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COURT OF APPEALS

In Re: S.F., No. 10, September Term 2021, filed February 3, 2022. Opinion by Hotten, J.

Watts, J., dissents.

https://mdcourts.gov/data/opinions/coa/2022/10a21.pdf

CIVIL PROCEDURE – APPEALS – MOOTNESS

CRIMINAL LAW – SENTENCING – CONDITIONS OF PROBATION

Facts:

On or about October 8, 2018 during regular school hours, S.F., who was twelve years old at the time, followed by another student enrolled in a middle school in Frederick, Maryland, ran into a classroom and began to punch another student, J.C., who fell into a metal desk, striking his head. S.F. claimed that he was retaliating for an earlier provocation from J.C. Thereafter, S.F. had to be pulled from J.C. during a second physical altercation that occurred in the hallway. On November 19, 2018, the State filed a Delinquency Petition charging S.F. with second-degree assault.

On December 9, 2018, Officer Steven Brown with the Frederick City Police Department responded to a burglary at 150 Stonegate Drive in Frederick City, Maryland. The sliding door of a home was found open and several items were missing. On January 8, 2019, Officer Brown returned to that location, where the homeowner advised Officer Brown that S.F. was seen wearing these items. The State filed a second Delinquency Petition that charged S.F. with theft of at least $100 but less than $1,500.

S.F. entered an *Alford* plea to the count of second-degree assault on February 12, 2019 before the Circuit Court for Frederick County, sitting as a juvenile court ("the juvenile court"). A juvenile magistrate delayed the date of disposition so the Maryland Department of Juvenile Services ("DJS") could complete a pre-disposition investigation. S.F. was also placed on pre-disposition supervision by DJS, which found a "history of problematic behavior in school and in the home . . . [and] recommend[ed] a period of supervised probation[.] . . ." (Emphasis removed). During

the disposition hearing, a juvenile magistrate placed S.F. on probation subject to several conditions, including "attend school regularly without any . . . suspensions[.]" Following the hearing, counsel for S.F. filed an exception to the no-suspension condition of probation as impermissibly vague.

In a separate proceeding, on May 16, 2019. S.F. entered an *Alford* plea to the count of theft. S.F. agreed to waive the five-day waiting period before disposition, and the juvenile magistrate recommended S.F. be placed on concurrent probation for the counts of assault and theft. The concurrent probation order included the no-suspension condition of probation. S.F. filed another exception to the no-suspension condition of probation. On June 5, 2019, the juvenile court denied the two exceptions to the no-suspension condition of probation. S.F. successfully completed probation, and the juvenile court closed S.F.'s cases on May 22, 2020.

Before the closure of S.F.'s cases, S.F. timely noted an appeal to the Court of Special Appeals on June 7, 2019. The Court of Special Appeals affirmed the juvenile court and held that the no-suspension condition of probation was not unduly vague and did not lack procedural safeguards. S.F. filed a petition for writ of *certiorari*, which was granted by the Court of Appeals on May 11, 2021.

Held: Affirmed.

The Court exercised its discretion to address the merits of whether a "no-suspension" condition was impermissibly vague because the number of students on probation meant the issue would recur frequently, the limited duration of juvenile probation suggested the issue would continue to evade judicial review, and providing guidance to juvenile courts when ordering conditions of probation implicated a matter of important public concern.

The Court held that the juvenile court did not abuse its discretion in ordering S.F. to attend school regularly without suspensions as a condition of probation. Juvenile courts have broad discretion when imposing conditions of probation, but a juvenile court abuses its discretion when a condition of probation is "vague, indefinite or uncertain[,] . . . arbitrary or capricious. . . ." *Allen v. State*, 449 Md. 98, 111, 141 A.3d 194, 202 (2016) (citations and quotations omitted). A condition of probation is not vague when it provides reasonable and specific guidance so that the probationer understands "what is required[.]" *Meyer v. State*, 445 Md. 648, 680, 128 A.3d 147, 166 (2015).

In the case at bar, the Court found that the condition ordering S.F. to attend school regularly without suspensions was not vague because it reasonably informed Petitioner to abide by school rules, pursuant to the student code of conduct, while on probation. The determination by a third party, specifically a school administrator, of whether Petitioner violated a condition of probation did not render the condition of probation vague. *See, e.g., Hudgins v. State*, 292 Md. 342, 349, 438 A.2d 928, 931 (1982) (holding that a condition of probation was not made vague by

permitting the Maryland State Police to determine whether defendant adequately cooperated as an informant).

The Court recognized that whether a suspension was arbitrarily or capriciously imposed against a student based on race, disability, or other factor, did not bear on the vagueness of the no-suspension condition of probation in the instant case, and was a question of fact to be determined by the juvenile court when deciding if a violation of a condition of probation resulted from factors beyond the control or fault of a student.

Daniel Beckwitt v. State of Maryland, No. 16, September Term 2021, filed January 28, 2022. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2022/16a21.pdf

SUBJECT MATTER JURISDICTION – GROSS NEGLIGENCE INVOLUNTARY MANSLAUGHTER – LEGAL DUTY INVOLUNTARY MANSLAUGHTER – LESSER-INCLUDED OFFENSE – JURY INSTRUCTION – SECOND-DEGREE DEPRAVED HEART MURDER

Facts:

The case involves the tragic death of twenty-one-year-old Askia Khafra, who died in a fire while trying in vain to escape from the reprehensible conditions of his workplace in the basement of his employer Daniel Beckwitt's, Petitioner's/Cross-Respondent's, home. Following a trial in the Circuit Court for Montgomery County, a jury found Beckwitt guilty of second-degree depraved heart murder and involuntary manslaughter. The circuit court sentenced Beckwitt to twenty-one years' imprisonment, suspending all but nine years, with credit for sixty days of time served, for second-degree depraved heart murder, and merged the conviction for involuntary manslaughter for sentencing. Beckwitt appealed, and the Court of Special Appeals held that the evidence was sufficient to support the conviction for gross negligence involuntary manslaughter but insufficient to support the conviction for depraved heart murder. *See Beckwitt v. State*, 249 Md. App. 333, 346, 245 A.3d 201, 209 (2021).

Beckwitt filed a petition for a writ of certiorari raising four issues—whether the circuit court lacked subject matter jurisdiction to enter a conviction on involuntary manslaughter due to old English statutes concerning a lack of liability for accidental fires, whether the evidence was sufficient to support the conviction for involuntary manslaughter, whether legal duty involuntary manslaughter is a lesser-included offense of depraved heart murder, and whether the circuit court erred by failing to correctly instruct the jury on the elements of legal duty involuntary manslaughter. The State, Respondent/Cross-Petitioner, filed a conditional cross-petition, raising one issue—whether the evidence was sufficient to support the conviction for second-degree depraved heart murder. The Court of Appeals granted both the petition and conditional cross-petition. *See Beckwitt v. State*, 474 Md. 720, 255 A.3d 1090 (2021).

