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Attorney Grievance Commission v. Christal Elizabeth Edwards, Misc. Docket AG No. 16, September Term 2016; Misc. Docket AG No. 21, September Term 2017, filed February 26, 2019. Opinion by Barbera, C.J.

https://www.courts.state.md.us/data/opinions/coa/2019/16a16ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland ("AGC"), acting through Bar Counsel, charged Christal Elizabeth Edwards ("Respondent") with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.15 (Safekeeping Property), 1.16 (Declining or Terminating Representation), 3.3(a) (Candor Toward the Tribunal), 3.4(c) (Fairness to Opposing Party and Counsel), 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law), 7.1(a) (Communications Concerning a Lawyer's Services), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a), (c), and (d) (Misconduct). These violations arose from Respondent's representation of five clients; her employment of a stenographer; and the Office of Bar Counsel's investigation of Respondent.

The Honorable Nelson W. Rupp, Jr., of the Circuit Court for Montgomery County, ("the hearing judge"), found that Respondent repeatedly neglected her clients' cases; failed to properly maintain client funds in her attorney trust account; and made material misrepresentations to clients, opposing counsel, Bar Counsel, and the courts. The hearing judge also found that Respondent's testimony was not credible. Thus, he rejected her argument that her illness (ulcerative colitis) excused her years of misconduct.

Held:

The Court of Appeals concluded that Respondent violated MLRPC 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.4, 8.1, and 8.4. Respondent's neglect of her clients' matters was a clear violation of Rule

1.1. Respondent violated Rule 1.2 by failing to abide by her clients' objectives enumerated in each retainer agreement and to keep her clients informed about the status of their respective cases. Respondent violated Rule 1.4 by failing to keep her clients reasonably and honestly informed about the status of their cases. For the same reasons that Respondent violated 1.1, 1.2., and 1.4, Respondent violated Rule 1.3. Respondent violated 1.5 by charging unreasonable fees given that she provided little to no services to her clients. Respondent's premature dispersal of client funds was a violation of Rule 1.15. Respondent violated Rule 1.16 by failing to withdraw from her representations when she claims she was too sick to perform her duties and by not promptly returning clients' files. Respondent's failure to appear at multiple hearings and failure to respond to discovery requests constituted a violation of Rule 3.4. Respondent violated Rule 8.1 by repeatedly failing to respond to Bar Counsel's lawful requests for information. Lastly, Respondent violated Rule 8.4 by taking fees prior to earning them and then retaining the unearned fees after the representation had ended; failing to provide complete, prompt responses to Bar Counsel's requests for information; failing to keep her clients apprised of the status of their legal matters; failing to represent her clients diligently; failing to inform her clients of her illness; failing to return client files; and misrepresenting that she was working on their cases.

The Court of Appeals concluded that disbarment is the appropriate sanction for Respondent's numerous and severe violations of the MLRPC.

Lawrence R. Carver v. RBS Citizens, N.A., et al., No. 45, September Term 2018, filed February 22, 2019. Opinion by Watts, J.

http://www.mdcourts.gov/data/opinions/coa/2019/45a18.pdf

FINAL JUDGMENT – NOTICE OF APPEAL – TIMELINESS – MARYLAND RULE 8-602(g)(1)(D)

Facts:

On July 19, 2013, in the Circuit Court for Cecil County, Lawrence R. Carver, Jr. ("Petitioner") and Nancy M. Carver filed a complaint against RBS Citizens, N.A. ("RBS") and Security Title Guarantee Corporation of Baltimore ("Security Title"), Respondents. Security Title and RBS filed cross-complaints against each other, raising cross-claims for indemnification and contribution. On April 12 and 13, 2017, and June 19, 2017, the circuit court conducted a bench trial. On the last day of trial, the Carvers and RBS filed a line dismissing with prejudice all of the Carvers' claims against RBS. The case proceeded on the Carvers' claims against Security Title for misrepresentation, fraud, constructive fraud, and conspiracy; and, according to an opinion that the circuit court issued later, Security Title "withheld" its cross-complaint against RBS pending the outcome of the trial.

On August 23, 2017, the circuit court entered an Opinion and Order. In the Order, the circuit court found in Security Title's favor on the claims for misrepresentation, fraud, and conspiracy, but found in the Carvers' favor on the claim for constructive fraud. As to the claim for constructive fraud, the circuit court awarded the Carvers $6,726 in damages. The Order did not mention Security Title's cross-claims against RBS.

