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Harrell, J., dissents.

https://mdcourts.gov/data/opinions/coa/2021/14a20ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – CHOICE OF LAW – DISMISSAL

Facts:

The Attorney Grievance Commission ("Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action, alleging that Celestine Tatung violated the Maryland Attorneys' Rules of Professional Conduct ("MARPC"). The charges arose in connection with Mr. Tatung's representation of two clients seeking asylum in a federal immigration proceeding in Texas. The Commission also charged Mr. Tatung with violating the MARPC in connection with the Commission's investigation. Mr. Tatung filed a motion, asserting that, pursuant to the choice of law provisions under MARPC 8.5(b), the Commission was required to apply the federal regulations that address professional conduct in immigration proceedings and not the MARPC. The hearing judge denied Mr. Tatung's motion.

In connection with the Texas immigration proceeding, the hearing judge concluded that Mr. Tatung violated MARPC 1.1, 1.3, 1.5, 8.(a), 8.4(a), 8.4(c), and 8.4(d). The hearing judge further concluded that Mr. Tatung violated MARPC 8.1(a) in connection with the Commission's investigation. Mr. Tatung and the Commission both filed exceptions to the hearing judge's findings of fact and conclusions of law. As part of his exceptions, Mr. Tatung raised the choice of law issue.

Held: Dismissed.

The Court of Appeals sustained Mr. Tatung's exception to the application of the MARPC to allegations of misconduct arising in connection with the proceedings before the federal

immigration tribunal. The Court of Appeals held that, under the plain language of the choice of law provisions set forth in MARPC 8.5(b)(1), the Commission should have applied the federal immigration professional rules to the misconduct charges arising in connection with the federal immigration proceeding, not the MARPC. Specifically, the language of MARPC 8.5(b)(1) states that, when misconduct occurs in connection with a matter pending before a tribunal, the disciplinary authority "shall" apply the professional conduct rules of the jurisdiction in which the tribunal sits, unless the tribunal's own rules specify otherwise. Because the alleged misconduct occurred in connection with a matter pending before the federal immigration tribunal in Texas, the Court determined that misconduct charges should have been charged under the federal regulations and not the MARPC. In determining that dismissal of the charges was appropriate (as opposed to a remand for further proceedings), the Court noted that, had it considered the merits of the exceptions, it would have sustained most of Mr. Tatung's exceptions pertaining to the hearing judge's findings of fact and conclusions of law. Accordingly, under the facts of this case, dismissal of the charges arising from the immigration proceeding was warranted.

Although the federal immigration professional rules applied to the conduct before the federal tribunal, the Court determined that the MARPC applied to the charges of misconduct arising in connection with the disciplinary investigation. After considering the exceptions filed by both Bar Counsel and Mr. Tatung to the hearing judge's legal conclusions pertaining to violations of the MARPC arising from the Commission's investigation, the Court determined that Bar Counsel had failed to prove any violations of the MARPC. Accordingly, the Court dismissed those charges.

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Attorney Grievance Commission of Maryland v. Jennifer Lynn Leatherman, Misc. Docket AG No. 40, September Term 2020, filed August 4, 2021. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2021/40a20ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel ("Petitioner"), filed a Petition for Disciplinary and Remedial Action ("the Petition") with the Court of Appeals, alleging that Jennifer Lynn Leatherman ("Respondent") violated Maryland Attorney's Rules of Professional Conduct ("MARPC") 19-301.1 (Competence), 19-301.3 (Diligence), 19-301.4 (Communication), 19-301.5 (Fees), 19-301.15 (Safekeeping Property), 19-301.16 (Declining or Terminating Representation), 19-308.1 (Bar Admission and Disciplinary Matters), and 19-308.4 (Misconduct). These allegations stemmed from Respondent's representation of two clients in separate immigration and family law matters.

As reflected in the findings of fact rendered by the hearing judge in March 2021, the hearing judge found that Respondent accepted $2,500 and $2,000 in retainers from each client, but provided little to no legal services of value. Respondent failed to deposit and maintain client funds in an attorney trust account until earned. Respondent knowingly and intentionally re-deposited a check that caused $2,500 to be fraudulently debited from a personal bank account of a client. Respondent failed to propound discovery, failed to respond to opposing counsel's discovery requests, failed to adequately communicate with clients about the status of their cases, failed to timely deliver a client file to successor counsel, and failed to timely execute a Substitution of Counsel. Respondent made knowingly and intentionally false statements to Bar Counsel, failed to timely and completely answer Bar Counsel inquiries, and failed to participate in disciplinary proceedings.

The hearing judge did not find any mitigating factors attributable to Respondent, nor did Respondent assert that any mitigating factors applied. The hearing judge also found several aggravating factors attributable to Respondent, including prior discipline, a dishonest and selfish motive, bad faith obstruction of the disciplinary process, a refusal to acknowledge the wrongful nature of conduct, an indifference to making restitution, substantial experience in the practice of law, and a pattern of misconduct. The hearing judge concluded that Respondent violated each rule of professional conduct as alleged by Petitioner.

Respondent did not participate in proceedings before the Court of Appeals. Petitioner filed a request to waive oral argument on May 4, 2021. With no response, the Court granted Petitioner's request to waive oral argument, and considered the matters on the papers submitted.

Held: Disbarred.

On May 27, 2021, the Court of Appeals issued a *per curiam* order disbarring Respondent. The Court explained why Respondent's conduct warranted disbarment in a separate opinion filed on August 4, 2021. Based on an independent review of the record, the Court affirmed the hearing judge's legal conclusions that Respondent violated MARPC 19-301.1 (Competence), 19-301.3 (Diligence), 19-301.4 (Communication), 19-301.5 (Fees), 19-301.15 (Safekeeping Property), 19-301.16 (Declining or Terminating Representation), 19-308.1 (Bar Admission and Disciplinary Matters), and 19-308.4 (Misconduct).

The Court found that Respondent exhibited a pattern of misconduct and providing inadequate representation that jeopardized the interests of Respondent's clients and brought disrepute to the legal profession as a whole. Respondent failed to satisfy the professional standards of competence, diligence, and communication by failing to deposit and maintain client funds in an attorney trust account, failing to answer and propound discovery, and failing to adequately respond to client communications, opposing and successor counsel communications, and Petitioner's requests for information. Respondent violated the obligation to charge reasonable fees by collecting $4,500 in cumulative retainers, but performed little to no work for her clients. Respondent exhibited dishonesty by fraudulently re-depositing a check that caused an $2,500 to be debited from a client's personal checking account. Respondent also made knowing and intentional misrepresentations to successor counsel, opposing counsel, and Petitioner. The Court also sustained each of the hearing judge's aggravating factors. In aggregate, the Court determined that Respondent's conduct warranted disbarment.

Attorney Grievance Commission of Maryland v. Edward Emad Moawad, Misc. Docket AG No. 11, September Term 2020, filed August 11, 2021. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2021/11a20ago.pdf

ATTORNEY DISCIPLINE – SANCTION – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland (the "Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("Petition") with this Court alleging that Edward Emad Moawad violated the Maryland Attorneys' Rules of Professional Conduct. The Petition concerned Mr. Moawad's incompetent representation of multiple immigration clients. Mr. Moawad failed to properly file his clients' immigration forms, failed to take remedial action to correct the filing errors, failed to communicate with his clients about the status of their cases, and failed to supervise non-attorney staff to ensure their conduct was compatible with his professional obligations. Additionally, Mr. Moawad charged his clients unreasonable fees for legal services never rendered or erroneously completed and made many intentional misrepresentations to Bar Counsel.

The Petition alleged that Mr. Moawad violated the following rules of professional conduct: 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.16 (Declining or Terminating Representation), 5.3 (Responsibilities Regarding Non-Attorney Assistants), 8.1 (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct).

The Court of Appeals transmitted this matter to the Circuit Court for Montgomery County and designated the Honorable Cheryl A. McCally to conduct an evidentiary hearing and make findings of fact and recommend conclusions of law. The evidentiary hearing was held remotely on December 18, 21, 22, and 23, 2020.

The hearing judge found the following pertinent facts. Mr. Moawad was admitted to the Maryland Bar on July 20, 2015, and had been previously admitted to the Virginia Bar and the District of Columbia Bar in October 2009 and January 2011 respectively. In July 2014, Mr. Moawad established a law practice located in Chevy Chase, Maryland, under the firm name of Adams, Burton, & Moawad ("the ABM firm") with George Adams and William Burton. The ABM firm was originally formed with the understanding that Mr. Moawad would handle the immigration cases. However, as business progressed most of the firm's practice was in the field of immigration law. Thus, Mr. Adams began taking immigration cases under Mr. Moawad's tutelage. Further, Mr. Moawad was made the "Managing Director" of the firm, which involved handling all of the financial matters, including approval of legal fees assessed by the firm, and the management of the firm's attorney trust account.

The petition concerned Mr. Moawad's representation of three cases: Mr. and Ms. Togbetse, Dr. Hao, and Ms. Liang and Mr. Machado. During the representation of Mr. and Ms. Togbetse, Mr. Moawad failed to communicate the status of the case when contacted by Mr. Togbetse multiple times, failed to file Mr. Togbetse's I-485 application with the Executive Office for Immigration Review and instead filed it with United States Citizenship and Immigrations Services, and failed to complete the remedial legal services to correct the filing error that he promised to provide at no cost. In the case of Dr. Hao, Mr. Moawad erroneously filed the wrong category of EB-1 visa, resulting in significant prejudice to Dr. Hao. Additionally, Mr. Moawad was unresponsive when Dr. Hao contacted him after the filing error came to light and later refused Dr. Hao's request for a reduction in fees. Lastly, although Mr. Machado and Ms. Liang never met with an attorney at the ABM firm, they signed an engagement letter and spoke with several non-attorney staff members at the firm in an effort to get an I-601A filed. Mr. Machado's I-601A was rejected multiple times due to the firm's failure to include a fee receipt with the application. Mr. Moawad, in his managerial role, failed to consistently oversee the non-attorney staff members working on this case. Further, when Ms. Liang emailed Mr. Moawad seeking an accounting of what she had paid and a fee reduction for the firm's incompetent representation, Mr. Moawad did not respond.

In all three matters, the hearing judge found that Mr. Moawad persistently made false and misleading statements to Bar Counsel regarding his role in the representation of the complainants. Mr. Moawad submitted letters to Bar Counsel in response to the complaints, which contained many knowing and intentional misrepresentations, including that Mr. Adams was the attorney of record for the complainants and that Mr. Adams handled all the immigration work at the firm. In addition, Mr. Moawad authored letters for Mr. Adams to sign containing further misrepresentations.

Held: Disbarred.

The Court of Appeals concluded that Mr. Moawad violated the following Rules: 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 5.3 (Responsibilities Regarding Non-Attorney Assistants), 8.1 (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct).

The Court of Appeals concluded that disbarment is the appropriate sanction for Mr. Moawad's numerous violations. Mr. Moawad's conduct included a pattern of intentional misrepresentation to conceal his wrongdoing and to avoid punishment. In each of the three matters, Mr. Moawad declined to accept any responsibility for his actions, and instead deflected all blame to Mr. Adams and other non-attorneys at the ABM firm. The hearing judge correctly determined that there were multiple aggravating factors present in Mr. Moawad's case—a dishonest or selfish motive, a pattern of misconduct, multiple offenses, submission of false evidence, false statements, or other deceptive practices during the disciplinary process, vulnerability of the victim, and indifference to making restitution. Considering the numerous aggravating factors, an absence of mitigating factors, and the persistent nature of Mr. Moawad's misrepresentations to

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Bar Counsel, the Court of Appeals concluded that disbarment was the only appropriate sanction for Mr. Moawad.

Attorney Grievance Commission of Maryland v. Christopher Edward Vasiliades, Misc. Docket AG No. 10, September Term 2020, filed August 16, 2021. Opinion by Hotten, J.

https://www.courts.state.md.us/data/opinions/coa/2021/10a20ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT.

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel ("Petitioner"), filed a Petition for Disciplinary and Remedial Action with the Court of Appeals, alleging that Christopher Edward Vasiliades ("Respondent") violated Maryland Attorney's Rules of Professional Conduct ("MARPC") 19-308.1(b) (Bar Admission and Disciplinary Matters), and 19-308.4(a), (b), (c), (d), and (e) (Misconduct). The allegations stemmed from Respondent's responses and omissions during the process of his admission to the Maryland Bar, as well as personal misconduct arising thereafter. Petitioner recommended disbarment.

As reflected in the findings of fact rendered, the hearing judge concluded that Respondent violated MARPC 19-308.1(b) (Bar Admission and Disciplinary Matters), and 19-308.4(a), (b), (c), (d), and (e) (Misconduct). Respondent violated MARPC 19-308.1(b) by failing to include in his bar admission questionnaire or supplemental materials his addiction to Percocet and use of Suboxone. Respondent violated MARPC 19-308.4(b) through his criminal assault of J.T. and violation of a protective order. Respondent violated MARPC 19-308.4(c) by engaging in conduct involving deceit or misrepresentation in the failure to correct his answers on the bar admission questionnaire. Respondent violated MARPC 19-308.4(d) as a result of his multiple acts of misconduct underlying his other MARPC violations. Respondent violated MARPC 19-308.4(e) in posting biased and prejudicial language on his social media accounts which he also served to advertise his legal practice. The hearing judge found the presence of the aggravating factors of dishonest or selfish motive; pattern of misconduct; multiple offenses; and refusal to acknowledge the wrongful nature of conduct. The hearing judge also found the presence of the mitigating factors of absence of prior disciplinary record; personal and emotional problems; timely good-faith efforts to rectify the consequences of his misconduct; cooperative attitude toward the proceedings; positive reputation in the legal community; and interim rehabilitation.

Held: Disbarred.

The Court agreed that Respondent knowingly failed to supplement his answers to the bar admission document, and failed to disclose that information to the character committee in violation of MARPC 19-308.1(b). The Court determined that the violation of other Rules was also violative of MARPC 19-308.4(a). Next, the Court determined that there was clear and

convincing evidence that Respondent committed a second-degree assault and violated a protective order, in violation of MARPC 19-308.4(b). Respondent's failure to properly disclose his substance abuse issues during the bar admission process also constituted conduct involving deceit or misrepresentation in violation of MARPC 19-308.4(c). The Court further determined that the underlying conduct that violated MARPC 19-308.4(b) and (c), negatively impacted the public's perception of the legal profession, and violated MARPC 19-308.4(d). Finally, the Court determined that Respondent's social media content was replete with racial, homophobic, and sexist remarks, which were prejudicial to the administration of justice and violated MARPC 19-308.4(e). Accordingly, the Court imposed the appropriate sanction of disbarment.