Held: Affirmed.

The Court of Appeals rejected Beckwitt's argument that, because the case involved an accidental house fire, certain old English statutes, namely the English Fires Prevention (Metropolis) act of 1774 and earlier statutes, deprived the circuit court of subject matter jurisdiction. The Circuit Court for Montgomery County—the circuit court in the case—plainly had subject matter

jurisdiction over Beckwitt's criminal case because it had the power to render a judgment with respect to the felony offenses with which Beckwitt was charged. In actuality, Beckwitt's argument did not involve a question of subject matter jurisdiction, but rather was an argument that the 300-year-old statutes compelled the circuit court to exercise its jurisdiction in a particular way, *i.e.*, that given the circumstances, permitting Beckwitt's prosecution was erroneous. The Court concluded that, under Maryland law, it was clear that Beckwitt's prosecution for depraved heart murder and involuntary manslaughter was not beyond the circuit court's subject matter jurisdiction. The Court determined that, because the issue raised by Beckwitt did not constitute an issue of subject matter jurisdiction, Beckwitt was required to raise the issue in the circuit court to preserve the matter for appellate review. Beckwitt failed to do so and the matter was not preserved for appellate review. Even were the Court to consider the issue, though, the Court would determine that the statutes on which Beckwitt relied did not preclude his prosecution or otherwise serve as a defense.

The Court of Appeals held that the evidence was sufficient to support Beckwitt's conviction for involuntary manslaughter under both a gross negligence and failure to perform a legal duty theory of the offense. The Court held that the evidence was sufficient to establish gross negligence involuntary manslaughter because Beckwitt's conduct constituted a departure from the conduct that any reasonable person would have taken under the circumstances and demonstrated a disregard of the consequences to Khafra. On multiple levels, Beckwitt's conduct constituted a departure from the conduct that a reasonable person would have engaged in under similar circumstances. No reasonable person would have required Khafra to live and work in a basement with a faulty supply of electricity for light and airflow and without a reliable way for Khafra to contact him. No reasonable person would have maintained the abhorrent conditions that existed in the basement with debris and trash blocking Khafra's route out in the event of an emergency. And no reasonable person would have reacted as casually as Beckwitt did on the day of the fire upon learning of the two power outages in the basement. The Court determined that Beckwitt's conduct was likely to bring harm to Khafra at any moment and an ordinarily prudent person under similar circumstances would have been conscious of the risk to Khafra.

The Court of Appeals concluded that, in the case, with certainty, viewing the evidence in the light most favorable to the State, any rational juror could have concluded beyond a reasonable doubt, based on evidence of the dangerous conditions that Beckwitt created in the basement and his disregard for Khafra's safety on the day of the fire, that his conduct amounted to a wanton and reckless disregard for human life—a gross departure from the conduct of an ordinarily prudent person, without regard to the consequences or the rights of others, and was likely to bring harm at any moment. Beckwitt not only departed from conduct that a reasonable person would have taken under similar circumstances but also demonstrated both a disregard of the consequences which might ensue and an indifference to Khafra's well-being, and so evinced a wanton and reckless disregard for Khafra's life. In sum, the evidence was sufficient for a rational trier of fact to find that Beckwitt's conduct was grossly negligent.

The Court of Appeals held that the evidence was sufficient to establish legal duty involuntary manslaughter because the evidence was sufficient for the jury to conclude that Khafra was Beckwitt's employee and, as such, Beckwitt had a duty to provide Khafra with a reasonably safe

workplace, which he failed to do with reckless indifference as to the endangerment of Khafra and that failure constituted gross negligence. The evidence was sufficient for a rational juror to conclude that Beckwitt should have been aware, and was in fact aware, of the risk of harm to Khafra posed by the deplorable conditions in the workplace, i.e., the basement, and that his failure to remedy the conditions was conduct that demonstrated a wanton and reckless disregard for Khafra's safety. Beckwitt hired Khafra to live and work in a basement filled with trash and debris, with spotty electricity provided by a series of extension cords and power strips, and without a reliable manner for Khafra to contact him. The conditions in the basement made it difficult to move around. Testimony at trial established that Khafra would have had to crawl through and climb over debris, including buckets and bags of cement, to get out of the basement. Beckwitt created unsafe conditions in the basement that made escape from a fire, or any other emergency for that matter, difficult if not impossible and allowed those conditions to exist while Khafra worked in the basement for weeks at a time. Moreover, Beckwitt's conduct on the day of the fire demonstrated a reckless and wanton disregard for Khafra's life. Based on all of the above, the jury could have concluded that Beckwitt violated his common law duty to provide a reasonably safe workplace with reckless indifference as to whether his actions or inactions endangered Khafra and that Beckwitt's failure to fulfill his duty constituted gross negligence.

In addition, the Court of Appeals held that there was sufficient evidence for the jury to conclude that Beckwitt's conduct was both the actual and legal cause of Khafra's death. As to actual, but-for causation, the evidence was sufficient for the jury to have concluded that, but for Beckwitt's conduct, *i.e.*, having subjected Khafra to the dangerous conditions that existed in Beckwitt's basement, Khafra would not have died in the fire. The jury could have reasonably inferred that Khafra would have been able to escape the relatively minor fire but for the circumstance that the basement was full of trash and debris that impeded Khafra's ability to move freely about. The jury could also have reasonably inferred that but for Beckwitt's failure to promptly respond to the two electrical failures, Khafra would not have been trapped in the fire. As to legal causation, the Court was persuaded that the State produced sufficient evidence demonstrating that Khafra's death was a reasonably foreseeable consequence of Beckwitt's conduct. A reasonable person would have been able to discern the risk of danger or harm to Khafra from the working conditions in the basement. Although the evidence demonstrated that the fire likely started as the result of a latent defect in an electrical outlet and that Beckwitt would not have been aware of the defect, it was entirely foreseeable that in a fire, or any other emergency that might occur in the basement, due to the numerous unsafe conditions that Beckwitt allowed to exist, Khafra's ability to escape would have been seriously impeded. In sum, viewing the evidence in the light most favorable to the State, the evidence was sufficient for the jury to have found beyond a reasonable doubt the essential elements of involuntary manslaughter under both a gross negligence and legal duty theory.

Because the Court of Appeals concluded that the evidence was sufficient to support Beckwitt's involuntary manslaughter conviction under both theories, it need not reach the issue of whether legal duty involuntary manslaughter is a lesser-included offense of depraved heart murder. Nonetheless, the Court determined that legal duty involuntary manslaughter is not a lesser-included offense of depraved heart murder, although gross negligence involuntary manslaughter is. The Court explained that legal duty involuntary manslaughter is not a lesser-included offense

of depraved heart murder. A key element of legal duty involuntary manslaughter is that the defendant had a legal duty to perform and failed to do so. The offense of depraved heart murder contains no such element.