On September 14, 2017, Security Title filed a "Motion [] to Revise or so as to Dispose of an Unresolved Issue" ("the motion to revise"), requesting that the circuit court rule on its cross-complaint against RBS. On September 22, 2017, Petitioner noted an appeal of the August 23, 2017 Opinion and Order. On May 18, 2018, the circuit court conducted a hearing on the motion to revise and ruling from the bench, denied the motion, and found the August 23, 2017 order to be a final judgment. On May 24, 2018, the circuit court issued an Order denying the motion to revise, and stating: "The [circuit c]ourt finds that its order of August 2[3], 2017 was a final order and no judgment shall be entered in favor of Security Title [] against RBS [] under its cross claim." A docket entry dated May 29, 2018, states: "Case Closed[.]" As to the disposition of the case, the Maryland Electronic Courts system provides the following "Disposition Detail": "05/29/2018 1:45 PM Final Judgment / Decree / Order[.]"

On June 1, 2018, Security Title noted an appeal, which was assigned case number different from the case number that had been assigned to the appeal noted earlier by Petitioner. On the same day, Security Title filed in the Court of Special Appeals a motion to permit a supplemental brief in the other appeal. On June 25, 2018, the Court of Special Appeals issued an order denying the

motion to permit a supplemental brief, and ordering Petitioner to show cause in writing within fifteen days as to why the "appeal should not be dismissed as [a] premature appeal from a non-final judgment." On July 10, 2018, Petitioner filed a response to the show cause order, arguing that his appeal was timely filed from a final judgment. On July 23, 2018, the Court of Special Appeals issued an order stating that the show cause order was satisfied, but ordering, "on the Court's own initiative, that the [] appeal be, and is hereby, dismissed pursuant to [Maryland] Rule 8-602(c)(1) as not allowed by law as a premature appeal from a non-final judgment."

On August 2, 2018, Petitioner filed a motion for reconsideration. On August 15, 2018, the Court of Special Appeals denied the motion for reconsideration. On August 30, 2018, Petitioner petitioned for a writ of *certiorari*, raising the following issue: "Whether the Court of Special Appeals erred by dismissing [Petitioner]'s appeal as premature." On October 9, 2018, this Court granted the petition. *See Carver v. RBS Citizens*, 461 Md. 481, 194 A.3d 935 (2018).

Held: Vacated and remanded to the Court of Special Appeals for further proceedings.

The Court of Appeals exercised its discretion to hold that, pursuant to Maryland Rule 8-602(g)(1)(D), the notice of appeal filed by Petitioner should be treated as if it were filed on the same day as, but after, the entry of the circuit court's final judgment on May 24, 2018, and that the appeal should proceed on the merits in the Court of Special Appeals. As such, the Court vacated the judgment of the Court of Special Appeals dismissing the appeal, and remanded the case to that Court with instruction to treat the notice of appeal as timely filed.

The Court of Appeals concluded, under the circumstances of the case, that the notice of appeal, filed on September 22, 2017, should be treated as if it were filed on the same day—May 24, 2018—as, but after, the entry of the final judgment pursuant to Maryland Rule 8-602(g)(1)(D). The Court determined that the criteria for applying Maryland Rule 8-602(g)(1)(D) were satisfied. The order from which the appeal was taken was not a final judgment when the notice of appeal was filed, as the August 23, 2017 Opinion and Order did not dispose of Security Title's cross-claims against RBS. Nevertheless, the circuit court would have had discretion at that time to direct the entry of final judgment pursuant to Maryland Rule 2-602(b), i.e., to "expressly determine[] in a written order that there [was] no just reason for delay" and to direct in the August 23, 2017 Order "the entry of a final judgment . . . as to one or more but fewer than all of the claims or parties[.]" Md. R. 2-602(b)(1). The record plainly reflected that a final judgment was entered by the circuit court on May 24, 2018, after the notice of appeal had been filed. As such, under the circumstances of the case, the Court determined that it was appropriate under Maryland Rule 8-602(g)(1)(D) to treat the notice of appeal as if it were filed on the same day as, but after, the entry of the judgment, *i.e.*, to treat the notice of appeal as timely and to allow the appeal to proceed on the merits.

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Gregory Smith v. Wakefield, LP, No. 28, September Term 2018, filed February 27, 2019. Opinion by McDonald, J.

Getty and Adkins JJ.., dissent

https://www.courts.state.md.us/data/opinions/coa/2019/28a18.pdf

LANDLORD-TENANT LAW – RESIDENTIAL LEASES – STATUTE OF LIMITATIONS

LIMITATIONS – MODIFYING STATUTES OF LIMITATION BY AGREEMENT

Facts:

Under the Maryland Code, Courts & Judicial Proceedings Article ("CJ"), 5-101 "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time." CJ §5-102 states that a cause of action that fits the definition of a specialty "shall be filed within 12 years after the cause of action accrues." CJ §5-102 then lists items which count as a specialty, and includes a "contract under seal."