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Attorney Grievance Commission of Maryland v. Gary Morgan Brooks, Misc. Docket AG No. 71, September Term 2019, filed August 27, 2021. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2021/71a19ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – REPRIMAND

Facts:

Respondent Gary Brooks operates a solo law practice in Baltimore City. On February 25, 2020, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Mr. Brooks in connection with his administration of a small estate. Bar Counsel alleged that Mr. Brooks violated Maryland Attorneys' Rules of Professional Conduct (the "MARPC") 19-301.1 (competence), 19-301.3 (diligence), 19-301.4 (communication), 19-301.5 (fees), 19 301.7 (conflict of interest), 19-301.15 (safekeeping property), 19-308.4 (misconduct), and Maryland Rule 19-407 (attorney trust account record-keeping). Bar Counsel subsequently withdrew its claim that Mr. Brooks violated Rule 19-301.7.

The Court of Appeals designated the Honorable Kendra Y. Ausby of the Circuit Court for Baltimore City to conduct an evidentiary hearing concerning the alleged violations. The hearing was conducted remotely on December 10 and 11, 2020. In her findings of fact and conclusions of law, the hearing judge concluded that Mr. Brooks violated Rules 19 301.1, 19-301.3, 19-301.4(a), 19-301.15, 19-308.4(a), and Maryland Rule 19-407. The hearing judge did not find that Mr. Brooks violated Rule 19-301.5 and did not make an explicit finding as to whether Mr. Brooks violated Rules 19-301.4(b), 19-308.4(c) and (d).

Bar Counsel and Mr. Brooks subsequently filed exceptions to the hearing judge's findings of fact and conclusions of law. On May 10, 2021, the Court heard oral argument regarding those exceptions and the parties' recommendations as to an appropriate sanction.

Held: Reprimand

The Court of Appeals held that Mr. Brooks violated Rules 19 301.1, 19-301.3, 19 301.4(a)(2) and (3), 19-301.15(a) and (c), 19-308.4(a) and (d), and Maryland Rule 19 407(a)(3). These violations were based on the following: (1) Mr. Brooks made numerous errors in his initial and supplemental filings with the Orphans' Court; (2) Mr. Brooks violated the statutory order of priority for payment of claims as required under Estates and Trusts Article (ET) § 8-105(a) when he did not use the Estate's remaining assets to pay funeral expenses as required by ET § 8-106(b) and when he paid himself $860 in attorney's fees from Estate funds without leave of the court; (3) Mr. Brooks made errors in depositing client funds when he failed to obtain informed consent,

confirmed in writing, to place those funds in his operating account; (4) Mr. Brooks failed to maintain client matter records and client ledgers as required by Maryland Rule 19-407(a)(3); and (5) Mr. Brooks failed to timely provide the beneficiaries an accounting of his time.

The Court agreed with the hearing judge's findings concerning the mitigating factors of absence of a dishonest or selfish motive, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, good character or reputation, and remorse. However, the Court sustained Bar Counsel's exception to the mitigating factor of timely good-faith efforts to make restitution or to rectify the consequences of misconduct. Although Mr. Brooks made restitution (including interest), it was not sufficiently timely to be mitigating.

The Court further agreed with the hearing judge's assessment of two aggravating factors: prior discipline and substantial experience in the practice of law. Mr. Brooks received a reprimand in 2014, and he has been practicing law full time as a solo practitioner since 2004. The Court also found a third aggravating factor: multiple violations of the MARPC.

The Court held that the appropriate sanction for Mr. Brooks's violations is a reprimand. While Mr. Brooks's handling of the Estate involved a number of errors, he did not act with a dishonest or selfish motive. In addition, he expressed significant remorse for his errors. Throughout Bar Counsel's investigation, Mr. Brooks was fully cooperative and did not impede the investigation in any way. Moreover, Mr. Brooks's contributions to the community through his pro bono legal service and his other volunteer efforts have been exceptional. The hearing judge found that Mr. Brooks possesses an "exceptionally good reputation in the legal community and in the community at large." While a suspension of some length would ordinarily be the sanction in cases like this, the Court concluded that the lesser sanction of a reprimand is appropriate under the fact and circumstances of this case.

MAS Associates, LLC, et al. v. Harry S. Korotki, Nos. 54 & 59, September Term 2020, filed August 4, 2021. Opinion by Watts, J.

McDonald and Hotten, JJ., concur.

https://www.mdcourts.gov/data/opinions/coa/2021/54a20.pdf

PROCEEDINGS ON REMAND – AUTHORITY OF TRIAL COURT

Facts:

For the second time in two years, the parties, MAS Associates, LLC ("MAS"), Petitioner/Cross-Respondent, and Harry S. Korotki ("Harry"), Respondent/Cross-Petitioner, were before the Court of Appeals in a case concerning the question of whether a partnership, operating through MAS, was created. (In the instant case, Saralee Greenberg ("Saralee") was also a Petitioner/Cross-Respondent.) In *MAS Assocs., LLC v. Korotki*, 465 Md. 457, 462-63, 473, 214 A.3d 1076, 1079, 1085 (2019), the Court addressed the question of whether competent material evidence existed to support a finding by the Circuit Court for Baltimore County, at a bench trial, that three people—Joel Wax and Mark Greenberg, who were defendants in the trial court proceeding, and Harry—intended to form a general partnership and that Harry was entitled to an award of damages on a declaratory judgment count seeking a determination that the partnership existed and the buyout price of his partnership interest. The Court held that the answer to the question was "no" and reversed the circuit court's finding and award of damages. *See id. at* 463, 214 A.3d at 1079. Specifically, the Court held that Harry had "failed to provide competent material evidence demonstrating [an] intent to form a partnership." *Id*. at 463, 214 A.3d at 1079. Accordingly, the Court held that the circuit court's finding to the contrary—*i.e.*, that the parties intended to form a partnership—was clearly erroneous and the Court reversed and remanded the case to the Court of Special Appeals, with instructions to remand to the circuit court "to adjust the damage award in a manner consistent with th[e] Opinion." *Id*. at 494, 214 A.3d at 1097. The Court's mandate stated:

> Judgment of the Court of Special Appeals reversed as to finding of partnership. Case remanded to that Court with instructions to reverse the judgment of the Circuit Court for Baltimore County and remand to the circuit court for further proceedings, consistent with this opinion. Costs to be paid by Respondent.

Id. at 494, 214 A.3d at 1097 (bolding and some capitalization omitted).

On remand, rather than vacating the monetary award to Harry for the buyout price of his partnership interest, the circuit court reopened two counts that Harry brought in the original complaint—unjust enrichment and violation of the Maryland Wage Payment and Collection Law—that had previously been adjudged at trial against Harry in favor of the defendants, including Petitioners in the case. Harry had never appealed the circuit court's determination

against him with respect to the two counts at any time. Nonetheless, on remand, the circuit court entered judgments in favor of Harry on the two counts against Petitioners in the amount of $572,766.83 (later modifying the judgments to a total of $572,705.08). Petitioners and Harry both noted appeals. Thereafter, Petitioners filed in the Court a petition for a writ of *certiorari* and Harry filed a conditional cross-petition. The Court of Appeals granted the petition and conditional cross-petition. *See MAS Assocs., LLC v. Korotki*, 472 Md. 313, 245 A.3d 992 (2021).

Ten days after the Court granted the petition and conditional cross-petition, the circuit court issued an opinion and order that minimally adjusted the prejudgment interest amount of the judgments. Both Petitioners and Harry again noted appeals. Petitioners also again filed in the Court a petition for a writ of *certiorari*, raising the same issue as raised in the earlier granted petition, and Harry again filed a conditional cross-petition, raising the same three issues he had raised in the earlier granted conditional cross-petition. The Court of Appeals granted the petition and conditional cross-petition and ordered that the case be set for argument on the same day as the earlier granted petition and conditional cross-petition. *See MAS Assocs., LLC v. Korotki*, ___ Md. ___, ___ A.3d ___, 2021 WL 1257085 (Md. Mar. 26, 2021).

Held: Reversed.

Case remanded to the circuit court with instructions to vacate the judgments against Petitioners with respect to the unjust enrichment and wage payment claims and to reinstate the original judgments in favor of Petitioners.

The Court of Appeals held that the circuit court's action on remand in reopening the counts of unjust enrichment and violation of Maryland Wage Payment and Collection Law and awarding monetary judgments in favor of Harry, against Petitioners, was not consistent with the opinion and mandate issued by the Court. Both counts had been conclusively decided against Harry at trial and in favor of Petitioners and were not at issue on appeal in the Court of Special Appeals or on review before the Court of Appeals. The circuit court's judgments against Harry with respect to the unjust enrichment and wage payment claims were final enrolled judgments.

The Court of Appeals concluded that because Harry never sought appellate review of the judgments either in the Court of Special Appeals through the filing of an appeal or cross-appeal or in the Court of Appeals through the filing of a conditional cross-petition for writ of *certiorari*, the claims could not be reopened and Harry could not receive benefit of opinion indicating that a partnership did not exist.

The Court of Appeals determined that, in addition to the finality of the judgments against Harry and the circumstance that Harry failed to seek appellate review of the judgments, the circuit court lacked the authority to take any action on remand with respect to one Petitioner (Saralee) who had not been found liable at trial on any count in the complaint brought by Harry and, as such, had not participated in any appellate proceedings. The Court concluded that, for all of these

reasons, the circuit court erred on remand in entering judgments in favor of Harry against Petitioners on the counts of unjust enrichment and violation of Maryland Wage Payment and Collection Law.

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Larry S. Chavis, et al. v. Blibaum & Associates, P.A.; *Bryione K. Moore, et al. v. Peak Management LLC*, No. 30, September Term 2020, filed August 27, 2021. Opinion by Biran, J.

Getty, J., dissents.

https://mdcourts.gov/data/opinions/coa/2021/30a20.pdf

CONSUMER PROTECTION – MARYLAND CONSUMER DEBT COLLECTION ACT

CONSUMER PROTECTION – MCDCA, CL § 14-202(8) – "WITH KNOWLEDGE" ELEMENT

CONSUMER PROTECTION – MCDCA – WRIT OF GARNISHMENT

APPELLATE PRACTICE – REMAND – CLASS CERTIFICATION

Facts:

In *Ben-Davies v. Blibaum & Assocs., P.A.*, 457 Md. 228 (2018), the Court of Appeals answered a certified question from the United States District Court for the District of Maryland regarding the correct legal rate of post-judgment interest where a landlord has obtained a judgment against a residential tenant for breach of contract. We held in *Ben-Davies* that, under Md. Code Ann., Courts and Judicial Proceedings Article ("CJ"), § 11 107(b) (2013 Repl. Vol.), "where a landlord sues a tenant for breach of contract based on a residential lease, and the trial court enters judgment in the landlord's favor against the tenant and the judgment includes unpaid rent and other expenses, a post-judgment interest rate of 6% applies[.]" *Id*. at 275.

Petitioners Bryione Moore, Albert Grantham, Patricia Grantham, Sharone Crowell, Larry S. Chavis, Laronda Green, and Cassandra Reid rented residential properties managed by Respondent Peak Management LLC ("Peak") or another entity. After Petitioners defaulted on their leases, Peak or another entity engaged Respondent Blibaum & Associates, P.A. ("Blibaum"), a law firm, to file suit against Petitioners in the District Court of Maryland for breach of contract. Blibaum obtained judgments against Petitioners that included amounts of unpaid rent. When entering the judgment in each case, the District Court of Maryland ordered post-judgment interest "at the legal rate." These judgments did not set forth a specific rate of post-judgment interest. Blibaum attempted to collect on the judgments by garnishing Petitioners' wages. In the requests for writs of garnishment made using the District Court-approved form, Blibaum included post-judgment interest at a rate of 10% as well as post-judgment court costs (the filing fees for the writs of garnishment). This collection activity occurred before we issued our opinion in *Ben-Davies*.

In January 2017, several of the Petitioners filed a putative class action lawsuit in the Circuit Court for Baltimore City against Peak in which they claimed, among other things, that Peak violated the Maryland Consumer Debt Collection Act (the "MCDCA"), Md. Code Ann., Commercial Law Article ("CL"), Title 14, Subtitle 2, and the Maryland Consumer Protection Act (the "MCPA"), CL, Title 13, by obtaining writs of garnishment that charged post-judgment interest at a rate of 10%, rather than 6%, and by including post-judgment court costs (*i.e.*, filing fees for the requests for writs of garnishment) in the amounts sought to be garnished. Specifically, Petitioners alleged a violation of MCDCA, CL § 14-202(8). In October 2018, several of the Petitioners filed a similar lawsuit against Blibaum in the Circuit Court for Baltimore County.

The circuit courts in both cases granted Respondents' motions to dismiss the MCDCA claims. In the case against Peak, the only remaining claim ultimately was for unjust enrichment. In the case against Blibaum, the circuit court dismissed the complaint in its entirety.

In the Peak case, Petitioners moved for class certification. In August 2018, the circuit court held a hearing on the motion. The circuit court denied the motion for class certification of the unjust enrichment claim in a written opinion in September 2018. Petitioners then filed a second motion for class certification and requested a hearing in December 2018. The circuit court denied the second motion for class certification without a hearing in January 2019. The circuit court subsequently ruled on the parties' cross-motions for summary judgment, resolving the unjust enrichment claims as to the named plaintiffs.

In both cases, Petitioners noted a timely appeal. On appeal, the Court of Special Appeals consolidated the two cases for decision and held that both circuit courts properly dismissed the MCDCA and MCPA claims. *Chavis v. Blibaum Assocs*., P.A., 246 Md. App. 517 (2020). The intermediate appellate court reasoned that "[t]he MCDCA, and in particular § 14-202, is meant to proscribe certain *methods* of debt collection and is not a mechanism for attacking the validity of the debt itself." *Id*. at 528 (internal quotation marks and citation omitted). The court viewed Petitioners' MCDCA claim regarding the charging of excess post-judgment interest as a challenge to the amount of debt owed, rather than as a challenge to a method of debt collection. *Id*. at 530.

The Court of Special Appeals also considered whether a judgment creditor may include the filing fee for a writ of garnishment in the amount it seeks to collect through the garnishment. Petitioners argued that the cost of the filing fee for the writ of garnishment was not a cost "actually assessed in the cause" when the judgment was ordered, as required by CL § 15-605(c). *Id*. at 531. The intermediate appellate court disagreed and held that "CL § 15-605(c) refers to the order that a judgment creditor must follow when it receives payments from a garnishee. It does not restrict the types of costs that a creditor is entitled to receive." *Id*. at 532. Important to the court was that Blibaum properly used and completed the published and approved District Court of Maryland form to request a writ of garnishment, which explicitly included a line for "[t]otal court costs, including this writ." *Id*. at 531-32.