The Court of Appeals concluded that Beckwitt's contention that the circuit court erred or abused its discretion by failing to instruct the jury as to all of the essential elements of legal duty involuntary manslaughter was not preserved for appellate review. If the issue were preserved, however, the Court would conclude that the circuit court did not abuse its discretion in giving the instruction because it constituted a correct statement of law and covered the essential elements of the offense.

In agreement with the Court of Special Appeals, the Court of Appeals held that the evidence was not sufficient to support Beckwitt's conviction for second-degree depraved heart murder because his conduct, although demonstrating a wanton and reckless disregard for human life, was not the kind of conduct that was likely, if not certain, to have caused death, and thus did not constitute conduct that demonstrated an extreme indifference to the value of human life. Beckwitt's conduct—including having Khafra dig tunnels beneath his home while living and working in a basement with electrical power provided by multiple extension cords and power strips and that was filled with trash and debris which severely hampered Khafra's escape in the event of an emergency—whether considered individually or cumulatively, although demonstrating a reckless disregard for human life, did not constitute conduct that was reasonably likely, if not certain, to cause death.

Marlon Koushall v. State of Maryland, No. 13, September Term 2021, filed February 3, 2022. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2022/13a21.pdf

CRIMINAL PROCEDURE – SUFFICIENCY OF EVIDENCE – USE OF FORCE

CRIMINAL PROCEDURE – SENTENCING – MERGER

Facts:

On August 26, 2018, officer Marlon Koushall ("Petitioner") of the Baltimore City Police Department ("BCPD") responded to a call for back-up outside a strip club in downtown Baltimore. Several off-duty BCPD officers had become involved in an altercation with another patron. Petitioner arrived at the scene and shouted at one of the off-duty BCPD police officers, Sergeant Henrietta Middleton ("Sgt. Middleton"), to "back up." According to security camera footage, Petitioner struck Sgt. Middleton on the left side of the face less than five seconds after his initial approach. A witness for the State testified that Petitioner "pulled back his fist all the way and then hit [Sgt. Middleton]." Another witness testified that Petitioner made no effort to de-escalate the situation, and acted "extremely aggressive" as if he had a "vendetta" against Sgt. Middleton. The State charged Petitioner with second-degree assault and misconduct in office.

Petitioner elected to proceed with a bench trial, which occurred in September and October 2019 in the Circuit Court for Baltimore City. In addition to several witnesses, the State presented video footage and still frames of the incident from multiple sources and angles. Petitioner called three BCPD police officers to testify, and Dr. Charles J. Key to provide expert testimony regarding police use of force. According to Dr. Key, Petitioner responded appropriately under the circumstances and would have been justified under the circumstances to have used even greater force.

The circuit court found Petitioner guilty of second-degree assault and misconduct in office. The circuit court expressed doubts about the credibility of the fact witnesses, and relied on security camera footage in making its decision. The circuit court found that Petitioner's perception of Sgt. Middleton's alleged level of aggression was not reasonable and that he had "overreacted [to] everything." The circuit court did not find Sgt. Middleton to be an immediate threat to the officer's safety. The circuit court "was shocked[]" by the level of force depicted in the security video footage. The circuit court concluded that Petitioner's "actions were not reasonable given the totality of the circumstances. They went beyond what a reasonable officer would have done with his training and experience under the same circumstances." The circuit court sentenced Petitioner to six years' imprisonment, all suspended but one day of time served, for the second-degree assault conviction with three years of probation with the first year supervised, and 100 hours of community service. The circuit court also sentenced Petitioner to ten years' imprisonment for the misconduct in office conviction, all suspended but one day of time served

consecutive to the second-degree assault conviction, with three years of probation and the first year supervised.

Petitioner appealed the circuit court's finding of legal sufficiency of evidence to support the second-degree assault and misconduct in office convictions to the Court of Special Appeals. In the alternative, Petitioner argued that the two convictions should merge for sentencing purposes because the same act—striking another in the head during the commission of an arrest—was the factual predicate for both convictions. The Court of Special Appeals rejected Petitioner's arguments and affirmed the circuit court.

Held: Affirmed.

The Court held that there was legally sufficient evidence to sustain both convictions, because after viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that witness testimony and security camera footage depicting Petitioner strike another individual in the head approximately five seconds after ordering the individual to "back up", was not consistent with the reasonably necessary use of force under the circumstances. The Court recognized that it does not retry the case when reviewing the sufficiency of evidence. The circuit court is entrusted with making credibility determinations and resolving conflicting evidence. The record supported the conclusion of the circuit court that the evidence, when viewed in the light most favorable to the State, was sufficient in establishing unreasonable use of force beyond a reasonable doubt. In the instant case, the same evidence that established unlawful use of force for the second-degree assault conviction also satisfied the corrupt behavior element of misconduct in office.

The Court also held that the convictions for second-degree assault and misconduct in office did not merge for sentencing purposes. "Maryland recognizes three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness." *Carroll v. State*, 428 Md. 679, 693–94, 53 A.3d 1159, 1167 (2012) (citation and quotation marks omitted). The convictions did not merge under the required evidence test, because second-degree assault and misconduct in office both contained at least one element of a crime not contained in the other. The rule of lenity did not apply because the General Assembly did not express an intent for the crime of second-degree assault to merge with the common law crime of misconduct in office for sentencing purposes. The Court did not address fundamental fairness because it was not raised by Petitioner.

Amit Kumar v. State of Maryland, No. 21, September Term 2021, filed December 20, 2021. Opinion by Watts, J.

McDonald and Biran, JJ., concur.

https://www.mdcourts.gov/data/opinions/coa/2021/21a21.pdf

VOIR DIRE – APPLICABILITY OF HOLDING TO PENDING CASES – PRESERVATION FOR APPELLATE REVIEW

Facts:

In *Kazadi v. State*, 467 Md. 1, 9, 223 A.3d 554, 559 (2020), the Court of Appeals held "that, on request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the fundamental principles of presumption of innocence, the State's burden of proof, and the defendant's right not to testify." In so holding, the Court overruled *Twining v. State*, 234 Md. 97, 100, 198 A.2d 291, 293 (1964), in which this Court had previously held that a trial court was not required to ask such *voir dire* questions. In *Kazadi*, the Court initially stated that the holding would apply to *Kazadi* and to other cases prospectively as of the date on which the opinion was issued. Subsequently, the Court replaced the language in *Kazadi* concerning its applicability to indicate that the holding would apply to the case and "any other cases that [were] pending on direct appeal when [the] opinion [was] filed, where the relevant question ha[d] been preserved for appellate review." *Kazadi*, 467 Md. at 47, 223 A.3d at 581 (citations omitted).