In *Tipton v. Partner's Management Co.*, 364 Md. 419 (2001), the Court of Appeals was asked to determine whether an action to cover back rent under a residential lease, which had the word "SEAL" in parenthesis at the end of the signature line, was subject to the general statute of limitations in CJ §5-101 or was a specialty controlled by CJ §5-102. The *Tipton* court ruled that the mere inclusion of the word "SEAL" and a reference to the parties "sett[ing] their hands and seals," was not enough to turn a residential lease into a contract under seal. In one of the statements of its holding, the Court included dicta that did not apply to the case before it:

> We hold that claims for arrearages of rent under a residential lease, even a lease to which a seal is affixed, must be filed within the three-year limitation period unless the parties to the lease agree, in the body of the lease, that the lease is subject to the twelve-year limitation period of section 5-102.

364 Md. at 445. In the two other instances where the *Tipton* court restated its holding, it did not make any mention of an agreement within the body of the lease.

In *Tipton*, the Court explicitly declined to decide whether an extension of the statute of limitations for a back rent action would be "repugnant" to Real Property Article ("RP"), §8-208(d), which provides certain protections to tenants in residential leases.

In the instant case, Petitioner Gregory Smith entered into a month-to-month lease with Wakefield LP for an apartment in Baltimore City in 2007. He remained in the apartment only a few months before vacating it.

In 2015, seven years after Mr. Smith had vacated the property, Wakefield brought suit against Mr. Smith seeking to recover unpaid rent that it claimed Mr. Smith owed from 2008. When the case finally came to trial in 2018, Mr. Smith asserted that Wakefield had not filed suit within the three-year period of limitations in CJ §5-101 that applies to actions seeking back rent. Wakefield argued that the lease qualified as a "contract under seal" because of a provision in the lease that stated, "[t]his lease is under seal and is subject to the twelve-year limitation period of Section 5-102."

The District Court in Baltimore City agreed with Wakefield's argument and entered a judgment in its favor. On appeal, the Circuit Court for Baltimore City reached the same conclusion.

Held: Reversed

Wakefield cited the *Tipton* dicta that suggested that "the parties to the lease [may] agree, in the body of the lease, that the lease is subject to the twelve-year limitation period of section 5-102." 364 Md. at 445. Wakefield argued that this language provided a roadmap for extending the period of limitations for back rent actions from three years to 12 years.

The Court of Appeals reviewed the history of limitations applicable to back rent actions and noted that since 1715, "all Actions of Debt for Arrearages of Rent" were subject to a three-year limitations period. The specification that an action for back rent be subject to a three-year period of limitations remained an explicit part of Maryland statutory law through numerous recodifications for more than three centuries and was eventually incorporated in CJ §5-101 as part of code revision. The Court reiterated that "a change in a statute as part of a general recodification will ordinarily not be deemed to modify the law unless the change is such that the intention of the Legislature to modify the law is unmistakable." *Blevins v. Baltimore County*, 352 Md. 620, 642 (1999). Moreover, there was no indication that the code revision of the early 1970s intended to change the three-year limitations period.

This holding is consistent with the reasoning in *Tipton*, where the Court had emphasized that Maryland law had always applied a three-year statute of limitations to back rent claims, and no legislative history existed suggesting that the Legislature had intended to change that longstanding period of limitations. Contrary to the notion that *Tipton* created a road map for quadrupling the statute of limitations for residential leases, the analysis in *Tipton* all but closed the door to the possibility that residential leases could ever become a specialty without further legislative action. In light of this history, the Court held CJ §5-101 governs actions to recover back rent.

The Court further considered whether the parties could modify by contract the period of limitations, applying the criteria set forth in *Ceccone v. Carroll Home Services, LLC*, 454 Md. 680 (2017). In that case, the Court looked to three factors to determine whether a statute of limitations could be modified via contract: (1) whether there is a controlling statute to the

contrary, (2) whether the modification is reasonable, and (3) whether the modification is subject to other defenses such as fraud, duress, or misrepresentation.

Mr. Smith argued that RP §8-208(d)(2) is a controlling statute to the contrary in this case. It states that "[a] landlord may not use a lease or form of lease containing any provision that: [h]as the tenant agree to waive or to forego any right or remedy provided by applicable law." A three-year statute of limitations may be considered a right because it confers on the defendant the right to be free from suit based on a particular cause of action. The Court was not directed to any potential action that a tenant would foreseeably bring under the lease a decade after its termination. Additionally, the Court determined that the modification was not reasonable given the bargaining power of the landlord and the quadrupling of the length of the limitations period.