With respect to the case against Peak, Petitioners also challenged the circuit court's denial of the second motion for class certification without a hearing. Petitioners argued that Maryland Rule 2-231 requires the court to hold an evidentiary hearing if one is requested. The intermediate appellate court rejected that argument. After examining the plain language of Maryland Rule 2-231, the court stated that "[c]ritically, the circuit court held an extensive hearing" on Petitioners' first class certification motion. *Id*. at 540. In addition, the court noted that Petitioners had "made a tactical decision to file the first motion for class certification prior to discovery." *Id*. Under such circumstances, the intermediate appellate court held that the circuit court did not abuse its discretion when it denied the second motion for class certification without a hearing. According to the Court of Special Appeals, Petitioners were not "entitled to a hearing each time they file the same motion" and "cite[d] no authority in support of their contention that they are entitled to multiple hearings on each of their motions for class certification." *Id*.

Held: Reversed and remanded for further proceedings.

The MCDCA, CL § 14-202(8), provides: "In collecting or attempting to collect on an alleged debt a collector may not: … [c]laim, attempt, or threaten to enforce a right with knowledge that the right does not exist." The Court of Appeals held that the circuit court erroneously dismissed Petitioners' claims under CL § 14-202(8) (and corresponding claims under the MCPA) based on Respondents' collection of post-judgment interest at a rate of 10%, instead of the applicable legal rate of 6%. The Court rejected the distinction that some courts have drawn between "methods" of debt collection and "amounts" of debts sought to be collected, when assessing a claim under CL § 14-202(8). A plaintiff is not precluded from invoking § 14-202(8) when the amount claimed by the debt collector includes sums that the debt collector, to its knowledge, did not have the right to collect.

The Court also held that, in order to prevail under CL § 14-202(8), a plaintiff must show that a debt collector acted with actual knowledge or with reckless disregard as to the falsity of the existence of the claimed right. Although § 14-202(8) does not impose strict liability on a debt collector for a mistake of law, neither does a debt collector escape liability under § 14-202(8) whenever, in the absence of controlling authority, the collector makes a mistake of law. In the situation where the law concerning the claimed right is unsettled, a debt collector's reckless mistake of law violates CL § 14 202(8); a non-reckless mistake of law is not a violation. A debt collector's mental state in claiming, attempting, or threatening to enforce a right is a question of fact.

The Court further held that Petitioners could not state a viable claim under CL § 14 202(8) based on Respondents' inclusion of the cost of the filing fee for a writ of garnishment in the amount sought to be garnished. A debt collector has the right to include the cost of the filing fee for a writ of garnishment in its request for such writ of garnishment.

The Court declined to decide whether the circuit court in the case against Peak abused its discretion by denying Petitioners' second motion for class certification without a hearing. Given

the possibility that the circuit court would have granted a motion for class certification, had the MCDCA and MCPA claims been before it at the time it ruled on the motion, the Court of Appeals held that, upon remand, Petitioners shall be permitted to file a new motion for class certification, which the circuit court shall deem an initial motion for class certification.

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Nationstar Mortgage LLC d/b/a Mr. Cooper, et al. v. Donna Kemp, No. 43, September Term 2020, filed August 27, 2021. Opinion by McDonald, J.

Getty, J., dissents.

https://mdcourts.gov/data/opinions/coa/2021/43a20.pdf

MORTGAGES – ASSIGNMENT

STATUTES – STATUTORY INTERPRETATION – CODE REVISION – MARYLAND USURY LAW

MARYLAND USURY LAW – PROHIBITED FEES

CONSUMER FINANCE – DEBT COLLECTION – PROHIBITED PRACTICES

CONSUMER FINANCE – DEBT COLLECTION – PROHIBITED PRACTICES – STATEMENT OF CAUSE OF ACTION

Facts:

Respondent/Cross-Petitioner Donna Kemp entered into a mortgage loan secured by a deed of trust on her home. The originator of that loan later assigned it to Petitioner/Cross-Respondent Federal National Mortgage Association ("Fannie Mae"), which contracted with the predecessor of Petitioner/Cross-Respondent Nationstar Mortgage, LLC ("Nationstar") to service the loan.

When Ms. Kemp fell behind on her mortgage payments, Nationstar declared her to be in default and began assessing her fees for drive-by inspections of the property. Eventually Ms. Kemp, Fannie Mae, and Nationstar entered into a loan modification agreement to resolve the default, but Ms. Kemp objected to the assessment of the property inspection fees. A provision of the Maryland Usury Law, Section 12-121 of the Commercial Law Article ("CL"), prohibits a "lender" from imposing such fees. Nationstar and Fannie Mae asserted that the law did not apply to them because they were not "lenders" since Fannie Mae is an assignee of the mortgage loan and Nationstar is the assignee's agent.

Ms. Kemp then filed a complaint in the Circuit Court for Montgomery County. Ms. Kemp alleged, among other claims, a violation of CL §12-121 and the Maryland Consumer Debt Collection Act ("MCDCA") CL §14-202(8). The Circuit Court granted Nationstar and Fannie Mae's motion to dismiss both claims. With respect to the CL §12-121 claim, the court reasoned Nationstar and Fannie Mae were not "lenders." With respect to the MCDCA claim, the court reasoned the letters sent by Nationstar were not an attempt to collect a debt.

In a reported opinion, the Court of Special Appeals reversed the rulings of the Circuit Court in part and affirmed them in part. The intermediate appellate court determined Nationstar and

Fannie were subject to CL §12-121 and reversed the Circuit Court's dismissal of the alleged CL §12-121 violation. However, the Court of Special Appeals affirmed the Circuit Court's dismissal of the MCDCA claim, but for different reasons. Relying on its opinions in prior cases, the intermediate appellate court held the MCDCA may not used to challenge the "validity" of a debt, as opposed to the "methods" used to collect and that Ms. Kemp's MCDCA claim addressed the "validity" of the underlying debt, rather than the "method" by which Nationstar was attempting to collect that debt.

The primary issue before the Court of Appeals was whether "lender," as defined and used throughout the Maryland Usury Law, includes assignees of a mortgage loan. A second question was whether the complaint adequately pled an MCDCA claim.

Held: Affirmed in part and reversed in part.

The Court of Appeals affirmed the Court of Special Appeals' holding that the prohibition on charging inspection fees in CL §12-121 applied to an assignee of a mortgage loan, such as Fannie Mae, and a servicer, such as Nationstar. However, the Court reversed the Court of Special Appeals' holding that Ms. Kemp did not adequately plead the MCDCA claim.

After examining the statutory context of the Usury Law, the Court determined the term "lender" was ambiguous. "Lender" as used in CL §12-121 is defined in CL §12-101(f) as "a person who makes a loan under this subtitle." However, the Court concluded it was unclear whether that definition was limited to the originator of a mortgage loan or also encompasses an assignee of the originator. Therefore, the Court considered the legislative history to discern the Legislature's intent.

The Court noted the statutory definition of "lender" was added to the law as a result of the code revision that incorporated the Usury Law in the then-new Commercial Law Article. Prior to the recodification, the common law generally gave assignees the same rights and responsibilities as its assignor. *See James v. Goldberg*, 256 Md. 520, 527 (1970). Code revision is intended to clarify, but not change, existing law. Therefore, the Court concluded that assignees, and their servicers, were subject to CL §12-121.

The Court explained that Nationstar and Fannie Mae's interpretation limiting "lender" to a loan originator would yield illogical results — it would abrogate the common law and exempt assignees from most restrictions of the Usury Law. The Court also addressed CL §12-109.2(a)(3), which states in that section "lender" includes "a lender and assignee of a lender." Noting that section specifically applied to escrow accounts, the Court determined there was no indication that the definition was intended to repeal the common law rule of assignments and instead was added due to issues arising from the assignment of escrow accounts separate from a mortgage loan. The Court also noted no Maryland appellate decision supported Nationstar and Fannie Mae's construction of CL §12-121. The unreported federal trial court cases Nationstar and Fannie Mae had relied on failed to consider the legislative history of the statute.

With respect to the MCDCA claim, the Court relied on *Chavis v. Blibaum & Associates, P.A.*, ___ Md. ___ (2021) to hold that Ms. Kemp adequately pled that claim. As determined in *Chavis*, the Court held MCDCA claims are not limited to "methods" of debt collection. In addition, the Court rejected Nationstar and Fannie Mae's assertion that the knowledge element of CL §14-202(8) was necessarily negated when the law is unsettled as to the existence of a claimed right. After examining the complaint, the Court determined Ms. Kemp pled all of the elements of a claim under CL §14-202(8).

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Mayor and City Council of Ocean City, et al. v. Commissioners of Worcester County, Maryland., et al., No. 52, September Term 2020, filed August 5, 2021. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2021/52a20.pdf

MARYLAND CONSTITUTION – ARTICLE XI-E, § 1 – HOME RULE AMENDMENT – TAX SETOFFS

Facts:

This case arises from a long-standing dispute between Ocean City and Worcester County. Ocean City taxpayers primarily receive governmental services, such as police, fire, and ambulance services, from the city despite paying taxes to both the city and the county. Since 1999, Ocean City has repeatedly sought tax setoffs from Worcester County to offset these expenditures. Worcester County has repeatedly refused to grant them; neither Ocean City nor its residents receive tax setoffs from Worcester County for the money that it spends on these governmental services. Rather than provide a tax setoff to Ocean City, Worcester County provides discretionary funding to Ocean City in the form of annual grants averaging between $4 million and $5 million per year to assist in funding Ocean City's ambulance and fire services, tourism, and other city services. Seeking mandatory tax setoffs from Worcester County, Ocean City filed suit in the Circuit Court for Worcester County.

In the circuit court, Ocean City asserted that Md. Code, Tax-Prop. ("TP") §§ 6-305 and 6-306, which give some counties like Worcester County the discretion to grant tax setoffs whereas others are mandated to grant them, are unconstitutional within the meaning of Article XI-E, § 1 of the Maryland Constitution. Moreover, Ocean City argued that both provisions should be severed so that all counties in Maryland are required to provide mandatory tax setoffs when municipalities offer services similar to those offered by the county. The circuit court granted summary judgment in favor of Worcester County on the basis that TP §§ 6-305 and 6-306 "are not 'special or local in [their] terms or in [their] effect' relating 'to the . . . government, or affairs of . . . municipal corporations,' as those terms are used in Article XI-E[,] § 1, of the Maryland Constitution[.]" *Mayor of Ocean City v. Comm'rs of Worcester Cty*., No. C-23-CV-18-000021, at 2 (Md. Cir. Ct. Worcester Cty. Oct. 19, 2018). The Court of Special Appeals affirmed.

Two questions were raised on appeal before the Court of Appeals. First, whether TP §§ 6-305 and 6-306 are constitutional under Article XI-E, § 1 of the Maryland Constitution. Second, if the statutes are unconstitutional, whether TP §§ 6-305 and 6-306 should be severed so that all municipalities are required to receive mandatory tax setoffs upon demonstrating that they provide a type of service that is also provided by the county.

Held: Affirmed.

First, the Court held that TP §§ 6-305 and 6-306 are constitutional within the meaning of Article XI-E, § 1 of the Maryland Constitution. Article XI-E, § 1 of the Maryland Constitution specifies that "the General Assembly shall act in relation to the incorporation, organization, government, or affairs of any . . . municipal corporation *only* by general laws which shall in their terms and in their effect apply alike to all municipal corporations." The Court determined that TP §§ 6-305 and 6-306 must be purely local in nature in order to relate to "the incorporation, organization, government, or affairs of any . . . municipal corporation" and concluded that they are not.

In determining what constitutes an enactment that relates to "the incorporation, organization, government, or affairs of any . . . municipal corporation" the Court applied the test set forth in *Birge v. Town of Easton*, 274 Md. 635 (1975). In relying on *Birge*, the Court determined that the tax setoff scheme set forth by the General Assembly in TP §§ 6-305 and 6-306 has significant implications for residents of Worcester County who do not reside in Ocean City. The Court noted that, under a straightforward application of *Birge*, the effect of mandating Worcester County to grant Ocean City a tax setoff would "be felt by a considerable number of people outside the city and in a rather strong degree." Thus, the Court determined that TP §§ 6-305 and 6-306 do not affect purely local matters, need not apply uniformly, and therefore do not violate Article XI-E, § 1 of the Maryland Constitution.

The Court also explained why it rejected an alternative standard suggested by Ocean City, which broadly defined "municipal affairs" within the meaning of Article XI-E as those that merely impact a municipality. In rejecting the case law cited by Ocean City, the Court distinguished issues of municipal concern from municipal affairs within the scope of Article XI-E, § 1. Specifically, the Court explained that it would be "inappropriate to allow Ocean City to mandate a county taxation scheme merely because its residents are impacted locally by county taxation rates."

Finally, the Court outlined the legislative practices of the General Assembly and Maryland county delegations. The Court explained the process of county delegations in the General Assembly to illustrate that TP §§ 6-305 and 6-306 are the result of policy decisions made by individual county delegations, and that "Ocean City's requested relief more appropriately belongs within the Worcester County Delegation of the General Assembly."

The Court declined to reach the question of severability given its holding that TP §§ 6-305 and 6-306 are constitutional under Article XI-E, § 1.

James Matthew Leidig v. State of Maryland, No. 19, September Term 2020, filed August 5, 2021. Opinion by Biran, J.

Watts, J., concurs.

https://mdcourts.gov/data/opinions/coa/2021/19a20.pdf

CONSTITUTIONAL LAW – SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION – ARTICLE 21 OF THE MARYLAND DECLARATION OF RIGHTS – RIGHT OF ACCUSED TO CONFRONT WITNESSES – FORENSIC EVIDENCE

Facts:

Petitioner James Matthew Leidig was indicted by a grand jury on charges of first-, third-, and fourth-degree burglary, theft, and malicious destruction of property arising from the alleged burglary at a home in Hagerstown, Maryland. A police officer who responded to the scene of the reported burglary collected forensic evidence from the scene by swabbing what he suspected was the burglar's blood from a window frame and a curtain. The officer submitted those swabs to the Maryland State Police Forensic Sciences Division for analysis, where forensic scientist Molly Rollo conducted a serological examination and deoxyribonucleic acid (DNA) analysis of the swabs and prepared a report detailing her analysis, results, and conclusions.

Ms. Rollo's report – titled a "LABORATORY REPORT" – contained language indicating the report's author prepared the report "with the understanding that the evidence is connected with an official investigation of a criminal matter and that the Laboratory Report will be used for official purposes only related to the investigation or a subsequent criminal prosecution" and that it "contains the conclusions, opinions and interpretations of the examiner whose signature appears on the report." Ms. Rollo's report also provided that the results were "determined by procedures which have been validated according to the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories." To be admissible in court, a forensic analysis report that includes a DNA profile must contain a statement of validation. Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 10-915(b) (2020 Repl. Vol.).

Ms. Rollo concluded in her report that blood was indicated on the swabs, and that the DNA source of the blood samples taken from both the window frame and the curtain was one male contributor. She signed the report as the "Examiner" and noted that the DNA profiles generated from the swabs would be entered into a national DNA database. A subsequent DNA database search revealed Leidig as a possible suspect.