In the case, the State, Respondent, charged Amit Kumar, Petitioner, with first- and second-degree murder of his wife, Ankita Verma, and openly carrying a dangerous weapon (a knife) with the intent to injure. In the Circuit Court for Baltimore City, a jury found Kumar guilty of first-degree murder and openly carrying a dangerous weapon with the intent to injure after his wife had been found stabbed to death in their apartment.

On November 4, 2019, the circuit court conducted jury selection. Before *voir dire*, Kumar submitted to the circuit court in writing a list of seventeen proposed *voir dire* questions, which included, as questions 15 and 16, *Kazadi*-type questions. While reviewing the parties' proposed *voir dire* questions, the circuit court asked: "Is there anything that is not included in the State's *voir dire* that the defendant specifically requests?" Kumar's counsel responded by requesting that the circuit court ask several *voir dire* questions that he had proposed, including questions 15 and 16. The circuit court denied Kumar's counsel's request to ask proposed *voir dire* questions 15 and 16. The circuit court asked the *voir dire* questions of the jury panel as a group. Upon completion of the group questions, before the court individually questioned prospective jurors who had responded affirmatively, Kumar's counsel stated: "I'll just ask the Court to note by continuing exception to the Court's refusal[.]"

On November 18, 2019, in the circuit court, Kumar filed a motion for a new trial, contending, among other things, that the circuit court erred in declining to ask proposed *voir dire* questions 15 and 16. In the motion for a new trial, Kumar's counsel raised various allegations of error but the only allegation raised concerning the circuit court's failure to ask proposed *voir dire* questions pertained to the court's failure to ask the *Kazadi* questions. On January 24, 2020, prior to the date of Kumar's sentencing, the Court of Appeals issued the opinion in *Kazadi*. On February 21, 2020, the circuit court conducted the sentencing proceeding in Kumar's case at which it heard argument on and denied the motion for a new trial. The circuit court sentenced Kumar to life imprisonment for first-degree murder and a consecutive sentence of three years' imprisonment for the weapons offense. On March 2, 2020, the Court of Appeals issued an Order replacing the language in *Kazadi* on the applicability of the holding.

On March 20, 2020, in the circuit court, Kumar filed a notice of appeal. On April 13, 2021, the Court of Special Appeals affirmed Kumar's conviction for first-degree murder and reversed for lack of sufficient evidence the conviction for openly carrying a dangerous weapon with the intent to injure. *See Amit Kumar v. State*, No. 300, Sept. Term, 2020, 2021 WL 1392142, at *7-8 (Md. Ct. Spec. App. Apr. 13, 2021). The Court of Special Appeals held that the circuit court did not err or abuse its discretion in declining to ask proposed *voir dire* questions 15 and 16. *See Kumar*, 2021 WL 1392142, at *4. The Court of Special Appeals acknowledged that the State conceded that proposed *voir dire* questions 15 and 16 were *Kazadi*-type *voir dire* questions—*i.e.*, *voir dire* questions that must be asked on request under *Kazadi*. *See Kumar*, 2021 WL 1392142, at *3. The Court of Special Appeals noted, however, that it was not bound by concessions of law. See id. at *4. The Court of Special Appeals reasoned that because the revised opinion in *Kazadi* stated that its holding applied to "any [] cases that [were] pending on direct appeal" when the opinion was filed and Kumar had not filed a notice of appeal until after the *Kazadi* opinion was issued, Kumar was not entitled to relief. *Kumar*, 2021 WL 1392142, at *4. The Court of Special Appeals determined that *Twining*, not *Kazadi*, applied and that, as such, it need not address the State's contention that Kumar's *Kazadi* claim was waived or unpreserved for appellate review. *See Kumar*, 2021 WL 1392142, at *4.

Kumar petitioned for a writ of certiorari, which the Court of Appeals granted on July 9, 2021. i, 475 Md. 3, 256 A.3d 270 (2021).

Held:

Reversed as to conviction for first-degree murder. Case remanded to the circuit court with instructions to vacate the conviction and sentence and for a new trial on the first-degree murder charge.

The Court of Appeals held that *Kazadi* applies to any case pending in a trial or appellate court that had not become final on direct appeal when the opinion was issued, *i.e.*, cases in which there

had not yet been a final disposition at the time that the opinion was issued, and in which the issue was preserved for appellate review. In the case, both circumstances were satisfied.

The Court of Appeals held that, in light of case law from the United States Supreme Court and this Court and considerations of fairness, the holding in *Kazadi* applies to any case that was pending in a trial or appellate court that had not become final on direct appeal when this Court issued the opinion in *Kazadi* and in which the *Kazadi* issue had been preserved for appellate review. In other words, the holding in *Kazadi* applies to cases in which there had not yet been a final disposition, regardless of whether a notice of appeal had been filed at the time the opinion in *Kazadi* was issued, and in which the issue had been preserved for appellate review.

The Court of Appeals stated that considerations of judicial economy and the desire to avoid unnecessary appellate litigation persuaded it to address the issue of preservation, given that it is an issue that can be decided quickly and easily and that in all likelihood would wind up back in the Court after a determination on remand. The Court explained that it had everything needed to determine whether Kumar's *Kazadi* claim is preserved for appellate review and that it need only determine whether Kumar's exceptions were sufficient to preserve the *Kazadi* claim for appellate review. As the State acknowledged at oral argument in the Court, the holding in *State v. Ablonczy*, 474 Md. 149, ___, 253 A.3d 598, 600 (2021) disposed of the State's contention in the Court of Special Appeals that Kumar waived his *Kazadi* claim by accepting the jury as empaneled. As such, the Court needed only address the issue of preservation for appellate review, not waiver.

The Court of Appeals concluded that Kumar preserved the *Kazadi* claim for appellate review. Kumar preserved the *Kazadi* claim for appellate review in accordance with Maryland Rule 4-323(c) by making known his objection to the circuit court's failure to ask the *Kazadi*-type *voir dire* questions. Kumar requested the unasked *Kazadi voir dire* questions at issue at least twice before the jury panel was questioned as a group—first in writing and then orally during the process in which the circuit court reviewed with counsel the *voir dire* questions that would be asked. Prior to the circuit court asking the proposed *voir dire* questions, Kumar's counsel specifically advised the court that he took exception to the court's refusal to ask questions 15 and 16—the *Kazadi*-type *voir dire* questions—and the circuit court explicitly stated that each exception was noted. When given the opportunity to do so after the group *voir dire* questions were asked, Kumar excepted to the circuit court's refusal to ask proposed *voir dire* questions. It was clear that when Kumar's counsel asked the circuit court to note his "continuing exception to its refusal" he was referring to the court's refusal to ask proposed *voir dire* questions that he had requested. In addition to excepting to the circuit court's refusal to include the *Kazadi* questions in the group *voir dire* questions and noting a continuing exception after the group *voir dire* occurred, in the motion for a new trial, Kumar asserted that the circuit court erred in refusing to ask the *Kazadi*-type *voir dire* questions.