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Won Sun Lee v. Won Bok Lee, No. 1732, September Term 2017, filed January 30, 2019. Opinion by Fader, C.J.

https://mdcourts.gov/data/opinions/cosa/2019/1732s17.pdf

ENTRY OF JUDGMENT – TIME FOR FILING APPEAL

RENEWAL OF JUDGMENT – CREATION OF LIEN

RENEWAL OF JUDGMENT – EXPIRATION OF LIEN

Facts:

In 2002, Mr. Bok Lee obtained a default judgment against Mr. Sun Lee in federal district court. In 2004, Mr. Bok Lee filed a "Request to File Notice of Lien" in the Circuit Court for Howard County based on the federal judgment. The circuit court entered a "Notice of Lien of Judgment" and made the following docket entry: "Judgment entered on 06/01/04."

In July 2015, Mr. Bok Lee filed a "Request to Renew Judgment" in the circuit court, claiming that because the judgment was filed in that court in 2004, it was still subject to renewal (within 12 years from its entry). The clerk entered the renewed judgment. Thereafter, Mr. Sun Lee moved to vacate the renewal, arguing that Mr. Bok Lee's 2004 filing had created a lien, rather than a new judgment, and so could no longer be renewed because the underlying federal judgment had expired in 2014. After a hearing, the court found that the 2004 filing had created a lien, not a new judgment, but agreed with Mr. Bok Lee that it was subject to renewal.

The court then issued a final judgment. Although the judgment was entered on the docket on June 3, 2016, the entry available through the case search feature on the Maryland Judiciary's website did not identify the date of entry.

Mr. Sun Lee noted an appeal of the order on the motion to vacate on July 6, 2016. Mr. Bok Lee moved to strike the notice as untimely. The circuit court agreed, and Mr. Sun Lee appealed. In an unreported opinion, a panel of the Court of Special Appeals found that it could not conclusively determine from the record when the final judgment had been entered, if at all, or

whether Mr. Sun Lee's time to appeal had begun to run. The panel thus remanded the case to the circuit court to conduct further proceedings to determine the entry of judgment.

On remand, the circuit court found that the operative date of entry of judgment was June 3, because that was the date on which the final judgment was entered into the circuit court's electronic case management system. Mr. Sun Lee appealed and Mr. Bok Lee moved to dismiss the appeal as untimely.

Held: Reversed and remanded.

The Court of Special Appeals examined the timeliness of Mr. Sun Lee's appeal by reviewing Rule 2-601, which governs the requirements for a final judgment that triggers the time for filing an appeal. The Court concluded that there must be (1) a judgment reflected on a "separate document," (2) signed by either the court or the clerk, (3) entered onto the docket of the court's electronic case management system, and (4) made accessible to the public through the case search feature on the Judiciary website. The Court found that to enter an effective final judgment, the clerk must make an entry of it on the docket such that both the fact and date of entry of the judgment are available to the public through the case search feature on the Judiciary website. Here, the clerk's docket entry did not provide clear notice of the date on which the judgment was entered, as required by Rule 2-601(b). It thus did not trigger the beginning of the appeal period.

The Court further found that although Mr. Sun Lee's appeal was initially premature, it had subsequently been clarified by the inclusion of the date of entry. Because the notice of appeal was filed after the judgment was announced but before the docket was clarified, the notice was deemed to have been filed after, but on the same day as, the docket entry was clarified. Rule 8-602(f). The appeal was thus ripe to proceed.

Finally, the Court turned to the merits. The Court found that a judgment creditor's filing of notice of a federal judgment in a state circuit court establishes a lien, not a new money judgment. When the original judgment on which a lien is predicated expires, the lien is destroyed and neither the original judgment nor the lien it created may be renewed. Thus, the Court concluded that Mr. Bok Lee's 2004 filing in circuit court established a lien based on the federal judgment that was not subject to renewal in 2015 because the judgment had expired in 2014.

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Jeffrey Lowery v. Minh-Vu Hoang, et al., No. 2085, September Term 2016, filed February 27, 2019. Opinion by Friedman, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/2085s16.pdf

COURTS & JUDICIAL PROCEEDINGS – CJ § 5-202 – BANKRUPTCY – DENIAL OF DISCHARGE

Facts:

In 2002, Jeffrey Lowery obtained a default judgment against Ming-Vu Hoang. In 2005, Hoang filed for bankruptcy. In 2006, the Bankruptcy Court lifted the automatic stay and denied Hoang a discharge of her debts. Hoang's bankruptcy therefore remains open as the trustee marshals her assets. In 2016, Hoang recovered $87,000 in an unrelated dispute, out of which Lowery sought to recover his debt.

The circuit court held that Md. Code, Cts. & Jud. Proc. ("CJ") § 5-202 did not toll Lowery's 2002 claim, and it therefore expired in 2014 pursuant to the 12-year statute of limitations.

Held: Reversed.

CJ § 5-202 was originally enacted in 1815, but after code revisions today it states:

> If a debtor files a petition in insolvency which is later *dismissed*, the time between the filing and the *dismissal* is not included in determining whether a claim against the debtor is barred by the statute of limitations.