At Leidig's trial, the State called Tiffany Keener as its only DNA expert. Ms. Keener is the forensic scientist who analyzed a reference sample collected from Leidig after he became a suspect. The State subpoenaed Ms. Rollo to the trial, but ultimately did not produce her as a witness. In Ms. Rollo's absence, the report she authored was admitted into evidence through Ms.

Keener's testimony and over Leidig's objection on hearsay and confrontation grounds. Ms. Keener's report, in which she compared the DNA profile generated by Ms. Rollo to Leidig's known profile and concluded that his DNA profile matched the samples taken at the crime scene, was likewise admitted over Leidig's objection. Ms. Keener was also permitted to testify about the findings in her report, which relayed to the jury that the DNA profile from Leidig matched the DNA profile obtained from the crime scene. There was no eyewitness testimony linking Leidig to the scene of the alleged crime.

A jury acquitted Leidig of first-degree burglary and theft and found him guilty of third- and fourth-degree burglary and malicious destruction of property.

Leidig appealed his convictions, arguing that the trial court violated his confrontation rights when it admitted DNA evidence through a witness who did not perform the serological or DNA analysis of the crime scene evidence. In an unreported opinion, the Court of Special Appeals affirmed Leidig's convictions. *Leidig v. State*, No. 463, Sept. Term 2019, 2020 WL 2128837 (Md. Ct. Spec. App. May 5, 2020). The intermediate appellate court concluded that Ms. Rollo's report was not "testimonial" because it was neither "formal" within the meaning of Justice Thomas's opinion concurring in the judgment in *Williams v. Illinois*, 567 U.S. 50 (2012), nor "accusatory" within the meaning of Justice Alito's plurality opinion in *Williams*. Accordingly, the court held that Leidig's right to confrontation was not violated when the trial court admitted Ms. Rollo's report without Ms. Rollo present for cross-examination.

Held: Reversed and remanded.

The Court of Appeals held that the admission of Ms. Rollo's report into evidence and Ms. Keener's testimony conveying the results contained in Ms. Rollo's report to the jury, without requiring that Ms. Rollo be available for cross-examination, violated Leidig's rights to confrontation and cross-examination under Article 21 of the Maryland Declaration of Rights.

The Court first noted that a sea change in Sixth Amendment jurisprudence occurred in 2004, when the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), in which the Supreme Court held that an out-of-court "testimonial statement" of a witness who does not testify at trial is admissible under the Confrontation Clause of the Sixth Amendment "only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine." *Id*. at 59. However, the Supreme Court declined to provide a "comprehensive definition of 'testimonial.'" *Id*. at 68. In a trio of cases over the next decade, the Supreme Court considered the applicability of *Crawford* to forensic test results: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Williams v. Illinois*, 567 U.S. 50 (2012). The last of these cases, *Williams v. Illinois*, resulted in a fractured decision, and revealed that there was not a majority position on the Supreme Court concerning the minimum requirements for a forensic test report to qualify as testimonial.

The Court of Appeals demonstrated the difficulty of applying the existing Sixth Amendment analysis in a case like Leidig's by applying the test adopted in *State v. Norton*, 443 Md. 517 (2015). The *Norton* Court, attempting to "better refine" the *Williams* analysis into a two-part test, held that a report is testimonial if, under Justice Thomas's concurring opinion in *Williams*, it is a "formalized statement[] bearing indicia of solemnity" (formal) or, under Justice Alito's plurality rationale, if it was "prepared with the primary purpose of accusing a targeted individual" (accusatory). *Id*. at 547. Noting Leidig's concession that Ms. Rollo's report was not accusatory and applying Justice Thomas's formality test to the facts in this case, the Court concluded that it was unable to predict with any confidence whether Ms. Rollo's report would be formal because she did not certify the accuracy of her results, but her report references the use of standards and methods that are generally accepted and does so in compliance with a statute governing the admissibility of DNA reports.

The Court concluded that Justice Thomas's formality test places form over substance to the detriment of the rights afforded under Article 21. Therefore, the Court declined to read Leidig's federal and state constitutional confrontation rights in *pari materia*, noting that Article 21 provides robust rights to confrontation and cross-examination that should not vary based on the Supreme Court's shifting interpretations of the Sixth Amendment's Confrontation Clause. The Court reasoned that Article 21 should be first in the Court's mind, as the state's highest court, and the Court should break *Williams*'s gridlock as a matter of state constitutional law. Therefore, the Court fashioned a test to "give full effect to the substance of Article 21," based on *Crawford*, the "primary purpose" standard provided in *Davis v. Washington*, 547 U.S. 813 (2006), and Justice Kagan's dissenting opinion in *Williams*, which encompassed *Crawford* and *Davis*'s teachings. The Court announced the new Article 21 standard that

> a statement contained in a scientific report is testimonial if a declarant reasonably would have understood that the primary purpose for the creation of the report was to establish or prove past events potentially relevant to later criminal prosecution. If the trial court concludes that a scientific report is testimonial under this standard, the report (and/or testimony relaying the information set forth in the report to the trier of fact) is inadmissible under Article 21 unless the declarant is unavailable to testify and the defendant previously had the opportunity to cross-examine the declarant concerning the report.

Applying the new standard, the Court concluded that Ms. Rollo provided her results and conclusions in her report to the police for the purpose of establishing past events potentially relevant to a future prosecution because she reported that the swabs taken from the area of the broken window in the Browns' home contained blood, and that the blood contained a specific DNA profile from a single male source. Those facts were relevant to a potential criminal proceeding because they tended to identify the burglar. Furthermore, Ms. Rollo's document was labeled a "Laboratory Report"; it described the relevant samples, test methodology – including that the methods satisfied the FBI's Quality Assurance Standards for Forensic Testing Laboratories – and results. The language in Ms. Rollo's report referencing the FBI's Quality Assurance Standards would lead a reasonable declarant to understand that the report's reference to the Standards served to comply with CJP § 10 915(b), and thereby rendered the report

admissible at trial. Accordingly, the report was testimonial and Ms. Rollo was required to be available for cross-examination.

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State of Maryland v. Oliver Miller, No. 24, September Term 2020, filed August 5, 2021. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2021/24a20.pdf

CONSTITUTIONAL LAW – ARTICLE 21 OF THE MARYLAND DECLARATION OF RIGHTS – SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION – RIGHT OF ACCUSED TO CONFRONT WITNESSES

Facts:

In 2008, an unidentified assailant sexually assaulted a 19-year-old woman in her Baltimore City apartment. During the Baltimore Police Department's investigation, forensic evidence was collected at the woman's apartment and from her body during a Sexual Assault Forensic Examination ("SAFE Exam"). Thomas Hebert, a forensic scientist in the Forensic Services Division, generated a DNA profile from the evidence for an "unknown male #1," the presumptive assailant. Subsequently, the case went cold.

Nine years later, the Federal Bureau of Investigation's Combined DNA Index System ("CODIS") produced Respondent Oliver Miller as a match for "unknown male #1." Miller's DNA sample had been collected and processed by another forensic analyst in connection with an unrelated sexual assault case, which facilitated the CODIS match. Thereafter, Mr. Hebert authored a new report (the "2017 report") comparing Miller's DNA profile to the DNA profiles generated from the forensic evidence collected at the woman's apartment and from her body during the SAFE Exam, and naming Miller as the source of that DNA. A grand jury subsequently charged Miller with several offenses related to the 2008 sexual assault.

At Miller's jury trial, the State did not call Mr. Hebert, who had relocated to Georgia by that time. In his stead, the State proposed to call Kimberly Morrow, who was the technical reviewer of the 2017 report. Miller's counsel moved to exclude the report, as well as Ms. Morrow's testimony about the conclusions contained in it.

Citing *State v. Norton*, 443 Md. 517 (2015), wherein the Court of Appeals held that the forensic report "could come into evidence only if Norton had a chance to cross-examine the responsible analyst," *Id*. at 552, Miller's counsel argued that the admission of evidence related to Mr. Hebert's analysis would violate the rule against hearsay and Miller's constitutional right to confrontation. The prosecutor clarified his intent not to introduce the 2017 report into evidence if Mr. Hebert did not testify, but argued that Ms. Morrow's testimony, as the report's technical reviewer, would not violate Miller's confrontation rights. The court examined Ms. Morrow outside the presence of the jury, before ruling that she would be permitted to testify over Miller's continuing objection. Ms. Morrow testified that Miller's DNA matched the DNA of "unknown male #1" whose DNA was found in the samples taken from the victim and her apartment. The

2017 report was not admitted into evidence. The jury found Miller guilty on all counts. He was sentenced to an aggregate of 109 years of imprisonment.

On appeal, Miller raised his confrontation argument under *State v. Norton*, in addition to a sentencing error. With respect to Miller's confrontation argument, the Court of Special Appeals held that the 2017 report was testimonial because it was both "formal" and "accusatory." *Miller v. State*, No. 2053, 2020 WL 737638, at *7 (Md. Ct. Spec. App. Feb. 12, 2020). Therefore, the court reasoned that the trial court violated Miller's federal and state constitutional confrontation rights by allowing Ms. Morrow to "effectively read [the contents of the 2017 report] into evidence as the basis of her expert opinion." *Id*.

Held: Reversed and remanded.

The Court of Appeals held that the trial court did not violate Miller's rights to confrontation and cross-examination by allowing Ms. Morrow to testify about the results contained in the 2017 report because her testimony did not constitute testimonial hearsay. Rather, as the report's technical reviewer, Ms. Morrow conveyed her independent expert opinion to the jury, which was based on her thorough, substantive review of the report and adoption of its results and conclusions as her own.

According to the Court, neither the Supreme Court nor the Court of Appeals, in *State v. Norton*, decided whether a technical reviewer could testify in the place of a DNA report's primary author without violating a defendant's confrontation rights. In *Bullcoming v. New Mexico*, 564 U.S. 567 (2011), the Supreme Court considered whether a "surrogate witness" who neither signed the report nor performed or observed the analysis could be permitted to testify without violating the Confrontation Clause. The Supreme Court held that Bullcoming had a right to confront the witness who prepared the report, and that the introduction of the report through an expert who neither signed the report nor performed or observed the test reported in it, does not pass constitutional muster. *Id*. at 652. In *Norton*, the testifying expert was the supervisor of the analyst. 443 Md. at 522. He was not involved in the creation or issuance of the report and he did not sign the report.

The Court highlighted the distinction between witnesses like those in *Bullcoming* and *Norton* and a technical reviewer by relying on the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing Laboratories ("FBI QAS"). The former witnesses lacked "any independent opinion" concerning the analysis contained in the forensic reports about which they testified, whereas a technical reviewer adopts a report's results and conclusions after a complete review of the same data the primary author used and is part of the process of finalizing and releasing the report. Based on the FBI QAS's requirements, to which CODIS participants must adhere, the Court concluded that the technical review process makes a technical reviewer the functional equivalent of a second author of a forensic report. Thus, a technical reviewer who complies with the FBI QAS is accountable for the substance of the report as a "responsible analyst" whom the defendant has a right to cross-examine. Ms. Morrow's technical review

required her to: (1) thoroughly review all the data that Mr. Hebert used; (2) independently determine whether or not Mr. Hebert's results and conclusions were correct; and (3) if they were correct, sign off on the report's issuance. That degree of involvement qualified her to convey the information in the 2017 report to the jury without violating Miller's rights to confrontation.

Clifford Cain, et al. v. Midland Funding, LLC, No. 38, September Term 2020; *Tasha Gambrell v. Midland Funding*, LLC, No. 39, September Term 2020, filed August 4, 2021. Opinion by Booth, J.

McDonald, J., dissents in part.

https://mdcourts.gov/data/opinions/coa/2021/38a20.pdf

COURTS & JUDICIAL PROCEEDINGS § 5-101 – STATUTES OF LIMITATION – GENERAL APPLICATION

STATUTE OF LIMITATIONS – ACCRUAL – CONTINUING HARM DOCTRINE

STATUTES OF LIMITATION – TOLLING – CLASS ACTION TOLLING OF SUCCESSIVE CLASS ACTIONS

STATUTES OF LIMITATION – TOLLING – CROSS-JURISDICTIONAL CLASS ACTION TOLLING

CIVIL PROCEDURE – APPELLATE JURISDICTION – JURISDICTION OVER A FINAL, APPEALABLE ORDER

Facts:

The two cases that are the subject of the opinion originated as separate putative class action cases filed against Midland Funding, LLC ("Midland") in Maryland circuit courts. In both cases, Petitioners Clifford Cain, Jr. and Tasha Gambrell alleged that Midland obtained judgments against the named plaintiffs and similarly situated members of the putative classes for consumer debts during a time period when Midland did not have a collection agency license under the Maryland Collection Agency Licensing Act ("MCALA"). Both actions included counts for declaratory judgment, injunctive relief, and money damages under claims for unjust enrichment, as well as alleged violations of the Maryland Consumer Debt Collection Act ("MCDCA") and Maryland Consumer Protection Act ("MCPA"). In Mr. Cain's case, the circuit court entered an order granting summary judgment to each party in part, and a separate declaratory judgment declaring the rights of the parties. In Ms. Gambrell's case, the circuit court granted Midland's motion to dismiss.

The parties in each case appealed. The Court of Special Appeals issued an unreported opinion in each case. The court held that the Court of Appeals' decision in *LVNV Funding LLC v. Finch*, 463 Md. 586 (2019) ("*Finch III*") resolved the declaratory judgment counts. Specifically, under *Finch III*, the judgments obtained when Midland was unlicensed were not void. The court also held that Petitioners were not entitled to injunctive relief because their judgments had already been satisfied. The court also determined that any remaining claims were barred by the general

three-year statute of limitations codified at Maryland Code, Courts and Judicial Proceedings Article ("CJ") § 5-101. The court further rejected Petitioners' contention that the continuing harm doctrine applied to change the accrual date for their unjust enrichment claims. Specific to Mr. Cain, the Court of Special Appeals held that the prior federal class action to which he was a putative member did not toll the statute of limitations, thereby enabling him to bring a second class action suit in state court. Finally, the court found that the circuit court entered a final judgment that was reviewable on appeal.

Held:

Affirmed in part and reversed in part as to Mr. Cain's claims. Judgment affirmed with respect to Ms. Gambrell's case.

The Court of Appeals agreed that *Finch III* disposed of the declaratory judgment claims and conclusively determined that the judgments Midland obtained while unlicensed were valid, the Court held that Petitioners' claims for unjust enrichment and statutory claims for money damages under the MCDCA and MCPA were subject to the general three-year statute of limitations. Further, the Court declined to apply the continuing harm theory to extend the accrual date for Petitioners' claims. The Court also held that the circuit court had issued a final judgment in Mr. Cain's case, which was therefore subject to appellate review.