Jason Mercer v. Thomas B. Finan Center, No. 9, September Term 2021, filed December 17, 2021. Opinion by Watts, J.

McDonald and Booth, JJ., concur and dissent.

https://www.mdcourts.gov/data/opinions/coa/2021/9a21.pdf

FORCED MEDICATION – RIGHT TO COUNSEL UPON REQUEST – WAIVER OF RIGHT

Facts:

In July 2019, Jason Mercer, Petitioner, a patient at a psychiatric institution, refused to take prescribed psychotropic medication. After a panel was convened and approved forced medication, Mercer requested a hearing within the forty-eight-hour deadline but indicated on an appeal request form that he declined legal representation. The form presented Mercer four choices with respect to representation at the administrative hearing: (1) legal representation to be provided at no cost by the State's designated Legal Assistance Provider; (2) private legal representation at his own expense; (3) no legal representation and having a layperson serve as an advocate; or (4) no legal representation and appearing on his own behalf. Mercer checked the line indicating that he declined legal representation and would appear at the hearing on his own behalf. Six days later, Mercer received a notice of the hearing date from the Maryland Office of Administrative Hearings ("OAH") advising that he had the right to request representation or the assistance of a lawyer or other advocate of his choice.

On the day of the hearing, Mercer asked for counsel. The Administrative Law Judge ("the ALJ") treated the request for counsel as a request for a postponement. The ALJ determined that Mercer had been given the opportunity for legal representation at no cost to himself and had indicated on the appeal request form and verbally to a rights advisor that he did not want counsel. After making this determination, the ALJ announced that there was not good cause to postpone the hearing. The hearing took place with Mercer unrepresented. The ALJ made findings of fact and concluded that the Center had shown by a preponderance of the evidence that Mercer "should be medicated with the psychiatric medications which were listed in the August 5, 2019, Clinical Review Panel Decision, not to exceed 90 days."

On August 29, 2019, on his own behalf, Mercer filed a petition for judicial review in the Circuit Court for Allegany County. On September 4, 2019, the circuit court conducted a hearing. At the time, Mercer was represented by counsel. The circuit court denied the request for a new administrative hearing and ruled that Mercer had "the right to representation afforded him by statute and before the ALJ[,]" and that the Appeal Request Form was permissible under the statute and an effective waiver. Although the circuit court indicated that it was possible for an individual in certain situations to have a change of mind regarding counsel, the court stated that whether to grant a request for counsel at a hearing rested within the discretion of the ALJ. The circuit court affirmed the ALJ's decision, and Mercer appealed. On January 28, 2021, the Court

of Special Appeals affirmed the circuit court's judgment. *See Mercer v. Thomas B. Finan Ctr.*, 249 Md. App. 144, 151, 245 A.3d 85, 88 (2021). Mercer petitioned for a writ of certiorari, which the Court of Appeals granted. *See Mercer v. Thomas B. Finan Ctr.*, 474 Md. 632, 255 A.3d 169 (2021).

Held: Reversed.

The Court of Appeals held that, under the plain language of Md. Code. Ann., Health-Gen. (1982, 2019 Repl. Vol.) ("HG") § 10-708, an individual possesses a right to counsel upon request. Stated differently, if an individual makes a request, the individual has the right to counsel. The plain language of the statute imposes no time limit or deadline by which an individual must make a request for counsel. Therefore, unless the right is waived, an individual may request counsel up to the time of and including at the administrative hearing. To safeguard the right to counsel, an on-the-record waiver colloquy of the kind required in a criminal case is not necessary, but there must be verification that an individual has knowingly and voluntarily waived the right to counsel and elected to proceed without legal representation. Applying these principles, the Court concluded that in this case the ALJ erred in declining Mercer's request to be represented by counsel at the administrative hearing.

The Court of Appeals stated that HG § 10-708(i)(4) utilizes the same language—"right to request"—to establish an individual's right to a hearing and right to counsel at the hearing. HG § 10-708(i)(4)(i) and (ii). Comparing the manner in which the statute describes an individual's right to request a hearing to the language setting forth the right to request counsel led to the determination that an individual has upon request both the right to a hearing and the right to counsel. Specifically, HG § 10-708(i)(4)(i) employs the identical language of "right to request" to describe the right to a hearing as HG § 10-708(i)(4)(ii) does to describe the right to counsel. It is undisputed that an individual's right to request a hearing—once invoked—confers the right to an appeal of a panel's decision. That HG § 10-708(i)(4)(ii) employs the same language as HG § 10-708(i)(4)(i) concerning the "right to request" led to the conclusion that, unless waived, once an individual invokes the right to request counsel, the individual indeed has the right to the assistance of counsel.

The Court of Appeals determined that, unlike with the forty-eight-hour deadline for requesting a hearing, HG § 10-708 imposes no deadline or timeframe in which an individual is required to request counsel. The Court declined to read a time restriction into HG § 10-708 and to impose a requirement that, to be effective, a request for counsel must be made at some unidentified point prior to the hearing. The Court of Appeals concluded that it was evident that in 1991, in amending HG § 10-708, the General Assembly sought to safeguard an individual's liberty interest in being free from the arbitrary forced administration of medication by providing due process protections, including the right to counsel upon request. To determine that the right to request counsel means less than the statute states, or that a deadline for making the request exists (which is not set forth in the statute), would undermine the General Assembly's intent.

The Court of Appeals held that, after careful balancing of the factors that the Supreme Court set forth *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) for evaluating procedural due process questions, given the significant constitutionally protected liberty interest at stake, the apparent inadequacy of the current procedures to avoid erroneous deprivation of the interest, and the Center's unexplained delay in taking action in furtherance of the State's interest, the ALJ deprived Mercer of procedural due process in declining his request for counsel at the administrative hearing.

The Court of Appeals concluded that an on-the-record waiver colloquy of the type used in a criminal case involving the constitutional right to counsel is not necessarily required, but there must be verification that an individual has knowingly and voluntarily waived the right to request counsel afforded under HG § 10-708. The Court concluded that, given the significant constitutionally protected liberty interest at stake where the forced administration of psychiatric medication is concerned, the high risk of erroneous deprivation of the interest under existing procedures, and the lack of an established burden on the State's interest if additional safeguards were provided, at a minimum, verification that an individual wants to waive the right to request counsel under HG § 10-708 is required and, further, such verification must demonstrate that the waiver is knowing and voluntary. Because an individual subject to forced medication under HG § 10-708(b)(2) is necessarily hospitalized involuntarily or committed for treatment by order of a court, determining that the waiver of the right to counsel is the product of the individual's free will and that the individual has been advised of the nature of the right and the consequences of waiving the right is paramount. The Court determined that the strict standard of waiver requiring that a court, or in this case an ALJ, conduct a personal inquiry on the record with an individual to establish that the person has been advised of the right to request counsel and is waiving the right knowingly and of his or her own free will is not required.