(emphasis added). The Court held that when a debtor enters bankruptcy and is either denied a discharge or the bankruptcy petition is dismissed, the creditor is entitled to the benefit of CJ § 5-202 because the statute was designed to benefit creditors after a debtor's unsuccessful bankruptcy.

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Vyacheslav Redkovsky v. State of Maryland, No. 1478, September Term 2017, filed February 27, 2019. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2019/1478s17.pdf

CRIMINAL LAW – SUFFICIENCY OF THE EVIDENCE – § 11-208(a)(4)(i) OF THE CRIMINAL LAW ARTICLE – DISTRIBUTION OF CHILD PORNOGRAPHY

Facts:

This case involves convictions for distribution and possession of child pornography. Corporal Roger Schwarb of the Maryland State Police Internet Crimes Against Children testified at trial as to the process by which is transferred child pornography files from a computer belonging to the appellant, Vyacheslav Redkovsky, to his state computer.

Corporal Schwarb explained the process by which users can access files via a peer to-peer file sharing network using the BitTorrent file-sharing protocol. Generally, users can search for "torrents" related to a particular search term. Thereafter, a user can utilize a BitTorrent client to search the peer-to-peer network for "hashes" associated with that torrent. Corporal Schwarb explained that he used a program called "Torrential Downpour," which is specifically designed to allow law enforcement to operate undercover, to search for child pornography files located in Maryland. Typically, BitTorrent clients obtain portions of files from multiple sources at once, but Torrential Downpour allows law enforcement to receive files from a single source download.

Corporal Schwarb downloaded four files containing child pornography from an IP address that was later determined to be linked to the appellant's computer. A subsequent search of the appellant's computer revealed "thumbcache" images of three of the downloaded files, as well as a complete video file of the fourth downloaded file in the "unallocated" space of appellant's computer. Based upon this evidence, the appellant was convicted of four counts of distribution of child pornography and four counts of possession of child pornography.

Held: Affirmed.

On appeal, appellant contended that the evidence was insufficient to support his convictions for distribution of child pornography, arguing that he did not actively transfer or distribute the videos to the State's computer and did not knowingly make the videos available for download. Appellant did not challenge the sufficiency of the evidence as to his convictions for possession of child pornography.

The Court of Special Appeals explained that the appellant was convicted of violating Md. Code (1985, 2012 Repl. Vol.) § 11-207(a)(4)(i) of the Criminal Law Article), which prohibits an

individual from knowingly distributing or possessing, with the intent to distribute any matter, visual representation, or performance that depicts a minor engaged in sexual conduct. For purposes of that section, "knowingly" is defined as "having knowledge of the character and contents of the matter," § 11-201(c), and "distribute" means to "transfer possession." § 11-201(b). The Court observed that no reported Maryland decision has addressed the question of whether the use of peer-to-peer file-sharing networks which allow users to obtain and download child pornography files from another user's computer constitutes knowing distribution under § 11-207(a)(4)(i). The Court examined the decisions of several state and federal courts that upheld convictions for distribution of child pornography where the courts held that evidence was sufficient to show that the defendant shared child pornography files using a peer-to-peer file-sharing network with the understanding that the network permitted others to download files from the defendant's computer.

The Court explained that the four child pornography videos were downloaded to Corporal Schwarb's state computer from a single source: the appellant's IP address. Additional evidence was presented linking the four video files to the appellant's computer. The Court adopted the reasoning of the overwhelming majority of other courts to address the issue and held that this evidence was sufficient to support appellant's convictions.

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Dana T. Johnson v. State of Maryland, No. 1718, September Term 2017, filed February 4, 2019. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2019/1718s17.pdf

CRIMINAL LAW– STATUTES – SENTENCING

CRIMINAL LAW– STATUTES – DUE PROCESS

Facts:

On February 9, 2017, Dana T. Johnson led police on a car chase that ended in a nearly catastrophic accident. Mr. Johnson was arrested and taken to the hospital accompanied by a police officer. As medical personnel removed his clothing, the officer discovered a large quantity of heroin in Mr. Johnson's underwear. He was charged and ultimately convicted in the Circuit Court for Baltimore County of possession of heroin, volume possession of heroin, and attempting to elude a police officer. The court sentenced him to fourteen years' imprisonment, the first five to be served without the possibility of parole under Maryland Code (2002, 2012 Repl. Vol. 2018 Cum. Supp.), § 5-612 of the Criminal Law Article ("CR"), which mandates a minimum sentence of five years without the possibility of parole for a volume heroin conviction.