With respect to Mr. Cain's tolling arguments, the Court declined to expand Maryland's jurisprudence involving statute of limitations tolling principles to successive class action cases—in other words, to toll the limitations period where a second class action is filed after an earlier class action case is dismissed or otherwise concluded. The Court instead adopted the reasoning and logic of the Supreme Court in *China Agritech, Inc. v. Resh*, ___ U.S. ____, 138 S. Ct. 1800 (2018). However, the Court adopted cross-jurisdictional class action tolling for later-filed individual claims. In *Philip Morris USA, Inc. v. Christensen*, 394 Md. 227 (2006), the Court had previously adopted class action tolling for intra-jurisdictional claims—that is, later-filed individual claims where a Maryland state court class action certification is denied. The Court concluded that it would recognize cross-jurisdictional tolling on the same basis. In other words, Maryland recognizes that a class action filed in another jurisdiction (i.e., another state or federal court) will toll the applicable Maryland statute of limitations for later-filed individual claims after the denial or dismissal of the putative class members' claims.

The Court further held that the same principles articulated in *Christensen* for intra-jurisdictional tolling apply to cross-jurisdictional class action tolling. Specifically, the factors the plaintiff must show when seeking class action tolling in a later-filed individual claim include that the class action complaint (1) notified the defendants of not only the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs; and (2) the individual suit must concern the same evidence, memories, and witnesses as the subject matter of the original class suit. Cross-jurisdictional class action tolling ends when there is a clear dismissal of a putative class action, including a dismissal for *forum non conveniens*, or a

denial of class action for any reason. Applying cross-jurisdictional class action tolling to Mr. Cain's individual claims, the Court determined that the claims were timely filed, reversing the lower court on that basis alone. Because Ms. Gambrell had raised the issue in her petition for *certiorari*, the Court of Appeals affirmed the judgment against her.

Darwin Naum Monroy Madrid v. State of Maryland, No. 50, September Term 2020, filed July 9, 2021. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2021/50a20.pdf

KNOWING AND VOLUNTARY WAIVER OF RIGHTS UNDER *MIRANDA v. ARIZONA* – VOLUNTARINESS OF CONFESSION – COMMON LAW OF MARYLAND – DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT TO CONSTITUTION OF UNITED STATES – ARTICLE 22 OF MARYLAND DECLARATION OF RIGHTS – DEFENSE OF DURESS

Facts:

In the Circuit Court for Prince George's County, the State, Respondent, charged Darwin Naum Monroy Madrid, Petitioner, with multiple offenses, including the murder of Gamaliel Nerio-Rico and the attempted murder of Carlos Tenorio-Aguirre. Prior to trial, during custodial interrogation in connection with the investigation of the offenses, Madrid made a statement advising a law enforcement officer that he shot Nerio-Rico, the deceased, and shot at Tenerio-Aguirre, the person who survived the shooting, *i.e.*, Madrid confessed. At trial, the State offered evidence that Madrid was a member of the gang Mara Salvatrucha, better known as MS-13, and that a higher-up in the gang ordered him to kill Tenorio-Aguirre, the surviving victim, who was a member of a rival gang known as 18th Street, and evidence of Madrid's statement.

Madrid gave the statement while being interviewed by Detective Luis Cruz of the Homicide Unit of the Prince George's County Police Department and was sixteen years old at the time. During the interview, before administering the *Miranda* rights, among other things, Detective Cruz told Madrid that, although he was not in the country legally, he still had legal rights. Detective Cruz advised Madrid of his *Miranda* rights and asked whether he understood his rights, and Madrid responded affirmatively. During the interview, Detective Cruz mentioned to Madrid that he was in danger from his own gang, MS-13, and the rival 18th Street gang. Madrid ultimately confessed. Before trial, Madrid moved to suppress the statement. The circuit court denied the motion to suppress, determining that *Miranda* had been complied with and that Madrid's confession was voluntary.

At trial, as a witness on his own behalf, Madrid testified that that he had been involved with MS-13 and performed various tasks on behalf of the gang. On the night of the murder and attempted murder, Madrid went to a nightclub that members of MS-13 frequented. While at the nightclub, Madrid telephoned a higher-up in MS-13, who was said to be located outside of the country in El Salvador, and advised that members of the 18th Street gang were in the nightclub. Madrid testified that the higher-up called him back and gave him an order. Madrid and the other member of MS-13 ran to an apartment building in which Tenorio-Aguirre lived and were provided with guns. The record indicated, and Madrid admitted, that he fatally shot Nerio-Rico

and repeatedly shot at Tenorio-Aguirre, who survived the shooting, outside of the apartment building.

At trial, Madrid testified that he participated in the murder and attempted murder because, if he had not complied, he would have been punished "the following day" or "as soon as [the punishment] could possibly be done." Madrid's counsel submitted to the circuit court written proposed jury instructions, including an instruction on duress. After the circuit court and the parties discussed the propriety of giving a jury instruction on duress, the circuit court declined to give the instruction.

The jury found Madrid guilty. Madrid appealed, and the Court of Special Appeals affirmed his convictions. *See Madrid v. State*, 247 Md. App. 693, 741, 239 A.3d 770, 798 (2020). The Court of Special Appeals held that the circuit court did not err in denying the motion to suppress or declining to give a jury instruction on duress. *See id.* at 713, 728, 239 A.3d at 781, 790. Madrid filed a petition for a writ of certiorari, which the Court of Appeals granted. *See Madrid v. State*, 472 Md. 312, 245 A.3d 991 (2021).

Held: Affirmed.

The Court of Appeals held that Madrid knowingly and voluntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) and that Madrid's confession was voluntary under common law of Maryland, Due Process Clause of Fourteenth Amendment to Constitution of United States, and Article 22 of Maryland Declaration of Rights. The Court concluded that the circumstances that Madrid was sixteen years old, an immigrant to the United States, and not given the *Miranda* advisement in writing did not render the *Miranda* advisement given verbally by Detective Cruz in Madrid's first language, Spanish, insufficient and did not render Madrid's waiver of rights involuntary. The Court determined that Detective Cruz's statement to Madrid, prior to advisement of his *Miranda* rights, that he knew Madrid was in the United States illegally, and later, statements to Madrid that he was in danger from gangs did not render Madrid's waiver of rights involuntary.

The Court of Appeals held that, as to common law of Maryland, the State met its burden to prove by a preponderance of the evidence that Madrid's confession was not the product of a promise or implication of special consideration from a prosecuting authority or other form of assistance. As to Due Process Clause and Article 22, the Court determined that the State had met its burden to prove by a preponderance of the evidence that Madrid's confession was voluntary under the totality of the circumstances and was not the result of police conduct that overbore his will and induced him to confess.

The Court of Appeals also held that the circuit court was correct in determining that the giving of a jury instruction on duress was unwarranted as there was no evidence of a present, imminent, and impending threat. The Court concluded that Madrid intentionally or recklessly placed

himself in situation in which it was reasonably foreseeable that he would be subjected to coercion and was therefore as a matter of law not entitled to the defense of duress.

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Charles Edward Wallace v. State of Maryland, No. 46, September Term 2020, filed August 16, 2021. Opinion by Hotten, J.

https://www.courts.state.md.us/data/opinions/coa/2021/46a20.pdf

CRIMINAL LAW – INEFFECTIVE ASSISTANCE OF COUNSEL.

CRIMINAL LAW – INEFFECTIVE ASSISTANCE OF COUNSEL – CUMULATIVE EFFECT THEORY.

Facts:

Petitioner, Charles Wallace, was arrested and charged following the shooting of an individual. At trial, Wallace was convicted of attempted second-degree murder, first and second-degree assault, use of a handgun in the commission of a crime of violence, possession of a regulated firearm after previously having been convicted of a crime of violence, and reckless endangerment, and subsequently sentenced. Eight years later, Wallace petitioned for post-conviction relief, asserting ineffective assistance of counsel based on the failure to object to an erroneous jury instruction relative to the attempted second-degree murder charge; conceding to the admissibility of other crimes evidence; and the failure to object to the court's prejudicial instructions regarding the firearm offense. The State conceded that Wallace merited a new trial on the erroneous jury instruction, but argued that the remaining convictions should be upheld because the other alleged errors did not constitute ineffective assistance.

Following a hearing, the post-conviction court granted Wallace's petition and awarded a new trial on all counts. The State appealed to the Court of Special Appeals, which reversed and remanded for a new trial solely on the attempted second-degree murder charge. Thereafter, Wallace appealed to the Court of Appeals, which granted *certiorari*.

Held: Court of Special Appeals affirmed.

The Court reviewed the standard for a claim of ineffective assistance of counsel from the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), which requires a defendant to prove that "his attorney's performance was deficient; and [that] he was prejudiced as a result" under objectively reasonable professional norms. *Newton v. State*, 455 Md. 341, 355, 168 A.3d 1, 9 (2017). The Court reiterated that to find prejudice, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[] or . . . fundamentally unfair or unreliable." *Id*. at 355, 168 A.3d at 9.

The Court determined that Wallace's trial counsel erred in not objecting to the erroneous jury instruction. The Court concluded that there was a reasonable probability that defense counsel's failure to object to the instruction prejudiced Wallace on the attempted second-degree murder conviction, because it lowered the threshold intent requirement necessary for the jury to convict on that charge. The Court also determined that defense counsel erred in failing to object to the insertion of the "crime of violence" language into a stipulation relative to the firearm possession charge described in *Carter v. State*, 374 Md. 693, 824 A.2d 123 (2003), but did not err by failing to object to the admission of prior bad act evidence on the issue of motive.

The Court also determined that the cumulative effect theory discussed in *Bowers v. State*, 320 Md. 416, 578 A.2d 734 (1990), that numerous deficiencies of trial counsel can, in the aggregate, amount to ineffective assistance of counsel, has an exceedingly narrow application and did not warrant a new trial. The Court differentiated *Bowers*—where trial counsel's "numerous lapses" included an unjustified failure to investigate physical evidence related to the murder, failure to present an opening statement, proffer defense testimony, numerous errors during cross-examination, and failure to request an advantageous jury instruction based on the evidence presented by the prosecution—and the instant case where trial counsel's error was limited to the failure to object to an erroneous jury instruction on the attempted second-degree murder conviction. The Court further noted that it has rejected claims of cumulative ineffectiveness of counsel because "twenty times nothing still equals nothing." *State v. Borchardt*, 396 Md. 586, 634, 914 A.2d 1126, 1154 (2007).

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Neal Lawrence, IV v. State of Maryland, No. 32, September Term 2020, filed August 10, 2021. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2021/32a20.pdf

CRIMINAL LAW – PROHIBITION ON WEARING, CARRYING, OR TRANSPORTING A HANDGUN – MENS REA

Facts:

In the early morning hours of July 29, 2017, Maryland State Police Trooper Nicolas Urbano ("Trooper Urbano") responded to the report of a red Nissan Altima stopped in the middle of Route 152 near Interstate 95 in Harford County. Upon arriving at the vehicle, Trooper Urbano noticed that the driver's side window was open and that an unresponsive male, Neal Lawrence, IV, was in the driver's seat. Trooper Urbano conducted two sternum rubs on Mr. Lawrence, in which he rubbed the sternum bone area of Mr. Lawrence's chest with his knuckles to wake him. Mr. Lawrence regained consciousness and, shortly thereafter, Trooper Urbano noticed the handle of a handgun on the floorboard of the driver's seat in between Mr. Lawrence's legs. Trooper Urbano assisted Mr. Lawrence out of the car, placed him in handcuffs, removed the handgun from the car, and observed that it was loaded with four bullets.

At the conclusion of Trooper Urbano's investigation, he placed Mr. Lawrence under arrest and drove him to the State Police Barracks in Bel Air. At the State Police Barracks, Trooper Urbano searched Mr. Lawrence's person and found crack cocaine rocks in one of his socks. The officers also conducted an intoximeter test, in which Mr. Lawrence's blood alcohol concentration registered .13. Mr. Lawrence waived his *Miranda* rights, *Miranda v. Arizona*, 384 U.S. 436 (1966), and after admitting that he had smoked "crack" a few hours before being found unresponsive, he denied knowing anything about the handgun found in the car.

The State charged Mr. Lawrence with possession of ammunition by a disqualified person; possession of a regulated firearm by a disqualified person; wearing, carrying, or transporting a handgun on or about the person; possession of cocaine; driving under the influence of alcohol; and driving while impaired by a controlled and dangerous substance. At the close of trial in the Circuit Court for Harford County, the State asked the court to propound the pattern jury instruction for wearing, carrying, or transporting a handgun on or about the person, MCPJI 4:35.2. Mr. Lawrence objected to the State's requested instruction on the ground that it improperly omits the *mens rea*—knowledge—required to convict him of that charge. The circuit court overruled Mr. Lawrence's objection and explained that the statutory elements of wearing, carrying, or transporting a handgun do not require a "knowingly" *mens rea*. Therefore, the circuit court propounded the State's requested pattern jury instruction.

The jury returned a split verdict and acquitted Mr. Lawrence of possession of ammunition and possession of a regulated firearm by a disqualified person. The jury convicted Mr. Lawrence of

wearing, carrying, or transporting a handgun on or about the person; possession of cocaine; driving under the influence of alcohol; and driving while impaired by a controlled dangerous substance.

Mr. Lawrence appealed and the Court of Special Appeals affirmed, holding that wearing, carrying, or transporting a handgun on or about the person is a strict liability offense. Mr. Lawrence filed a petition for a writ of certiorari, which this Court granted to determine whether the statutory elements of that crime include *mens rea* as an element.

Held: Affirmed.

Section 4-203(a)(1)(i) of the Criminal Law ("CR") of the Maryland Code prohibits "wear[ing], carry[ing], or transport[ing] a handgun, whether concealed or open, on or about the person." Relying on the doctrine of *stare decisis*, the Court of Appeals held that CR § 4-203(a)(1)(i) sets forth a strict liability offense.

Thirty-three years ago, in *Lee v. State*, the Court of Appeals determined that the predecessor statute to CR § 4-203(a)(1)(i) imposed strict liability for wearing, carrying, or transporting a handgun on or about the person. 311 Md. 642 (1988). Where the language of CR § 4-203(a)(1)(i) is substantially unchanged from its predecessor, the Court of Appeals held that the statute's plain language, statutory structure, and legislative history all support the *Lee* Court's holding. In light of the Supreme Court's longstanding presumption that criminal statutes include *mens rea* as an element, the Court declined to overlook the General Assembly's clear intent by reading a "knowingly" *mens rea* into the statute.

Moreover, the Court determined that, in the thirty-three years since *Lee* has been decided, the General Assembly has acquiesced to the Court's holding in that case. Thus, in checking its statutory interpretation of CR § 4-203(a)(1)(i) against the Due Process Clause of the United States Constitution and Maryland case law involving "public welfare offenses," the Court declined to depart from *stare decisis*.

