’s 1976 trial did not constitute a waiver of the right to raise the issue in post-conviction proceedings because the decisions in *Stevenson v. State*, 289 Md. 167, 169 (1980), and *Montgomery v. State*, 292 Md. 84 (1981), “set forth a new interpretation of Article 23 and established a new state constitutional standard.” Here, unlike *Unger*, which involved a trial that took place prior to the decisions in **both** *Stevenson* and *Montgomery*, appellant’s trial took place post-*Stevenson* and pre-*Montgomery*. Appellant argues that *Stevenson* and *Montgomery* should be treated as “a single, unified . . . doctrine,” and because his trial was held during the “gestational” period between the two cases, that is, after *Stevenson* but before *Montgomery*, “his attorney’s failure to object” to the court’s instructions “did not constitute a waiver.”

A review of the cases shows that the Court’s interpretation of Article 23 originated in the *Stevenson* opinion. As the Court of Appeals subsequently explained, *Montgomery* merely “reaffirmed” the “*Stevenson* interpretation of Article 23” and “reinforced” the “*Stevenson* interpretation of Article 23.” Indeed, in *Unger*, the Court deemed the decision in *Stevenson* as the relevant time-period for the waiver analysis, holding that “failure to object to advisory only instructions in criminal trials prior to *Stevenson* will not constitute a waiver.” Therefore, because appellant’s trial took place after *Stevenson*, general waiver principles apply. And because there is no dispute that appellant’s attorney did not object to the trial court’s jury instructions, his claim of error in this regard has been waived.

Ivan Potts v. State of Maryland, No. 63, September Term 2016, filed December 28, 2016. Opinion by Wright, J.

<http://www.mdcourts.gov/opinions/cosa/2016/0063s16.pdf>

CRIMINAL LAW – MERGER OF OFFENSES

CRIMINAL LAW – LIBERAL OR STRICT CONSTRUCTION; RULE OF LENITY

Facts:

Following a jury trial in the Circuit Court for Baltimore City, appellant, Ivan Potts, was convicted of wearing, carrying, and transporting a firearm; possession of a firearm after having been convicted of a crime of violence; and possession of ammunition after having been prohibited from possessing a regulated firearm. He was sentenced to eight years' incarceration, the first five without the possibility of parole, for the possession of a firearm offense, and concurrent terms of one year for each of the other crimes. This appeal followed.

Held: Affirmed.

The circuit court did not err in imposing separate sentences for possession of a firearm after having been convicted of a crime of violence and for possession of ammunition after having been prohibited from possessing a regulated firearm. The relevant statutes, Md. Code (2011 Repl. Vol., 2015 Supp.), §§ 5-133(c)(1) & 5-133.1 of the Public Safety Article (“PS”), are not predicated upon possession of the same loaded firearm. Moreover, the enactment of PS § 5-133.1 as a separate statutory provision, the plain meaning of the statutory language, and its legislative history reveal an intent on the part of the Legislature to punish possession of ammunition separately from a conviction for possession of a firearm under PS § 5-133(c)(1).

In re: J.J. and T.S., No. 2631, September Term 2015, filed December 21, 2016.
Opinion by Graeff, J.

<http://www.mdcourts.gov/opinions/cosa/2016/2631s15.pdf>

CRIMINAL PROCEDURE § 11-304 – HEARSAY – OUT-OF-COURT STATEMENT –
TENDER YEARS EXCEPCTION.

Facts:

The Wicomico Department of Social Services (the “Department”) had a long history with Ms. B. and Mr. J., the parents of J.J., age 9, and D.J., age 3. In August 2015, J.J. and D.J. were living with Mr. J.; Ms. B. was incarcerated. On August 30, 2015, the Department was contacted by the Fruitland Police Department, which had received a complaint regarding the alleged sexual abuse of J.J. The Department, along with the police and the Wicomico Child Advocacy Center, conducted a joint investigation. During an interview conducted by Tiffany Gattis, a social worker with the Department, J.J. disclosed that, on August 27 and August 29, 2015, Mr. J. “had sexual intercourse with her and forced her to perform oral sex on him.” A SAFE exam indicated that J.J. had a possible “notch” to her vaginal opening that could be indicative of sexual abuse.