The Court of Appeals concluded that the procedure used in the case was insufficient to safeguard the significant constitutional liberty interest at stake—an individual's right to be free from the arbitrary forced administration of psychiatric medication—as well as an individual's right to counsel upon request under HG § 10-708. Although an on-the-record waiver colloquy is not required, in light of the significant liberty interest attendant to the forced administration of medication, verification that an individual wants to knowingly and voluntarily waive the right to request counsel and proceed unrepresented is necessary. In the case, at the administrative hearing, Mercer affirmatively requested counsel and there was no verification that he had knowingly and voluntarily waived the right. As such, the Court reversed the judgment of the Court of Special Appeals.

Westfield Insurance Company v. Michael Gilliam, Misc. No. 4, September Term 2021, filed February 8, 2022. Opinion by McDonald, J.

https://www.courts.state.md.us/data/opinions/coa/2022/4a21m.pdf

MOTOR VEHICLE INSURANCE – UNINSURED MOTORIST BENEFITS – STATUTORY OFFSET FOR BENEFITS RECOVERED UNDER WORKERS' COMPENSATION CLAIM

Facts:

While driving a company car on the job, Plaintiff Michael Gilliam was injured in an automobile accident. Mr. Gilliam's health care providers billed him $243,399.33 for the resulting medical treatment, but in accordance with the State's Workers' Compensation Commission's "Fee Guide," his workers' compensation insurer paid $118,369.15 in full satisfaction of those bills.

The other driver was underinsured and unable to provide full compensation to Mr. Gilliam. Mr. Gilliam filed a claim against his employer's underinsured motorist insurer, Defendant Westfield Insurance Company.

Maryland Code, Insurance Article ("IN"), § 19 513(e) provides for an underinsured motorist insurer to offset a claimant's underinsured motorist benefits by the amount of workers' compensation benefits received by the claimant. At issue is whether these "benefits" include the difference between the amount of medical bills submitted by a claimant's health care providers and a lower amount actually paid to the providers by a workers' compensation insurer to satisfy those bills.

Mr. Gilliam filed a one-count complaint in the Circuit Court for Baltimore City asserting a breach of contract claim against Westfield. Westfield removed the case to the U.S. District Court for the District of Maryland on the basis of the parties' diverse citizenship. Resolution of the offset with respect to Mr. Gilliam's claim required interpretation of the phrase "workers' compensation benefits" under IN § 19 513(e). For that purpose, the federal court certified the question to the Maryland Court of Appeals.

Held:

The Court of Appeals held that "workers' compensation benefits" under IN § 19-513(e) do not include the difference between a higher face amount billed by a health care provider and the amount actually paid by the workers' compensation insurer. The Court of Appeals concluded that this interpretation aligns with the plain statutory text and the legislative intent to place the claimant of underinsured motorist coverage in as good of a position as if the tortfeasor had carried insurance coverage equivalent to that of the claimant's underinsured motorist coverage.

Linda A. Sanders v. Board of Education of Harford County, et al., No. 20, September Term 2021, filed December 17, 2021. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2021/20a21.pdf

MARYLAND WORKERS' COMPENSATION ACT – DENIAL OF MOTION TO REOPEN OR MODIFY – MD. CODE ANN., LAB. & EMPL. (1991, 2016 REPL. VOL.) § 9-736(b) – JUDICIAL REVIEW

Facts:

The Maryland Workers' Compensation Act, Md. Code Ann., Lab. & Empl. (1991, 2016 Repl. Vol.) ("LE") §§ 9-101 to 9-1201, expressly provides the Workers' Compensation Commission ("the Commission") with continuing jurisdiction over workers' compensation claims in several provisions. One such provision—LE § 9-736(b)—authorizes the Commission to modify its findings or orders. In response to a motion or request to reopen or modify under LE § 9-736(b), the Commission may grant the request, hold a hearing at which evidence is considered and afterward issue a decision granting or denying the requested relief. On the other hand, the Commission may also deny a request to reopen or modify without reopening the case for the receipt of additional evidence or a hearing, and without considering the merits of the request or earlier order and making new findings. This is generally called a summary denial.

Linda A. Sanders, Petitioner, worked as a school bus driver for the Board of Education of Harford County, which is insured by the Maryland Association of Boards of Education (together, "Respondents"). Sanders filed a claim for workers' compensation benefits with the Commission due to an accident that occurred on the job. The Commission conducted an evidentiary hearing and issued an order that approved Sanders's request for four additional weeks of physical therapy for her left shoulder but denied her request for authorization for surgery on the left shoulder. Sanders did not seek judicial review of the Commission's decision or request a rehearing. Several months later, Sanders underwent surgery on her left shoulder, using her health insurance to pay the costs.

Over three years later, Sanders filed with the Commission a request for modification of the earlier order denying the request for authorization for surgery, seeking payment of her surgeon's bills. The Commission denied the request without a hearing and Sanders filed in the Circuit Court for Harford County a petition for judicial review. Respondents moved to dismiss the petition, and the circuit court granted the motion.

Less than three months after filing the initial request for modification, Sanders filed with the Commission a second request for modification of the Commission's initial order, again raising the issue of authorization for surgery and requesting identical relief, *i.e.,* payment of her surgeon's bills. As with the first request to reopen, the Commission denied the second request without a hearing. Sanders filed in the circuit court a petition for judicial review. Respondents

filed a motion to dismiss the petition. After conducting a hearing on the motion to dismiss, the circuit court denied the motion. The parties filed cross-motions for summary judgment. The circuit court issued a memorandum opinion and an amended memorandum opinion denying Respondents' motion for summary judgment, granting Sanders's motion, and remanding the case to the Commission for action on Sanders's second request for modification.

Respondents appealed and the Court of Special Appeals reversed the circuit court's judgment. *See Bd. of Educ. of Harford Cty. v. Sanders*, 250 Md. App. 85, __, 248 A.3d 1108, 1117 (2021). The Court of Special Appeals held that the circuit court erred in denying Respondents' motion to dismiss because the Commission has broad discretion to summarily deny a request to reopen under LE § 9-736(b) "and such a denial is not subject to judicial review." *Id.* at __, 248 A.3d at 1113 (bolding omitted). The Court of Appeals granted certiorari to consider whether the Commission's summary denial of a request to reopen or modify pursuant to LE § 9-736(b) is subject to judicial review. *See Sanders v. Bd. of Educ. of Harford Cty.*, 475 Md. 2, 256 A.3d 270 (2021).