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Darrell Leonard Mainor v. State of Maryland, No. 55, September Term 2020, filed August 11, 2021. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2021/55a20.pdf

CRIMINAL LAW – SENTENCING – DENIAL OF POSTPONEMENT – ABUSE OF DISCRETION

Facts:

On July 23, 2018, a violent home invasion took place in Salisbury, Maryland at the home of an elderly ninety-year-old woman, Francis Joan McCrorey. Shirley Donohoe, an eighty-one-year-old woman, was assisting Ms. McCrorey in her home that day. The two women were confronted by an unfamiliar man in the house demanding to know where the money was kept. The assailant violently struck Ms. Donohoe, knocking her temporarily unconscious, and then left the residence. Following a 911 call placed by Ms. Donohoe, the responding officer found both women injured and frightened. Both women were taken to the hospital for treatment.

Back at the scene of the incident, the officers determined that the assailant likely climbed on top of an oil tank to access a first-story roof, which allowed the assailant to access a second-floor window to enter the home. Swabs from the oil tank and from the windowsill provided sufficient DNA for an expert in forensic DNA analysis to make a match to Darrell Leonard Mainor's DNA profile. Mr. Mainor was arrested and charged with twelve criminal counts in connection with the home invasion, burglary, and assault, of Ms. Donohoe and Ms. McCrorey.

Following a two-day jury trial in July 2019, the jury found Mr. Mainor guilty of home invasion, burglary, assault against Ms. Donohoe, and reckless endangerment. The jury found Mr. Mainor not guilty of assault against Ms. McCrorey.

After polling the jury, the trial judge immediately stated, "All right. We'll go to sentencing." Mr. Mainor's defense counsel responded by requesting to postpone sentencing to undertake a long-form PSI. The trial judge indicated there was no need for a PSI, to which defense counsel responded that Mr. Mainor's mother was unable to be present that day even though she had been at the trial the prior day. In light of her absence, defense counsel emphasized the importance of providing the court with "some background information about [Mr. Mainor] in order to fashion an appropriate sentence." The trial judge then asked why Mr. Mainor's mother was unable to be present, to which defense counsel responded, "she has this thing called work that she had to attend." The trial judge speculated, "[s]o it's obviously not that important to her."

While asking the State's position on the request to postpone sentencing, the trial judge reasoned, "I think the jury is entitled to see the resolution of this case." Later, the trial judge again reiterated, "I see no need at all, any benefit at all from a long-form PSI." Defense counsel then asked the trial judge to release the jury from the jury box, although acknowledging that the jury

was free to stay if they wished. The trial judge responded, "that's not your decision. Maybe they would like to stay here . . .. They can stay right where they are, as far as I'm concerned." Defense counsel objected "to the [c]ourt's process[,]" to which the trial judge replied, "[this is a] process which I've followed for fifteen years."

At another point, defense counsel stated, "[m]y client is very young. As I indicated to the [c]ourt, I wish that his mother was capable of being here. Unfortunately, she did have to work." The trial judge answered, "[s]he could be here, [defense counsel], you know that." Defense counsel replied, "[s]he was here all day yesterday, Your Honor. It is hard for people to get away from work multiple days in a row, especially if they're in, you know, doing certain types of jobs."

The trial judge imposed a sentence of twenty years' incarceration for first-degree burglary and twenty years' incarceration for first-degree assault, to be served consecutively.

On November 5, 2020, in an unreported opinion, the Court of Special Appeals affirmed Mr. Mainor's home invasion, first-degree assault and reckless endangerment convictions, holding that there was sufficient evidence for each. The Court of Special Appeals held that the trial court's refusal to postpone sentencing was not an abuse of discretion, reasoning that, when questioned, defense counsel did not proffer any "specific details of what he expected the pre-sentence investigation to reveal" or what Mr. Mainor's mother's "hypothetical testimony would entail."

Mr. Mainor timely petitioned the Court of Appeals for a writ of certiorari, which was granted. Before the Court of Appeals was the following question:

> Did the trial court abuse its discretion and violate Petitioner's right to present information in mitigation of punishment where the court insisted that Petitioner be sentenced before it discharged the jury and refused to postpone sentencing for either a presentence investigation or the appearance and testimony of Petitioner's mother on his behalf?

Held: Reversed and remanded for re-sentencing before a different judge.

The Court of Appeals held that the trial court abused its discretion when it insisted that Mr. Mainor be sentenced before discharging the jury and refused to postpone sentencing for either a long-form presentence investigation or Mr. Mainor's mother's testimony, both of which were requested by Mr. Mainor to mitigate his punishment. By denying Mr. Mainor's request for postponement, the trial court infringed on Mr. Mainor's statutory right to present mitigating information, personally and through counsel, prior to sentencing pursuant to Maryland Rule 4-342(e).

Moreover, the denial of Mr. Mainor's request for a long-form PSI, together with the trial court's refusal to postpone sentencing to a later date where Mr. Mainor's mother could be present to give live testimony, prevented the trial court from fashioning an appropriate sentence by using "the fullest information possible concerning the defendant's life and characteristics." *Cruz-Quintanilla v. State*, 455 Md. 35, 40 (2017). By ignoring this guiding principle, and instead relying only on the age and criminal record of the defendant to fashion a lengthy sentence—particularly where Mr. Mainor identified two sources of further background information provided a postponement was granted—the circuit court abused its discretion.

Additionally considering the trial judge's remarks during sentencing, the Court of Appeals held that the trial court's consideration of the jury's presence during sentencing was an untenable reason to exercise discretion in denying the postponement request and that the trial judge's dismissive comments about Mr. Mainor's mother during sentencing could lead a reasonable person to infer the trial judge's partiality and ill-will towards the defendant. Therefore considering cumulatively the remarks and actions of the trial judge, the Court of Appeals concluded that the trial judge abused his discretion by denying Mr. Mainor's request to postpone sentencing and, consequently, reversed the judgment of the Court of Special Appeals and remanded the case to that court with instructions to vacate the sentence of the Circuit Court for Wicomico County and to remand the case to that court for re-sentencing before a different judge.

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Jonathan Torin Kidder v. State of Maryland, No. 53, September Term 2020, filed August 4, 2021. Opinion by McDonald, J.

Watts and Getty, JJ., dissent.

https://www.courts.state.md.us/data/opinions/coa/2021/53a20.pdf

CRIMINAL PROCEDURE – RIGHT TO AN IMPARTIAL JURY – JURY SELECTION

CRIMINAL PROCEDURE – JURY SELECTION

CRIMINAL PROCEDURE – JURY SELECTION – DISCRETION OF TRIAL JUDGE

CRIMINAL PROCEDURE – RIGHT TO AN IMPARTIAL JURY – JURY SELECTION – EXCLUSION OF COGNIZABLE GROUP

Facts:

Petitioner Jonathan Torin Kidder was charged with numerous crimes related to a drunk driving incident in 2018 that resulted in the death of a cyclist. Mr. Kidder stood trial later that year.

In selecting a jury for Mr. Kidder's trial, the trial judge propounded 18 *voir dire* questions, designed to elicit any biases among prospective jurors, to the 60 members of the jury panel. The trial judge took note of any prospective juror who affirmatively responded to a question. The trial judge did not immediately question any responding prospective juror to assess possible challenges to exclude them from the jury for cause. The trial judge then determined the number of prospective jurors who had not responded to any of the *voir dire* questions, and therefore who would not be subject to challenges for cause. Finally, the trial judge conducted individual questioning of prospective jurors who had indicated a response to a *voir dire* question only to the extent necessary to obtain the requisite number of prospective jurors to seat a jury (taking into account the peremptory strikes the parties were entitled to exercise) – 24. Fourteen prospective jurors who had responded to *voir dire* questions were individually questioned, five of whom were eventually seated on Mr. Kidder's jury.

The jury found Mr. Kidder guilty of all charges. Mr. Kidder appealed that verdict, arguing, among other things, that the jury selection method used by the trial judge violated his right to an impartial jury by impermissibly excluding numerous groups of people from his jury without making specific findings of bias or other cause. The Court of Special Appeals affirmed the verdict but remanded for sentencing on one count.

Held: Affirmed

The Court of Appeals held that the jury selection method used by the trial judge did not violate Mr. Kidder's constitutional right to an impartial jury drawn from a fair cross-section of the community. Nor did it violate a statute incorporating that constitutional right, Maryland Code, Courts & Judicial Proceedings Article ("CJ"), §8-404. However, the Court instructed trial judges to refrain from using the method as it might give priority to inattentive jurors and be inconsistent with the principle that juries be made more representative and inclusive through random selection.

The Court explained that under Article 21 of the Maryland Declaration of Rights and the Sixth Amendment to the federal Constitution a jury must be drawn from a fair cross-section of the community, but the jury ultimately seated need not contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community. Thus, in reviewing a jury selection method used by a trial judge, an appellate court asks whether that method systematically or intentionally excluded a cognizable group.

The Court observed that no juror was excluded by the jury selection method used by the trial judge without being excused for cause or struck by a party using a peremptory strike. Rather, the method amounted to a re-ordering of the jury panel, which a trial judge has the discretion to perform under Maryland Rule 4-312(f) and (g)(1). The Court rejected Mr. Kidder's argument that the selection method "constructively excluded" some of the prospective jurors who responded to any *voir dire* questions, noting that 14 who did so were subject to individual questioning and five were eventually seated on Mr. Kidder's jury. The Court noted that only 24 prospective jurors, at the most, of the 60 summoned for Mr. Kidder's trial were needed to seat a jury and thus that it was inevitable that some would not be reached in the selection process. The prospective jurors not individually questioned were not excluded from the jury; they were simply not reached.

The Court held that, even assuming *arguendo* that some jurors were excluded from the jury, the record did not establish the exclusion of any cognizable group. In distinguishing a cognizable group for the purposes of the right to an impartial jury, the Court looked for defining and limiting factors, cohesion, and whether exclusion of the group would result in bias. The Court found that Mr. Kidder offered no analysis as to how any of the prospective jurors who responded to any *voir dire* questions but were not reached in the selection process formed a cognizable group. The Court found it implausible that those responding to any particular *voir dire* question shared a common thread of similar attitudes, ideas, or experiences – as had been found for cognizable groups in other cases.

Last, the Court found no violation of CJ §8-404(b), which concerns when an individual summoned for jury service may be "struck" from a particular jury. The Court held, based upon a review of the legislative history of the statute, that the same standard applies to an alleged violation of CJ §8-404(b) as applies to Mr. Kidder's constitutional argument. Because the Court had already determined, in response to Mr. Kidder's constitutional argument, that no prospective juror was "struck" from Mr. Kidder's jury (other than those excused for cause or as a result of a party's peremptory strike) the Court held that the jury selection method used by the trial judge did not violate CJ §8-404(b).

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E.N. v. T.R., No. 44, September Term 2020, filed July 12, 2021. Opinion by Watts, J.

Barbera, C.J., and Biran, J., dissent.

https://www.mdcourts.gov/data/opinions/coa/2021/44a20.pdf

DE FACTO PARENTHOOD – TWO LEGAL PARENTS – CONSENT TO PROSPECTIVE DE FACTO PARENT'S FORMATION AND ESTABLISHMENT OF PARENT-LIKE RELATIONSHIP WITH CHILD

Facts:

E.N., Petitioner, is the biological mother of two minor children, G.D. and B.D. D.D. is the biological father of the children. The four lived together as a family until late 2009, when D.D. was incarcerated for drug offenses. Thereafter, the children lived with E.N. and E.N.'s mother, their maternal grandmother. In late 2013, D.D. was released from prison and entered into a new relationship with T.R., Respondent, to whom he was engaged at the time of the trial in this case. In 2015, D.D. and T.R. purchased a home together and later that year the children moved in with the couple. The children lived with D.D. and T.R. until late 2017, when D.D. was incarcerated again for drug offenses, this time in a federal prison in Pennsylvania. After D.D.'s incarceration, the children continued to live with T.R. In November 2017, while T.R. and the children were visiting the children's paternal grandparents, E.N. arrived and sought the return of her children. E.N. was rebuffed by T.R. and law enforcement officers were called to the house. The children returned from the grandparents' home to T.R.'s house the following day.

In February 2018, T.R. filed in the Circuit Court for Prince George's County a complaint for custody, seeking sole legal and physical custody of the children. E.N. filed a counter-complaint, seeking sole legal and physical custody of the children. Following a five-day trial on the merits, the circuit court granted T.R.'s complaint for custody and denied E.N.'s complaint. Despite expressly determining that E.N. did not consent to or foster the children's relationship with T.R. or even know T.R., the circuit court concluded that the four factors of the test set forth in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421, 435-36 (Wis. 1995), which the Court of Appeals adopted in *Conover v. Conover*, 450 Md. 51, 85, 74, 146 A.3d 433, 453, 446-47 (2016), were satisfied and T.R. was a *de facto* parent of the children. The circuit court granted joint legal custody of the children to T.R. and E.N., with tie-breaking authority awarded to T.R., and granted sole physical custody of the children to T.R., with visitation for E.N., the children's biological mother.

E.N. appealed and the Court of Special Appeals affirmed the circuit court's judgment. *See E.N. v. T.R.*, 247 Md. App. 234, 252, 236 A.3d 670, 680 (2020). The Court of Special Appeals held "that a de facto parent relationship may be established by the conduct of only one legal parent" even where there are two extant legal parents and that a *de facto* parent has an equal fundamental

constitutional right with the legal parents concerning the care, custody, and control of a child. *Id.* at 237, 247, 236 A.3d at 672, 678. E.N. filed a petition for a writ of certiorari, which the Court of Appeals granted. *See E.N. v. T.R.*, 471 Md. 519, 242 A.3d 1117 (2020).

Held: Reversed.

Case remanded to the Court of Special Appeals with instruction to remand to the circuit court for that court to vacate the judgment awarding joint legal custody and sole physical custody to T.R.

The Court of Appeals held that, under first factor of the H.S.H.-K. test adopted by the Court in Conover for establishment of *de facto* parenthood —whether the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child—where there are two legal (biological or adoptive) parents, a prospective *de facto* parent must demonstrate that both legal parents consented to and fostered such a relationship, or that a non-consenting legal parent is unfit or exceptional circumstances otherwise exist. To declare the existence of a *de facto* parentship based on the consent of only one legal parent and ignore whether the second legal parent has consented to and fostered the establishment of a parent-like relationship, or is a fit parent or whether exceptional circumstances exist undermines a parent's constitutional right to the care, custody, and control of the parent's children. Disregarding whether both legal parents have consented to and fostered a prospective *de facto* parent's parent-like relationship with a child, or that the parent is otherwise unfit or exceptional circumstances exist, runs afoul of the parent's constitutional rights and basic family law principles.