On August 31, 2015, the children were placed in shelter care. On November 30, 2015, the court held a hearing pursuant to Md. Code (2015 Repl. Vol.) § 11-304 of the Criminal Procedure Article (“CP”) to address the admissibility of the out-of-court statement that J.J. made to Ms. Gattis. The court concluded that J.J.’s out-of-court statement possessed reasonable particularized guarantees of trustworthiness, and it was admissible in evidence.

On appeal, Mr. J. argued that the court erred in finding that J.J.’s out-of-court statement to Ms. Gattis was admissible because it possessed reasonable particularized guarantees of trustworthiness. In support, he argued that J.J.’s interview “did not demonstrate that she possessed the capacity to be a reliable witness,” stating that, in “the absence of evidence that J.J. could appreciate the difference between a lie and truth, and the ability to recall past events, the court could not conclude” that she was competent to testify. Mr. J. further asserted that J.J.’s statements were not trustworthy for various reasons, including that she previously had made unsubstantiated allegations of sexual abuse, she did not like Mr. J. and therefore had a motive to fabricate, and she had knowledge of sex acts due to sexual abuse by a cousin.

Held: Judgment affirmed.

Although out-of-court statements generally are excluded from evidence as hearsay, many states, including Maryland, have enacted statutes, sometimes known as the tender years exception,

designed to protect the emotional and psychological health of young children alleged to be victims of sexual abuse and to provide for the admissibility of out-of-court statements under particular circumstances. Maryland's tender years statute, Criminal Procedure § 11-304, imposes multiple conditions that must be satisfied prior to the admission into evidence of an out-of-court statement of a child under the age of 13. The statute, however, does not contain any requirement that the court first conduct a competency determination. In the absence of such a provision, this Court cannot read this requirement into the statute. Rather, pursuant to the plain language of CP § 11-304, a competency determination is not a component of the analysis required prior to admitting a child victim's out-of-court statement. Given the plain language of CP § 11-304, as well as the different concerns regarding the competency of a child witness to testify and the admissibility of a prior out-of-court statement by an abused child, we hold that a court need not make a competency determination prior to admitting a prior statement pursuant to CP § 11-304.

Here, the court did what it was required to do by specifically addressing the 13 factors as set forth in CP § 11-304. After doing that, it properly found that J.J.'s statement possessed "particularized guarantees of trustworthiness."

Denise Kowalczyk v. Mark Bresler, No. 2188, September Term 2015, filed December 2, 2016. Opinion by Eyler, James R.

<http://www.mdcourts.gov/opinions/cosa/2016/2188s15.pdf>

CIVIL CONTEMPT – CUSTODY MODIFICATION

Facts:

The parties have one child, born on May 9, 2002. Prior to 2015, by court orders, appellant had primary physical custody of the child, and the parties had joint legal custody. In October 2015, the court awarded primary physical custody of the child to appellee and ordered that appellant's visitation be supervised.

In November, 2015 appellee filed an emergency petition for contempt, alleging that appellant has violated the October orders. After an evidentiary hearing, by order dated December 3, 2015, the court found appellant in contempt of the visitation orders by engaging in unsupervised text messaging. As a purge, the court ordered that appellant had to abide by the order as modified. The modification, entered pursuant to Maryland Code, section 9-105 of the Family Law Article, provided that appellant could not have any visitation with the child until further order of the court.

Held:

A purge provision cannot be a sanction. The purge provision must permit the person to avoid a sanction. The purge provision was in fact punishment for appellant's past failure to comply with the October orders. There was no way for appellant to perform some act and avoid the sanction.

Maryland Code, section 9-105 of the Family Law Article provides that, *inter alia*, in a custody or visitation proceeding, a court, after finding that a party interfered with visitation granted by a custody or visitation order, may modify the order to ensure future compliance with the order.

This statute is directed at a party who interferes with another party's right of visitation, not a party violating his or her right of visitation. Additionally, the statute requires a finding that the modification is consistent with the best interests of the child. There was no such finding by the court.

Natasha Burak v. Mark Burak, et al., No. 2744, September Term 2014, filed December 7, 2016. Opinion by Nazarian, J.