Mr. Johnson appealed his conviction arguing that his sentence was illegal because, although CR § 5-612 provides a mandatory minimum, it does not provide a maximum and therefore failed to give him notice of a potential sentence beyond five years. Mr. Johnson contended that the statute's failure to provide a maximum sentence *per se* violated his right to due process. Secondarily, he argued that the State failed to adequately establish the chain of custody for the heroin seized at the hospital because they did not call at trial the nurse who removed Mr. Johnson's clothing.

Held: Affirmed

The Court of Special Appeals affirmed the circuit court's decision and found that CR § 5-612's failure to provide a maximum sentence does not *per se* violate due process. Section 5-612 originally served as a sentence enhancement provision that increased sentences for individuals convicted of possessing a threshold quantity of a controlled dangerous substance to distinguish kingpins from smaller scale drug dealers. Now, CR § 5-612 is a stand-alone offense which, the Court of Special Appeals held in *Carter v. State*, 236 Md. App. 456 (2018), does not contain an "intent to distribute" element. Due process requires criminal statutes to provide, with sufficient clarity, notice of both the conduct proscribed and the consequences for the statute's violation. The plain language of CR § 5-612 provides both. Mr. Johnson was on notice that it was illegal to possess the large quantity of heroin he had on his person and that possessing such a quantity

would result in an automatic *minimum* penalty of five years' imprisonment. From a due process perspective, it doesn't matter that the statute didn't cap the potential punishment.

The Court also held that the State met its burden for establishing the chain of custody and that the circuit court did not err in denying Mr. Johnson's request to exclude the heroin recovered at the hospital.

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Amy Fulgium v. Christopher Fulgium, No. 1753, September Term 2017, filed February 27, 2018. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2019/1753s17.pdf

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT – MARITAL SHARE OF A MILITARY PENSION

Facts:

Amy Fulgium, appellant, and Christopher Fulgium, appellee, divorced on May 30, 2017. At the time of the divorce, Mr. Fulgium was an active duty member of the United States Marine Corps, since July 12, 1999. On July 31, 2017, the Circuit Court for Prince George's County issued a Judgment of Absolute Divorce and a Constituted Pension Order relating to Mr. Fulgium's military retirement benefits. On appeal, Ms. Fulgium challenged only the award of military retirement benefits, contending that the circuit court incorrectly calculated her marital share of Mr. Fulgium's military pension. Ms. Fulgium stated that Mr. Fulgium's military pension should have been calculated using the method devised under Maryland law. Mr. Fulgium argued that the circuit court correctly calculated Ms. Fulgium's marital share of his military pension using the method required by the Uniformed Services Former Spouses' Protection Act.

Held: Vacated and Remanded

Military pensions may be considered divisible marital property "[s]ubject to the limitations" of 10 U.S.C. § 1408. These limitations include that only "disposable retired pay" may be considered marital property, and the benefit is frozen at the time of divorce, as opposed to the time of retirement. Thus, under § 1408(a)(4), when there is a final decree of divorce prior to the date of the member's retirement, disposable retired pay is "the amount of retired pay to which the member would have been entitled using the member's retired pay base and years of service on the date of the decree of divorce." To the extent this is inconsistent with the formula generally used in Maryland, it preempts state law.

The USFSPA limits what is considered disposable military retirement pay that may be divided as marital property. It permits distribution only of disposable retired pay, but it does not require distribution. A state court has discretion whether to divide the disposable retired pay, and if so, how, in accordance with state law.

The circuit court's rationale in awarding Ms. Fulgium 15% of Mr. Fulgium's disposable retired pay is not entirely clear, but based on the court's comments, the percentage of retired pay the court awarded does not appear to be correct. Accordingly, we must vacate the judgment and remand for further proceedings.

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Michael Johnson, Jr. v. Tyrone S. Francis, et al., Nos. 1425 & 2500, September Term 2017, filed November 28, 2018. Opinion by Fader, J.

https://mdcourts.gov/data/opinions/cosa/2018/1425s17.pdf

DISCOVERY – DISCOVERY IN AID OF ENFORCEMENT OF A JUDGMENT – INTERROGATORIES

DISCOVERY IN AID OF ENFORCEMENT OF A JUDGMENT – LIMITATION ON SCOPE OF DISCOVERY

LOCAL GOVERNMENT TORT CLAIMS ACT – STATUTORY INTERPRETATION – LIABILITY FOR JUDGMENTS AGAINST EMPLOYEES – SCOPE OF EMPLOYMENT

LOCAL GOVERNMENT TORT CLAIMS ACT – ENFORCEMENT OF A JUDGMENT AGAINST LOCAL GOVERNMENT

Facts:

Mr. Michael Johnson brought an action against three Baltimore City police officers alleging various torts and violations of constitutional rights. Following a jury trial, Mr. Johnson was awarded a money judgment against the officers. In an attempt to collect on his judgment, Mr. Johnson propounded interrogatories to the Baltimore Police Department ("BPD"), and served deposition subpoenas on both the commissioner of the BPD and its chief of fiscal affairs. The BPD moved for a protective order on the ground that interrogatories may only be served on parties to an action. The commissioner and chief of fiscal affairs also moved for protective orders, arguing that Mr. Johnson's discovery requests sought information that was not in aid of execution of his money judgment against the officers. The Circuit Court for Baltimore City agreed, granted the motions, and quashed the subpoenas. Mr. Johnson appealed.