The Court of Appeals held that a legal parent's actual knowledge of and participation in the formation of a third party's parent-like relationship with a child may occur either through the parent's express or implied consent to and fostering of the relationship. The Court concluded that so long as the consent is knowing and voluntary and would be understood by a reasonable person as indicating consent to the formation of a parent-like relationship between a third party and a child, the first factor of the *de facto* parent test may be satisfied by a legal parent's express or implied consent. Inquiry into whether a legal parent impliedly consented to and fostered a potential *de facto* parent's formation of a parent-like relationship with a child is fact-specific inquiry to be determined on case-by-case basis. The Court concluded that permitting *de facto* parenthood to be established based on the express or implied consent of both legal parents, where there are two existing legal parents, or a showing of unfitness or exceptional circumstances strikes the appropriate balance between a parent's fundamental right to raise child and the best interest of child.

The Court of Appeals concluded that, it was clear that, although D.D. may have consented to and fostered T.R.'s formation and establishment of a parent-like relationship with his and E.N.'s children, E.N. did not consent to and foster the relationship between her children and T.R., (or even know T.R.). Because T.R. failed to satisfy the first factor of the H.S.H.-K. test, the circuit

court erred in concluding that she was a *de facto* parent to the children and in granting her joint legal custody and sole physical custody.

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Robert F. Cherry, Jr., et al. v. Mayor and City Council of Baltimore City, No. 36, September Term 2020, filed August 16, 2021. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2021/36a20.pdf

MUNICIPAL CORPORATIONS – PENSIONS AND RETIREMENT BENEFITS – BREACH OF CONTRACT – VESTED BENEFITS – RESERVED POWER

Facts:

In 1962, Baltimore City established a pension plan to provide pension and retirement benefits for officers and employees of the Baltimore Fire and Police Departments (the "Plan"). The Plan's terms and benefits are set forth in Article 22 of the Baltimore City Code. Section 42 of the Article establishes the City's contractual relationship with the Plan's members, providing that "the benefits provided thereunder shall not thereafter be in any way diminished or impaired" after the effective date of the ordinance or the date on which the employee becomes a member of the Plan.

In 1983, a variable benefit feature (the "Variable Benefit") was added to the Plan to provide a post-retirement cost-of-living adjustment ("COLA") for retirees and beneficiaries with more than two years of retirement. The Variable Benefit payments were not guaranteed by the City and were contingent on the annual investment performance of the Plan's assets, which fluctuated with financial market performance. Beginning in February 2002, the Plan's actuary became concerned about the negative impact that the Variable Benefit had on the Plan's assets and advised the City to consider alternatives to the Variable Benefit.

By 2005, the Plan had accumulated net losses amounting to $412.8 million, due in large part to the dot.com bubble burst in the early 2000s. In Fiscal Years 2009 and 2010, the City closed multi-million-dollar budget deficits due to the Great Recession, the record snowfall in 2010, unforeseen reductions in State aid, and revenue shortfalls, which caused the City to make cuts to core services and use $30 million of emergency reserve funds. The City faced a $121 million budget deficit for Fiscal Year 2011.

In June 2010, the City Council passed, and the Mayor signed into law, Ordinance 10-306. The Ordinance made several significant changes to the Plan's terms and benefits. Several City police officers and firefighters filed a federal class action lawsuit against the Mayor and City Council of Baltimore alleging federal constitutional violations and that the City breached its contract with the Plan members by enacting Ordinance 10-306. After the federal court directed the plaintiffs to refile their state law claims in state court, the plaintiffs commenced a class action lawsuit in the Circuit Court for Baltimore City, alleging claims for declaratory relief and that the City breached its contract with the Plan members by replacing the Variable Benefit with a tiered COLA and by breaking its promise under Section 42 not to diminish or impair pension benefits.

The circuit court certified the class in addition to three sub-classes: Plan members who retired from service before the enactment of Ordinance 10-306 (the "Retired Sub-class"); currently employed members who had reached eligibility to retire but who had not yet retired (the "Retirement-Eligible Sub-class"); and currently employed members who had not yet reached retirement eligibility (the "Active Sub-class"). After a bench trial, the circuit court ruled that the City breached its contract with the Retired and Retirement-Eligible Sub-classes, finding that Ordinance 10-306 retrospectively divested the members of those sub-classes of benefits they had earned. The court awarded more than $30 million in damages to members of the Retired and Retirement-Eligible Sub-classes. However, the circuit court found no breach of the City's contract with the Active Sub-class, ruling that Ordinance 10-306 did not affect their rights to benefits, which had not yet vested, but rather made permissible prospective changes to the Plan.

Held: Affirmed.

The Court of Appeals held that the City did not breach its contract with Plan members by "underfunding" the Plan. The plain language of the Plan does not prohibit underfunding of retiree reserves necessary to pay all benefits to which Plan members will be entitled over time. To the contrary, Article 22 requires funding in any given year that is sufficient to pay the pensions and other benefits due to members in the "then-current year." Art. 22, § 36(d)(5). It is undisputed that the City never breached its obligation to pay all pensions and benefits due to members in any given year.

The Court next held that, by enacting Ordinance 10-306, the City breached its contract with the Retired and Retirement-Eligible sub-classes, but did not breach its contract with the Active sub-class. Relying on *Saxton v. Bd. of Trs. of the Fire & Police Emps. Ret. Sys*., 266 Md. 690 (1972), and *City of Frederick v. Quinn*, 35 Md. App. 626 (1977), the Court explained that a governmental employer may make reasonable and necessary modifications to its pension plan at any time before an event gives rise to an employee's right to receive benefits, and that the employee must satisfy all conditions precedent set forth in the Plan to become entitled to receive the promised benefits. However, once an employee's rights to benefits vest, a governmental employer may not retrospectively eliminate those vested benefits. The Court concluded that the Retired and Retirement-Eligible Sub-classes held vested rights to benefits in the Plan because they had satisfied all of the contractual conditions precedent to receive benefits under the Plan; therefore, they held a vested right to receive the Variable Benefit, and the enactment of Ordinance 10-306 breached the contract with the members of those sub-classes by retroactively divesting them of that benefit. In contrast, the Active Sub-class's rights to benefits in the Plan had yet to vest prior to the enactment of the Ordinance; therefore, their rights were not immune from the City's prospective modifications to the Plan. The Court further held, however, that only those modifications that are reasonable *and* necessary are permissible. That is, any diminution to plan benefits caused by a legislative modification must be balanced both by comparable benefits and countervailing equities for the public's welfare – not one or the other, as *Quinn* had suggested. Applying that standard, the Court concluded that the circuit court's holding with respect to the Active sub-class was correct: (1) the Ordinance was reasonably intended to

preserve the integrity of the Plan; (2) the changes to the Plan, as they affected the Active members, were reasonable changes promoting a paramount interest of the City without serious detriment to the employees; (3) post-Ordinance, the employees received substantially the Plan they bargained for; and (4) to the extent any benefits were lessened or other terms became more onerous, those changes were balanced by a combination of overwhelming public welfare considerations and new benefits or qualifying conditions.

Finally, the Court affirmed the circuit court's calculation of damages owed to members of the Retired and Retirement-Eligible Sub-classes.

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Brawner Builders, Inc., et. al. v. Maryland State Highway Administration, No. 58, September Term 2020, filed August 25, 2021. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2021/58a20.pdf

STATE FINANCE AND PROCUREMENT – PROCUREMENT CONTRACTS – FORMATION – DISPUTE RESOLUTION – NOTICE OF CLAIM – TIMELINESS

Facts:

On November 19, 2012, Brawner Builders, Inc. ("Brawner") and the Maryland State Highway Administration ("SHA") entered into a contract for the construction of noise barriers along a 0.38-mile section of I-95 in Howard County, Maryland. SHA has developed procedures to pre-certify facilities producing noise barriers for use in SHA projects.

Brawner subcontracted with Faddis Concrete Products, Inc. ("Faddis"), a pre-certified supplier of noise barrier systems, to obtain 40,910 noise wall panels and three access doors for the project. SHA approved a sample noise wall panel from Faddis and, based on that approval, Faddis began manufacturing additional panels for Brawner's use under the contract. SHA learned that the noise panels produced by Faddis contained construction aggregate of a non-conforming coarseness from an unapproved source, which was a violation of SHA's noise barrier standards.

Following an investigation, SHA suspended approval of Faddis's manufactured noise panels for a minimum of 180 days. On June 23, 2014, Faddis sent letters to SHA, SHA's legal counsel, and Brawner, which asserted, among other things, that Faddis reserved a right to recover damages for the costs related to the suspended approval of noise panels already being manufactured under the sub-contract between Faddis and Brawner. The letters also requested that Brawner pass Faddis's contract claims through to SHA, which Brawner failed to do. SHA's legal counsel informed Faddis that any procurement claim against SHA had to be filed by Brawner and that any tort claim had to be filed in accordance with the Maryland Tort Claims Act.

On July 16, 2015, Faddis filed a complaint against Brawner in the U.S. District Court for the Eastern District of Pennsylvania. Faddis alleged it was harmed by Brawner's failure to pass through Faddis's claims to SHA, which ultimately precluded Faddis from pursuing claims against SHA. Along with a letter notifying SHA of the lawsuit, Brawner sent a copy of this complaint to SHA indicating that the letter was intended to serve as a "Notice of Claim." Brawner and Faddis eventually settled their lawsuit. On May 31, 2018, Brawner and Faddis requested that SHA issue a written decision on the pending claims. When SHA failed to do so, Brawner and Faddis appealed to the Maryland State Board of Contract Appeals ("MSBCA"). SHA filed a motion for summary decision. The MSBCA granted SHA's motion for summary decision on two grounds: (1) Faddis did not have a written procurement contract with SHA and, therefore, did not have standing to file a direct contract claim; and (2) Brawner was required to

provide notice of the claim within 30 days of the letter sent by Faddis to Brawner requesting that Brawner pass the claims through to the SHA.

Brawner and Faddis both sought judicial review of the MSBCA's decision in the Circuit Court for Baltimore City. The circuit court reversed MSBCA's decision on both grounds. The circuit court found that SHA's approval of Faddis as a pre-approved noise panel supplier was an independent procurement contract because Faddis paid SHA a fee to secure a plant inspection that would permit Faddis to be selected for use in a contract with the State through another contractor. The circuit court also found that the MSBCA inappropriately weighed evidence of whether there was timely notice of a claim given. On appeal initiated by SHA, the Court of Special Appeals reversed the circuit court and upheld the MSBCA's findings. The Court of Special Appeals concluded that the certification of Faddis as a pre-approved supplier did not fall within the definition of "procurement contract" under the State Finance and Procurement Article, and as a subcontractor, Faddis was not permitted to bring a direct claim against SHA. Finally, the court also held that Brawner did not submit a notice of claim until well over a year after the expiration of the 30-day statutory filing period.

Held: Affirmed.

The Court of Appeals held that: (1) Faddis did not have a procurement contract with the State and, therefore, did not have standing to bring a direct contract claim against SHA; and (2) Brawner's submission of a notice of a claim on Faddis's behalf was not timely.

The General Assembly has waived the State's sovereign immunity for actions against state agencies arising from procurement contracts as defined by the State Procurement Article ("SF") of the Maryland Code. Under SF § 11-101(n), a procurement contract exists where the State contracts to "buy[] or otherwise obtain[] supplies, services, construction, construction related services, architectural services, [or] engineering services." The plain language of SF § 11-101(o)(1) clearly states that an agreement is only a procurement contract to the extent the agreement is "entered into by a [State agency] for procurement." The Court held that pre-approval of eligibility to provide materials, work, or services does not create a procurement contract with the SHA. Thus, being an approved supplier of concrete panels did not create a procurement contract between Faddis and SHA because that approval did not obligate SHA to buy any panels from Faddis. Accordingly, Faddis's ability to bring a claim against SHA was limited to a pass-through claim filed on its behalf by Brawner, as the prime contractor. Pursuant to SF §§ 15-219(a) and 15-219(b), a party seeking administrative review of a procurement claim must file a written notice of claim with the procurement officer "within 30 days after the basis for the claim is known or should have been known." Once a contract claim is filed, the agency has a fixed amount of time to investigate and issue a final decision, which the contractor may appeal to the MSBCA. The Court of Appeals affirmed the finding by the MSBCA that Faddis's letter to Brawner on June 23, 2014—in which Faddis advised Brawner that it incurred damages as a result of SHA's suspension—showed the latest date when Faddis and Brawner were aware that a claim needed to be presented by Brawner to SHA. In violation of the 30-day statute of

limitations provided in SF § 15-219(a), Brawner did not pass Faddis's claim through to SHA until August 11, 2015 when Brawner notified SHA that Faddis had filed suit against Brawner in federal court.

The Court of Appeals also rejected Faddis's argument that summary disposition was inappropriate on the basis of equitable estoppel, as well as factual issues related to knowledge, motive or intent. The Court held that, under the facts of this case, there were no genuine disputes of material fact with respect to whether or when Faddis had knowledge of the claim against SHA. The Court further determined that equitable estoppel did not apply.

David Esteppe v. Baltimore City Police Department, No. 47, September Term 2020, filed August 25, 2021. Opinion by McDonald, J.

https://www.courts.state.md.us/data/opinions/coa/2021/47a20.pdf

LOCAL GOVERNMENT TORT CLAIMS ACT – NEGLIGENT ACT OR OMISSION OF LOCAL GOVERNMENT EMPLOYEE – SCOPE OF EMPLOYMENT

LOCAL GOVERNMENT TORT CLAIMS ACT – SCOPE OF EMPLOYMENT – SUMMARY JUDGMENT

Facts:

In 2012, a Baltimore City ("the City") police detective, Adam Lewellen, committed perjury to obtain a search warrant for Petitioner David Esteppe's home, and instigated a prosecution of Mr. Esteppe, in an effort to please Mr. Esteppe's estranged girlfriend, who was an old friend of Mr. Lewellen. When the internal affairs unit of the Baltimore City Police Department ("the Police Department") learned of Mr. Lewellen's deception, Mr. Lewellen attempted to obstruct its investigation. Eventually, the prosecution of Mr. Esteppe was dropped and criminal charges were brought against Mr. Lewellen. Mr. Lewellen pled guilty to perjury and misconduct in office and resigned from the Police Department.

Mr. Esteppe sued Mr. Lewellen in the Circuit Court for Baltimore City for numerous torts, arguing the absence of a legitimate law enforcement purpose for his prosecution and Mr. Lewellen's personal motive for pursuing it. The Circuit Court ruled for Mr. Esteppe on three counts and awarded him damages. The Court of Special Appeals affirmed the judgment on appeal.