<http://www.mdcourts.gov/opinions/cosa/2016/2744s14.pdf>

DIVORCE – PROPERTY DISTRIBUTION HEARING – INTERVENTION OF CREDITORS

Facts:

Natasha Burak (“Wife”) and Mark Burak (“Husband”) married in 2006. In 2011, they purchased a home; \$131,000 of the purchase price for the home came from Husband’s parents (the “Grandparents”). When Husband and Wife sought a divorce in 2013, they had one minor child (“Child”). At a hearing relating to marital property distribution, the Circuit Court for Montgomery County allowed the Grandparents to intervene for “judicial convenience” and determined that money the Grandparents had contributed toward the purchase of the marital home was a gift conditioned on Husband and Wife’s continued marriage and use of the home for the sole benefit of the Child, and because the divorce violated that condition, the Grandparents were entitled to recover those funds. After additional hearings, the circuit court further granted physical and legal custody of Child to the Grandparents, and ordered Husband and Wife to pay child support to the Grandparents and Wife reimburse Husband for the mortgage payments he made to maintain the marital home after he no longer lived there. Wife appealed, challenging all of the circuit court’s decisions. With regard to the divorce property distribution hearing, Wife argued that the circuit court should not have permitted the Grandparents to intervene.

Held: Dismissed in part, reversed in part, and affirmed in part.

The Court of Special Appeals held that the trial court abused its discretion when it allowed creditors to intervene in divorcing parties’ property distribution hearing. The Court considered case law from other jurisdictions and noted that the purpose of divorce proceedings is to sever the marital relationship and distribute the rights and responsibilities that grew out of it, such as the custody and support of children and the division of marital assets, not to facilitate the collection of marital debts by third parties. The Court also dismissed one of Wife’s challenges for failure to provide a transcript and affirmed the circuit court’s child custody, child support, and mortgage payment reimbursement decisions.

Cleanwater Linganore, Inc., et al. v. Frederick County, Maryland, et al., No. 1917, September Term 2015, filed December 28, 2016. Opinion by Harrell, J.

<http://www.mdcourts.gov/opinions/cosa/2016/1917s15.pdf>

MARYLAND DEVELOPMENT RIGHTS AND RESPONSIBILITIES ACT – MD. CODE, LAND USE § 7-304 – STATUTORY CONSTRUCTION

Facts:

The Eugene B. Casey Foundation (Casey) owns 634 acres in Frederick County (the County). From 1972 to 2008, the property was zoned for Planned Unit Development (PUD), designated for low density residential development, and located in a community growth area. In 2008, the then-members of the Frederick County Board of County Commissioners (BOCC) downzoned and re-designated the property for agricultural use, and rescinded its status as a growth area. Newly-elected members of the BOCC restored, in 2012, the property's designation for development and growth area status.

Casey applied for the rezoning of its property for PUD, which the BOCC approved in 2014. Contemporaneously, Casey sought to negotiate a Development Rights and Responsibilities Agreement (DRRA) with Frederick County, a contract that defines the process of development, in part, by “freezing” the application to the development, as of the DRRA’s effective date, of “local laws, rules, regulations, and policies governing the use, density, or intensity of the real property subject to [a DRRA].” Md. Code, Land Use Article (LU), § 7 304(a) (2012, 2016 Supp.). In 2014, the BOCC approved the Casey DRRA, which purported to freeze local ordinances related to “development, subdivision, zoning, comprehensive planning, moderately priced dwelling units, growth management, impact fees, water, sewer, stormwater management, environmental protection, land planning and design, adequate public facilities laws[,] and architecture.” Casey DRRA, Art. VIII § 8.1.B.

Spearheaded by Cleanwater Linganore, Inc. (CLI), Appellants challenged the BOCC’s decisions to approve the DRRA and the rezoning. Both decisions were upheld, in 2015, by the Circuit Court for Frederick County. On appeal to the Court of Special Appeals, Appellants argued first that the Casey DRRA’s “freeze provision” encompasses unlawfully an overly broad array of local ordinances that rather should be limited to the local zoning ordinance. Second, they contended that the rezoning application failed to include certain factual findings required by the Frederick County Code (FCC).

Held: Affirmed.