Held: Affirmed.

The Court of Special Appeals first observed that the BPD was not a party to the underlying action; therefore, Mr. Johnson could not have propounded interrogatories to it under Rule 2-421, which governs pre-trial discovery. The Court then examined Rule 2-633(a)(1), which authorizes post-judgment interrogatories in aid of enforcement of a judgment, to determine whether that Rule also contains a limitation that interrogatories may only be served on parties. The Court found that the limitation in Rule 2-421 applies to Rule 2 633(a)(1). Thus, Mr. Johnson may not propound post-judgment interrogatories to the BPD.

The Court then determined that other discovery authorized by Rule 2-633 is limited to that which may aid in enforcement of a judgment creditor's existing money judgment. Such discovery must

be relevant to, and reasonably calculated to lead to the discovery of admissible evidence regarding, enforcement of that money judgment. Here, Mr. Johnson's post-judgment deposition subpoenas sought broad information regarding the assets of the BPD, an entity against which he had no judgment, and did not seek any information about the assets of the officers. The Court found Mr. Johnson's deposition subpoenas would not lead to the discovery of admissible evidence related to his judgment and so were correctly quashed.

Finally, the Court analyzed the Local Government Tort Claims Act ("LGTCA") and concluded that a local government is liable to a plaintiff for the amount of the judgment against its employee if and only if the employee who committed the tortious acts or omissions at issue was acting within the scope of his or her employment with the local government. The Court found that Mr. Johnson could bring an enforcement action against the BPD to establish its liability. In such a proceeding, the BPD could raise as a defense that its employees were not acting within the scope of their employment.

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Claudia Maria Figueroa De Landaverde, et al. v. Santiago Navarro, et al., No. 1719, September Term 2016; *Elizabeth Gomes, et al. v. Parrish Services, Inc., et al*., No. 2089, September Term 2016, filed July 26, 2018. Opinion by Salmon, J.

https://mdcourts.gov/data/opinions/cosa/2018/1719s16.pdf

NEGLIGENCE – FORESEEABILITY OF HARM – DUTY TO OTHERS

Facts:

On the evening of April 23 – 24, 2012 five people, while residing at a house located in Oxon Hill, died as a result of carbon monoxide poisoning. They were poisoned because some unknown person or persons had negligently connected the home's bathroom ventilation fan to the flue that was supposed to carry carbon monoxide from the boiler and water heater up through the ceiling and then through the roof. On the evening of April 23 – 24, 2012, one of the residents of the house evidently left the bathroom fan on and later that evening, due to the improper fan connection, carbon monoxide gas backed up and entered the rooms occupied by the five victims. About two years before the accident that took the lives of the victims, the homeowner entered into a home warranty agreement with HomeSure Services, Inc. ("HomeSure") that covered repairs to certain appliances, including the boiler and water heater. In March 2010, one of the homeowners contacted HomeSure and reported that the heating system was not working properly. HomeSure arranged for Caviness ("Caviness Mechanical Services") to respond to the complaint. An agent of Caviness went to the home one-day later and determined that there was a defective pilot control module on the boiler which he replaced. A few months later, in June 2010, the homeowner contacted HomeSure once again, this time to report that the hot water heater was not working properly. This time HomeSure arranged for Parrish Services, Inc. ("Parrish") to investigate the complaint. An employee of Parrish, on June 4, 2010, went to the home and determined that the pilot light would not stay lit because the gas control valve needed replacing. The workmen returned to the home on June 10, 2010 and installed the new valve.

Representatives of the decedents filed a lawsuit in the Circuit Court for Prince George's County against Caviness and Parrish. Plaintiffs' complain that the service technicians from Caviness and Parrish should have discovered that there were holes and rust on the flue through which the exhaust from both the boiler and hot water heater vented. This, the plaintiffs' claimed, was extremely dangerous. Therefore, the service technician should have warned the occupants of the home that carbon monoxide poisoning could occur if the flue was structurally compromised as a result of the rust and holes. Alternatively, according to the plaintiffs, the technician should have investigated the cause of the rust damage on the flue pipe and then have fixed it. Furthermore, the plaintiffs' asserted that a competent investigation into the cause of the rust damage of the flue pipe would have revealed the life threating connection between the bathroom ventilation fan exhaust and the flue for the boiler and hot water heater. Caviness and Parrish filed motions for summary judgment, which were granted by the circuit court on the grounds that the service mechanics did not owe a duty to the decedents "because . . . there was no breach of contract [in

relation] to the actions that they took in this case, and [therefore] there's no independent basis for any negligence." The circuit court emphasized that the home warranty issued by HomeSure excluded the work that the plaintiffs' allege the employees and Caviness and Parrish should have looked into and fixed. The plaintiffs' filed an appeal to the Maryland Court of Special Appeals.