Mr. Esteppe, believing that the Local Government Tort Claims Act ("LGTCA") made the Police Department liable for the damages obtained against Mr. Lewellen, sought payment of the damages award from the City pursuant to a memorandum of understanding ("MOU") between the City and the Police Department. Mr. Esteppe was advised that the Police Department believed it was not responsible for the judgment because Mr. Lewellen had not been acting within the scope of his employment when he committed the wrongdoing. Mr. Esteppe then filed, in the otherwise concluded tort proceeding against Mr. Lewellen in the Circuit Court, a "Motion for Declaratory Relief to Enforce Judgment" against the City and the Police Department, neither of which was a party in that action at the time, seeking to collect the damages obtained against Mr. Lewellen.

Following a non-evidentiary hearing, the Circuit Court concluded that Mr. Lewellen's actions were within the scope of his employment and that the Police Department was liable for the judgment against him. The Circuit Court noted that the City was not liable under the LGTCA because Mr. Lewellen was not a City employee but that the City might be liable as a contractual

matter under its MOU with the Police Department. The Police Department appealed to the Court of Special Appeals.

After holding that the Police Department had waived a procedural objection, the Court of Special Appeals addressed the merits of the appeal. The court treated Mr. Esteppe's motion as, in substance, a motion for summary judgment on the issue of whether Mr. Lewellen had acted within the scope of his employment as a police officer. It explained that, to establish that a local government employee committed a tort within the scope of employment, a plaintiff must prove that the employee's acts (1) were in furtherance of the employer's business and (2) were authorized by the employer. The court held that Mr. Esteppe had failed to satisfy the first prong of this test because the undisputed facts in the record supported the conclusion that Mr. Lewellen was acting to further his own interests, not the Police Department's. The court also noted that the fact that Mr. Lewellen was exercising the powers of a police officer was not dispositive. Because the Police Department had not filed its own motion for summary judgment, the intermediate appellate court declined to address whether the record would support summary judgment in favor of the Police Department. Accordingly, the Court of Special Appeals reversed the judgment of the Circuit Court and remanded the case.

Held: Affirmed.

The Court of Appeals adopted the opinion of the Court of Special Appeals as its own.

COURT OF SPECIAL APPEALS

In re M.H., No. 1267, September Term 2020, filed July 29, 2021. Opinion by Ripken, J.

https://mdcourts.gov/data/opinions/cosa/2021/1267s20.pdf

FAMILY LAW – CHILDREN IN NEED OF ASSISTANCE – EVIDENCE AT ADJUDICATION

Facts:

On June 10, 2020, the Cecil County Department of Social Services ("DSS") filed an emergency shelter care report ("Report") for the minor child, M.H, following an allegation from M.H.'s Mother that M.H.'s Father burned M.H. with a cigarette. DSS alleged in the Report that M.H.'s Mother and Father had neglected, abused, or been unable or unwilling to give M.H. the proper amount of care and attention. On the same day, DSS filed a child in need of assistance ("CINA") petition on behalf of M.H. The petition's statement of facts consisted solely of a reference to the Report.

On October 6, 2020, the circuit court held an adjudicative hearing on the CINA petition. DSS did not present evidence and indicated they would "submit on the report." Father made an oral motion to dismiss given DSS's failure to present evidence in support of the petition. The court did not rule on the motion and continued the hearing until October 20, 2020, at which point DSS again indicated it would "submit on the report." DSS again did not present witness testimony or move to admit any evidence during the adjudicative hearing. Following the adjudicative hearing, the court found M.H. to be a CINA at disposition, and Father appealed.

Held: Vacated and remanded.

The Court of Special Appeals determined that DSS failed to prove the allegations in the CINA petition by a preponderance of the evidence during the adjudicative hearing when it simply submitted on the report without presenting any evidence. The Court held that Courts and Judicial Proceedings § 3-817(b) requires the Department of Social Services to submit evidence during a

contested adjudicative hearing, in compliance with the Maryland Rules, to support the allegations in a CINA petition.

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Ronalda Sullivan v. Caruso Builder Belle Oak, LLC, No. 1909, September Term 2019, filed July 2, 2021. Opinion by Zic, J.

https://mdcourts.gov/data/opinions/cosa/2021/1909s19.pdf

REAL PROPERTY – MD. CODE ANN., REAL PROP. ARTICLE § 14-117 – PROPERTY SALES CONTRACT REQUIREMENTS – ESTIMATED COSTS OF DEFERRED WATER AND SEWER CHARGES – DISCLOSURES

Facts:

Section 14-117(a)(3)(i) of the Real Property Article of the Annotated Code of Maryland provides that in an initial sale contract for residential real property in Prince George's County, a seller must provide the purchaser certain disclosures regarding deferred water and sewer assessment costs for which the purchaser may be liable. Deferred water and sewer assessments are paid by purchasers and are used to reimburse the entities or persons who installed water and sewer lines on the residential real property. Two of the required disclosures under the statute are the "amount remaining on the assessment, including interest" and the "estimated payoff amount of the assessment." Md. Code Ann., Real Prop. § 14-117(a)(3)(i)(4), (7) (2015 Repl. & Supp. 2020).

Ronalda Sullivan contracted with Caruso Builder Belle Oak ("Caruso") to purchase a newly constructed home on real property in Prince George's County. For the "amount remaining on the assessment, including interest" and the "estimated payoff amount of the assessment," Caruso disclosed both amounts to be $20,700.

Ms. Sullivan filed an amended complaint, which alleged that Caruso did not comply with the disclosure requirements under § 14-117(a)(3)(i) when it disclosed identical numbers for the "amount remaining on the assessment, including interest" and the "estimated payoff amount of the assessment." Caruso filed a renewed motion to dismiss for failure to state a claim upon which relief may be granted.

Following a hearing, the circuit court dismissed the amended complaint for failure to state a claim and found that Caruso's disclosures complied with § 14-117(a)(3)(i)(7). Ms. Sullivan appealed.

Held: Reversed and remanded.

First, the Court of Special Appeals held that to satisfy the disclosure requirements of § 14-117(a)(3)(i), the disclosure for the "estimated payoff amount of the assessment" must reflect a good faith calculation of the advance payoff amount that would be due on the settlement date.

The Court considered the meaning of the word "estimated" and determined that the plain language of the statute was unambiguous. The Court concluded that the General Assembly intended that the disclosure for the "estimated payoff amount" be made in good faith and fairly accurate to notify the purchaser that she has the option to save money by prepaying the assessment in full at the time of settlement. Importantly, the Court explained that because interest has not started to accrue at the date of settlement, it is illogical for the "amount remaining on the assessment, including interest" and the "estimated payoff amount of the assessment" to be the exact same amount when both are calculated at the time of settlement. If the General Assembly intended it to be acceptable for a developer to provide the same amount for both disclosures, then it would be "surplusage, superfluous, meaningless or nugatory" to require two different disclosures. *Daughtry v. Nadel*, 248 Md. App. 594, 612 (2020) (quoting *Berry*, 469 Md. at 687).

The legislative history of § 14-117(a)(3)(i) supports the Court's plain language interpretation. The legislative history indicates that the General Assembly intended the statutory disclosures to improve transparency and provide accurate information to purchasers, thereby providing purchasers the opportunity to save money by prepaying the assessment in full and avoiding interest payments.

Second, the Court held that, based on its statutory interpretation of § 14-117(a)(3)(i), the amended complaint stated a claim upon which relief may be granted.

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Comptroller of Maryland v. William Atwood, No. 163, September Term 2020, filed July 28, 2021. Opinion by Zic, J.

https://mdcourts.gov/data/opinions/cosa/2021/0163s20.pdf

TAX – MD. CODE ANN., TAX GEN. ARTICLE § 11-208(c)(1) – SALES AND USE TAX EXEMPTION – INTERSTATE COMMERCE

Facts:

William Atwood purchased an Aircraft in Ohio and stored it in Maryland. Mr. Atwood did not pay a sales and use tax on the Aircraft in either Ohio or Maryland. During the audit period, Mr. Atwood used the Aircraft to give his son flight lessons and to commute to his place of employment in New York. During the audit period, over 90% of the flights were flown for the purpose of providing flight instruction to Mr. Atwood's son. Over 70% of the flights during the audit period crossed state lines. The parties stipulated that there was no business purpose for friends and family flying on the plane, none of the flights involved the movement of freight or cargo, and none of the flights involved the movement of passengers for a commercial or business purpose.

The Comptroller of Maryland ("Comptroller") assessed a sales and use tax on Mr. Atwood's Aircraft. Mr. Atwood appealed the assessment to the Maryland Tax Court, which held that the Aircraft qualified for an exemption from the sales and use tax pursuant to § 11-208(c)(1) of the Tax-General Article of the Maryland Annotated Code. The Tax Court determined that Mr. Atwood did not have to pay the assessment because the Aircraft was used "principally in interstate or foreign commerce."

The Comptroller field a petition for judicial review of the Tax Court decision in the Circuit Court for Anne Arundel County. The circuit court affirmed the Tax Court's decision. The Comptroller appealed.

Held: Reversed and remanded.

The Court of Special Appeals examined the history of the applicable sales and use tax statute, Section 11-208(c)(1) of the Tax-General Article. The statute provides that "an aircraft, motor vehicle, railroad rolling stock, or vessel that is used principally to cross State lines in interstate or foreign commerce" is exempt from the State's sales and use tax. The Court explained that the statute requires that, for an aircraft to qualify for the sales and use tax exemption, it must be used for a commercial or business purpose. The mere crossing of state lines with an aircraft is not enough for it to be exempt from the sale and use tax pursuant to § 11-208(c)(1).

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The Court held that the Tax Court erred in applying the exemption in § 11-208(c)(1) to the Aircraft. The Aircraft was not used in the course of a commercial or business activity as Mr. Atwood purchased a personal aircraft for a personal purpose—to teach his son to fly. Thus, the aircraft was not used principally to cross state lines in interstate commerce.

The Court reversed and remanded to the circuit court with instructions to reverse the Tax Court's final decision and remand to the Tax Court with instructions to enter a new final decision affirming the assessment of the Comptroller.

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Annette Blake v. David Chadwick, et al., No. 1939, September Term 2019, filed February 26, 2021. Opinion by Moylan, J.

https://www.mdcourts.gov/data/opinions/cosa/2021/1939s19.pdf

CONTRIBUTORY NEGLIGENCE – SUMMARY JUDGMENT – GENERIC NEGLIGENCE VERSUS CONTRIBUTORY NEGLIGENCE – PROXIMATE CAUSATION

Facts:

This case arises from a three-car collision that occurred on August 2, 2016 on Martin Luther King Boulevard. The appellant, Annette Blake, filed suit against two drivers, David Chadwick and Denia Phillips, both of whom were in separate vehicles that were each involved in the collision. Two days prior to the date of the accident, Ms. Blake's vehicle overheated and broke down. She was informed by her mechanic that she needed a new radiator. The mechanic told her to purchase a new radiator from Advance Auto Parts and come, across town, to his shop to have her vehicle fixed. After picking up the radiator, Ms. Blake headed towards her mechanic, which was across town, around 4 P.M. on Martin Luther King Boulevard ("MLK"). Ms. Blake's vehicle overheated and stalled in one of the lanes of traffic (MLK has no shoulder lane). Denia Phillips, driving on MLK, noticed Ms. Blake's stalled vehicle ahead in her lane and she attempted, after stopping to check for traffic, to merge into the middle lane. At the exact time that Ms. Phillips attempted to merge, David Chadwick attempted to move his vehicle from the left lane into the middle lane. Mr. Chadwick's vehicle struck Ms. Phillips vehicle, which in turn was pushed into Ms. Blake's stalled vehicle. Ms. Blake filed suit and the Circuit Court for Baltimore City issued an Order and Memorandum Opinion in which it found that Ms. Blake had been contributorily negligent and, accordingly, Judge Jeannie J. Hong granted Summary Judgment in favor of both defendants. Ms. Blake appealed.

Held: Reversed.

The Court of Special Appeals held that Ms. Blake was not contributorily negligent and that Summary Judgment in favor of the defendants was granted in error. Further, the Court held that some negligence on the part of a plaintiff does not necessarily constitute contributory negligence. The Court agreed that Ms. Blake was indeed dangerously negligent, however, her negligence was not a proximate cause of the three-car collision. Courts may apply one of two tests to determine if causation-in-fact actually exists: the "but for" test and the "substantial factor" test. The "but for" test applies when only a single act of possible negligence is involved and the "substantial factor" test applies when two or more independent potentially negligent acts are involved.

In this case, the Circuit Court mistakenly applied the "but for" test when the "substantial factor" test controlled. Although the stalled vehicle was a result of Ms. Blake's antecedent negligence, two more potential acts of negligence arose from the actions of Ms. Watkins and of Mr. Chadwick. Ms. Blake's negligence was merely "passive and potential" and, therefore, was not a proximate cause of the collision.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated August 10, 2021, the following attorney has been disbarred by consent:

TIMOTHY GUY SMITH

*

By an Opinion and Order of the Court of Appeals dated August 11, 2021, the following attorney has been disbarred:

EDWARD EMAD MOAWAD

*

By an Order of the Court of Appeals dated August 16, 2021, the following attorney has been disbarred by consent:

JONATHAN ROBERT SCHUMAN

*

By an Opinion and Order of the Court of Appeals dated August 16, 2021, the following attorney has been disbarred:

CHRISTOPHER EDWARD VASILIADES

*

By an Order of the Court of Appeals dated June 25, 2021, the following attorney has been disbarred by consent, effective August 23, 2021:

ROBERT Z. BOHAN

*

*

By an Order of the Court of Appeals dated August 24, 2021, the following attorney has been disbarred:

ERNEST P. FRANCIS

*

By an Order of the Court of Appeals dated August 24, 2021, the following attorney has been indefinitely suspended:

WINSTON BRADSHAW SITTON

*

By an Order of the Court of Appeals dated June 3, 2021, the following attorney has been disbarred by consent, effective August 27, 2021:

CHRISTOS GEORGE VASILIADES

*

This is to certify that the name of

CHRISTIAN L. SIMPSON

has been replaced upon the register of attorneys in this State as of August 30, 2021.

*

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JUDICIAL APPOINTMENTS

*

On August 12, 2021, the Governor announced the appointment of **MAGISTRATE WENDY ANNE ZERWITZ SCHENKER EPSTEIN** to the Circuit Court for Baltimore County. Judge Epstein was sworn in on August 31, 2021 and fills the vacancy created by the retirement of the Hon. Kathleen Gallogly Cox.

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

	Case No.	*Decided*
A		
Adeleye, Oluremi v. State	0610 *	August 5, 2021
Allegany Neighbors & Citizens v. Dan's Mtn. Windforce	1177	August 16, 2021
Altassa, LLC v. EagleBank	1130	August 3, 2021
B		
Badii, Roozbeh v. State Bd. Of Physicians	1038	August 13, 2021
Bailey, William v. State	0888	August 2, 2021
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