Responding to CLI’s argument (anticipating that Appellees may contend that the controversy was not ripe for consideration) that the case was ripe for appellate review, the Court of Special Appeals determined that, because the County amended its waterbody buffer ordinance after the execution of the DRRA and the Casey property contains streams and tributaries, Appellants’ challenge to the scope of the Casey DRRA’s “freeze provision” was ripe for judicial review. The Court held next that the relevant language of LU § 7 304(a) was ambiguous. Thus, the Court looked to the legislative history and purpose for guidance in ascertaining legislative intent. It found that the legislative history and purpose of Maryland’s DRRA Act supported a broader interpretation of the “freeze provision” than was advanced by CLI. Legislative documents unearthed by the Court revealed that the General Assembly contemplated DRRAAs could freeze a broad range of local ordinances, including fees and costs associated with water and sewer hookups, permits, and public facilities impacts—requirements more attenuated in their direct impact on the governance of the “use, intensity, or density” of a property than, for example, zoning and subdivision ordinances. The purpose of the DRRA Act, moreover, is to balance a developer’s need for legal stability and certainty during the development of a project with a local jurisdiction’s interest in fostering development projects that attain greater public benefits through negotiation than may be attained through imposition strictly of local laws. Restricting a DRRA’s “freeze provision” to the local zoning ordinance alone would undermine this balance because the local government could change other laws (than merely the zoning ordinance) that affect an on-going development project’s legal and financial stability.

The Court held also that the BOCC’s rezoning decision was supported by substantial evidence. Zoning Ordinance No. 14-20-675 (the Ordinance), the BOCC’s formal approval of the rezoning application, includes all factual findings required by the FCC that Appellants claimed were absent, albeit not necessarily under the specific heading for various sections of the County Code. Because of the overlap in the factual findings required by County law and State law, several findings required by the FCC, including information about the design and siting of buildings, compatibility with surrounding land uses, and population growth, appear scattered throughout the Ordinance.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated December 6, 2016, the following attorney has been disbarred by consent:

RICHARD WELLS MOORE, JR.

*

By an Order of the Court of Appeals dated December 14, 2016, the following attorney has been disbarred:

ERIC JOHN PARHAM

*

By an Opinion and Order of the Court of Appeals dated December 15, 2016, the following attorney has been indefinitely suspended:

ANDREW NDUBISI UCHEOMUMU

*

By an Order of the Court of Appeals dated December 15, 2016, the following attorney has been suspended by consent for six months:

EDWIN ATTEH QUARTEY

*

By an Order of the Court of Appeals dated December 16, 2016, the following attorney has been disbarred by consent:

LEONARD HAL ADOFF

*

*

By an Order of the Court of Appeals dated December 14, 2016, the following attorney has been indefinitely suspended:

ELEANOR NACE

*

This is to certify that

JING TAN

a non-admitted attorney has been reinstated in the Court of Appeals to be eligible to practice law in this State as of December 16, 2016. .

*

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

WILLIE JAMES MAHONE

*

JUDICIAL APPOINTMENTS

*

In the election held November 8, 2016, **INGRID MARIE TURNER** was elected to the Circuit Court for Prince George's County. Judge Turner was sworn in on December 9, 2016.

*

On December 7, 2016, the Governor announced the appointment of **HON. TIFFANY HANNA ANDERSON** to the Circuit Court for Prince George's County. Judge Anderson was sworn in on December 12, 2016 and fills the vacancy created by the retirement of the Hon. Larnzell Martin, Jr.

*

On December 7, 2016, the Governor announced the appointment of **HON. ROBIN DANA GILL BRIGHT** to the Circuit Court for Prince George's County. Judge Bright was sworn in on December 12, 2016 and fills a new judgeship created by the General Assembly.

*

On November 17, 2016, the Governor announced the appointment of **CHARLES CAREY DEELEY, JR.** to the Circuit Court for Baltimore County. Judge Deeley was sworn in on December 16, 2016 and fills a new judgeship created by the General Assembly.

*

On December 7, 2016, the Governor announced the appointment of **CHARLES HENRY DORSEY, III** to the Circuit Court for Baltimore City. Judge Dorsey was sworn in on December 22, 2016 and fills a new judgeship created by the General Assembly.

*

RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Ninety-First Report of the Standing Committee on Rules of Practice and Procedure was filed on December 13, 2016.

<http://www.mdcourts.gov/rules/rodocs/191ro.pdf>

UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:
<http://www.mdcourts.gov/appellate/unreportedopinions/index.html>

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