Held: Affirmed.

The Court of Appeals held that the Commission's summary denial of Sanders's second request for modification under LE § 9-736(b) was not subject to judicial review. The Court determined that, where a party requests that the Commission reopen or modify a claim and the Commission summarily denies the request without a hearing and does not consider new evidence or the merits of the request to reopen, or make findings with respect to the merits of the request or of the earlier order in the issuance of a new or amended order, the Commission's denial is not subject to judicial review. In the case, the Commission issued an initial order in which it, among other things, denied Sanders's request for authorization for shoulder surgery. Sanders did not file a petition for judicial review or request a rehearing. Several months later, although the Commission did not authorize shoulder surgery, Sanders underwent shoulder surgery and paid for it using her health insurance. Over three years later, Sanders filed a request for modification of the Commission's order, which was denied. Sanders filed a second request for modification of the Commission's order, raising the same issue as in the first request—authorization for shoulder surgery and requesting payment of her surgeon's bills. The Commission denied the second request for modification without a hearing, stating only that the request was denied. In the order denying the second request for modification, the Commission did not address the merits or discuss the propriety of the request or of the initial order.

The Commission summarily denied the second request for modification, and in accord with the longstanding principles set forth in the Court's case law, the Court of Appeals concluded that Sanders did not have the right to seek judicial review of the summary denial. As such, the circuit court erred in denying Respondents' motion to dismiss the petition for judicial review and cross-motion for summary judgment and in granting Sanders's motion for summary judgment and remanding the case to the Commission for action on the second request for modification.

The Court of Appeals explained that, pursuant to the plain language of LE § 9-736(b), the Commission is vested with broad authority to decide whether to reopen or modify a case once a request to do so has been made. *See* LE § 9-736(b)(2) ("Subject to paragraph 3 of this subsection, the Commission may modify any finding or order as the Commission considers justified."). Stated differently, the Commission has wide discretion to either modify a finding or order that it has previously issued or not do so under LE § 9-736(b), provided that a request to modify is made within the statutory limitations period of five years outlined in LE § 9-736(b)(3). The Court stated that it is evident that the Commission exercised the broad discretion given to it by summarily denying Sanders's request and refusing to reopen or modify her claim. LE § 9-736(b) is silent as to whether there is a right to judicial review of a summary denial of the Commission decision (made under the subsection) concerning a matter the Commission has already addressed. To be sure, LE § 9-737 generally provides for judicial review of a decision by the Commission where a petition for judicial review is filed within thirty days after the date of the mailing of the Commission's order. Nevertheless, the Court's case law made clear that the summary denial of a request to reopen or modify under LE § 9-736(b) is not subject to judicial review—*i.e.*, that summary denial of a request to reopen or modify is not a decision of the Commission that is reviewable.

The Court of Appeals stated that it makes sense that where the Commission considers the merits of the request or relies on new evidence to issue a different or amended order, that decision is reviewable—a whole new decision has been made of which an aggrieved person may seek judicial review pursuant to LE § 9-737. By contrast, where the Commission summarily denies a request to reopen or modify, no new decision has been made and the previous order stands unchanged, *i.e.*, there is nothing new to review.

COURT OF SPECIAL APPEALS

Catherine M. Pomroy, et al. v. Indian Acres Club of Chesapeake Bay, Inc., No. 386, September Term 2021, filed February 23, 2022. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2022/0386s21.pdf

CIVIL PROCEDURE – DEFAULT JUDGMENT

Facts:

In June 2020, Indian Acres Club of Chesapeake Bay, Inc. ("IAC") filed a complaint against Gerald Pomroy and Catherine Pomroy in the Circuit Court for Cecil County. IAC alleged that the Pomroys had failed to pay $15,285.21 in charges that had come due between September 30, 2017, and January 31, 2020.

The Pomroys did not file a timely answer. At IAC's request, the circuit court issued an order of default under Md. Rule 2-613(b).

Before the expiration of the 30-day period in which the Pomroys could move to vacate the order of default, IAC filed an amended complaint. In the amended complaint, IAC alleged that the Pomroys failed to pay additional fees that had come due after the filing of the original complaint. IAC increased the damages sought to $22,078.88 to reflect the additional fees that the Pomroys allegedly failed to pay after the filing of the original complaint.

The Pomroys made a timely motion to set aside the order of default. They argued, among other things, that the fees had been improperly assessed. Ms. Pomroy also argued that she had not been properly served. The circuit court denied the Pomroys' motion.

After the denial of the motion to set aside the order of default, IAC personally served Mr. Pomroy with a copy of the amended complaint and the supporting documents. Under Md. Rule 2-341(a), the Pomroys had 15 days from the date of service in which to respond to the amended complaint.

Two days after a response to the amended complaint was due, IAC filed a request for the entry of a default judgment. IAC claimed that the Pomroys had failed to file a responsive pleading to

either the original complaint or the amended complaint. IAC asked the court to enter a judgment in the amount set forth in the amended complaint ($22,078.88), plus reasonable attorneys' fees.

The Pomroys filed a timely response to IAC's request for a default judgment. They argued that IAC was not entitled to a default judgment because the circuit court had yet to issue an order of default on the amended complaint.

The circuit court granted IAC's request for a default judgment. The court entered judgment in favor of IAC and against the Pomroys in the amount of $22,078.88, the sum requested in the amended complaint. The court also awarded IAC attorneys' fees and costs totaling $1,453.00.

The Pomroys appealed.

Held: Reversed.

The Court of Special Appeals held that the circuit court erred in granting the plaintiff's request for a default judgment with respect to the amended complaint where the court had never issued an order of default after the filing of the plaintiff's amended complaint.

When the plaintiff filed the amended complaint, the original complaint was withdrawn and the amended complaint became the operative pleading. Consequently, the existing order of default became a nullity, as the claims in the original complaint had been abandoned in favor of the amended complaint.

Moreover, because the amended complaint asserted a new and additional claim for relief, the plaintiff was required to serve the defendants in accordance with the rules for service of original process. If the defendants failed to file a timely response to the amended complaint, the plaintiff was then required to request a new order of default with respect to the amended complaint. Instead, the plaintiff skipped several steps by asking the court to proceed directly to the entry of a default judgment on the amended complaint. The court erred by entering a default judgment on the claims in the amended complaint, including the claim that the defendants had breached an obligation to pay a charge that came due only after the plaintiff filed the original complaint.

Where the amended complaint asserts a new or additional claim for relief, the court may not enter a default judgment on the amended complaint before the plaintiff has moved for an order of default on the amended complaint and the court has declined to vacate that order of default. Under those circumstances, the court may enter a default judgment with respect to the amended complaint only after: the plaintiff has sought and obtained an order of default as to the amended complaint; the court has denied a motion to vacate the order of default as to the amended complaint, or the defendant has failed to file a timely motion to vacate that order of default; and the plaintiff has requested the entry of a default judgment as to the amended complaint.