Held: Reversed.

> The Court held that even though the mechanics fixed the immediate problem that caused the boiler and hot water heater to malfunction, the mechanics had a duty to the homeowner and to the persons who lived in the home to either fix the flue pipe or warn of the danger it presented, even though no contractual privity existed. If: 1) it was foreseeable that occupants of the home would be at risk of death or serious bodily harm should the defects in the flue pipe not be repaired; and 2) the mechanics worked in a profession that required them to know of the risks and dangers of carbon monoxide poisoning when a defective flue pipe existed.

The Court emphasized that contrary to the circuit court's finding, there was nothing in the home owners' warranty agreement that limited or controlled in any way, the work the agents of Caviness or Parrish could perform. Moreover, the Court noted, that Caviness and Parrish were independent contractors and the agreements at issue specifically contemplated that the independent contractors might perform work beyond what was covered by the home warranty agreement and set forth conditions including one that required, in the event that additional work were to be done not covered by the warranty, the homeowner would be charged the same rate as would be the insurer. In regard to the issue of whether a duty existed between the defendants and the decedents, the Court, quoting *Jacques v. First National Bank of Maryland*, 307 Md. 527, 541 (1986) said: "In those occupations requiring a peculiar skill, a tort duty to act with reasonable care will be imposed on those who hold themselves out as possessing the requisite skill." In the subject case, both of the service representatives who inspected the house held themselves out as possessing the requisite skill.

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Carolyn Howard v. Ben Crumlin, et al., No. 1025, September Term 2017, filed November 28, 2018. Opinion by Fader, J.

https://mdcourts.gov/data/opinions/cosa/2018/1025s17.pdf

NEGLIGENCE – PUBLIC DUTY DOCTRINE – SPECIAL RELATIONSHIP EXCEPTION

IMMUNITY – PUBLIC OFFICIAL IMMUNITY – DISCRETIONARY VERSUS MINISTERIAL DUTIES

Facts:

Nicole Sade Enoch called 911 from her apartment shortly after 2:00 a.m. Montgomery County Police Officer Ben Crumlin was dispatched, attempted to enter the building, but found the door locked. He left without making contact with Ms. Enoch. At some point, Ms. Enoch went to the roof of her apartment building and either jumped, fell, or was pushed off. Her body was discovered following morning and she was pronounced dead at the scene.

Ms. Enoch's mother, Carolyn Howard, brought suit against Officer Crumlin and the Montgomery County Chief of Police for negligence and wrongful death. Ms. Howard alleged that Officer Crumlin and the Chief of Police owed a duty to Ms. Enoch that they breached by failing to, among other things, investigate the 911 call, protect Ms. Enoch, and enter the building and make contact with Ms. Enoch. The circuit court dismissed the claims on the ground that the defendants did not owe a duty to Ms. Enoch that was enforceable in tort.

Held: Affirmed.

The public duty doctrine provides that statutory or common law duties imposed on public officials or entities that are duties "to the public as a whole," and not to any particular group or individual, are unenforceable in tort. Under the public duty doctrine, Ms. Howard could not establish that Officer Crumlin owed a duty enforceable in tort to Ms. Enoch or a group of which she was a member. The special relationship exception to the public duty doctrine did not apply where there was no allegation that Officer Crumlin and Ms. Enoch ever met or communicated with each other or that any affirmative act by Officer Crumlin induced reliance by Ms. Enoch.

Moreover, even if Officer Crumlin owed Ms. Enoch a duty, he and the Montgomery County Chief of Police are entitled to common law public official immunity. Police officers enjoy common law public official immunity for negligent acts performed during the course of their discretionary, as opposed to ministerial, duties. An officer's determination regarding what degree of action or investigation might be necessary in responding to a 911 call is a discretionary action

for which the officer enjoys immunity.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated February 22, 2019, the following attorney has been suspended:

BRANDI SHANEE NAVE

*

By and Opinion and Order of the Court of Appeals dated February 26, 2019, the following attorney has been disbarred:

CHRISTAL ELIZABETH EDWARDS

*

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The full text of Court of Special Appeals unreported opinions can be found online:

https://mdcourts.gov/appellate/unreportedopinions

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