Brittany Simmons, et al. v. The Maryland Management Company, et. al., No. 1680, September Term 2019, filed February 4, 2022. Opinion by Eyler, D., J.

https://mdcourts.gov/data/opinions/cosa/2022/1680s19.pdf

MARYLAND CONSUMER DEBT COLLECTION ACT (MCDCA) § 14-202(8) – DEBT COLLECTION BY ENFORCING RIGHT WITH KNOWLEDGE RIGHT DOES NOT EXIST

MARYLAND CONSUMER PROTECTION ACT (MCPA) §§ 13-301(14)(iii) and 13-303(5) – MISREPRESENTATION IN DEBT COLLECTION

REAL PROPERTY § 8-208(d) – PROHIBITION AGAINST ANTI-WAIVER PROVISIONS IN RESIDENTIAL LEASES

COURTS AND JUDICIAL PROCEEDINGS ARTICLE § 5-1202(a) – PROHIBITION AGAINST FILING DEBT COLLECTION ACTION BEYOND STATUTE OF LIMITATIONS

Facts:

Former Tenants of residential properties in Maryland brought putative class action against former Landlords whose leases contained clause purporting to extend the statute of limitations for actions arising out of them from 3 to 12 years and against Lawyers who on behalf of Landlords brought back-rent collection actions against Tenants in the District Court of Maryland. Tenants sued for damages for violations of the MCDCA provision barring debt collectors from enforcing or attempting to enforce a right with knowledge it does not exist; for violations of the MCPA, including the prohibition against making false representations in collecting consumer debt; and for violations of provision of Real Property Article prohibiting landlords from including a waiver of rights in a residential lease. In addition, Tenants sought declaratory and injunctive relief based on violation of a statute prohibiting filing an action to recover time-barred consumer debt. Circuit court granted motion to dismiss for failure to state a claim for which relief could be granted.

Held: Judgment vacated.

In *Tipton v. Partners Management Co.,* 364 Md. 419 (2001), the Court of Appeals held that the statute of limitations for back-rent actions against residential tenants is three years and a lease with "(Seal)" next to the signature line is not a specialty to which a 12-year limitations period applies. It further stated it was "holding" that a provision so extending the limitations period could be included in the body of the lease. In *Smith v. Wakefield, LP*, 462 Md. 713 (2019), in which such a provision was included in the lease, the Court held that the latter "holding" in *Tipton* was "dicta," that a provision extending limitations to 12 years in a residential lease

violates the anti-waiver provision of RP section 8-208(d), and that it is otherwise unreasonable and unenforceable.

The District Court back-rent actions against Tenants were brought after *Tipton* was decided and before *Smith* was decided, and more than three years after leases were breached. Tenants alleged that Landlords and Lawyers violated the MCDCA by filing suits with knowledge that the right they were seeking to enforce did not exist, i.e., that debts were time-barred and no longer collectible. Landlords and Lawyers maintained that *Smith* only applied prospectively, that under *Tipton* limitations-extending clauses were acceptable in residential leases, and that given that state of the law, they could not have acted with knowledge that they were enforcing a right they did not have by filing suits for back-rent more than 3 years after breaches. Under *Chavis v. Blibaum*, 476 Md. 534 (2021), however, when an area of law is unsettled, a person who makes a mistake of law by seeking to enforce a right later shown not to exist is not shielded from liability under the MCDCA but may be liable if found to have acted recklessly. *Tipton* did not settle the question whether a limitations-extending clause in a residential lease is legal and enforceable; the question was not settled until *Smith* was decided. Therefore, whether the Landlords and Lawyers violated the MCDCA depends upon whether they acted recklessly, which is a question of fact not properly resolved on a motion to dismiss.

Tenants' MCPA claim that suits filed against them contained false representations was dismissed on the ground that the representations were not made to the consumers, i.e., the Tenants, but to the courts in which they were filed, under holding in *Sayyed v. Wolpoff & Abramson*, 733 F. Supp. 2d 635 (D. Md. 2010). This case differs from *Sayyed*, which concerned a request for attorneys' fees made in concert with motion for summary judgment sent to counsel and to court and not to consumers. Here, complaints were served on Tenants and therefore the alleged misrepresentations were made to them as consumers. MCPA claim should not have been dismissed.

Tipton did not address the question whether the anti-waiver provision in RP section 8-208(d) applies to clause extending limitations period in residential lease. *Smith* held that it does. That decision applied retroactively, as it did not change an established principle of law. Tenants stated a claim based on violation of that statute.

Tenants sought declaratory and injunctive relief, including orders precluding Landlords and Lawyers from enforcing judgments obtained against Tenants in District Court back-rent actions. Landlords and Lawyers maintained that because the suits were filed in violation of CJP section 5-1202(a), which prohibits filing consumer debt collection actions after limitations has expired, the District Court lacked jurisdiction over those cases and the judgments entered were void. Judgments were not void because the District Court had fundamental jurisdiction over the actions. Under reasoning in *LVNV v. Finch*, 463 Md. 586 (2019), declaratory and injunctive relief, including prohibition against enforcing judgments and disgorgement of funds received, could be pursued in conjunction with claim under MCDCA.

Jeanette Reyes v. State of Maryland, No. 1092, September Term 2020, filed January 26, 2022. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2022/1092s20.pdf

CRIMINAL LAW – POSTCONVICTION RELIEF – WRIT OF ERROR CORAM NOBIS –

CRIMINAL LAW – GUILTY PLEAS – KNOWLEDGE OF MAXIMUM SENTENCE

Facts:

In 2003, Ms. Reyes was charged with possession of a controlled dangerous substance with intent to distribute. The State intended to prosecute her for possession with intent to distribute cocaine, a change that carried a maximum possible sentence of twenty years' imprisonment. But at some point in the charging process, an error was made. The State mistakenly maintained that the maximum sentence she faced was only five years, not twenty, and she was told as much at her initial appearance. This error was repeated multiple times by the State, the circuit court, and Ms. Reyes's defense counsel. Compounding this error, Ms. Reyes—a non-U.S. citizen—later testified that her counsel had told her, incorrectly, that a conviction for possession with intent to distribute would have no impact on her eligibility for American citizenship, and that the conviction would be "off [her] record" in "five to seven years." In fact, the conviction would make her permanently ineligible for citizenship and make her subject to deportation with no possibility of discretionary relief.

Operating under these two misunderstandings, Ms. Reyes then pleaded guilty to the one count of possession with intent to distribute. Her plea was made pursuant to a plea deal which provided that the State would ask for a sentence consistent with the sentencing guideline but was otherwise silent on her sentence.

At Ms. Reyes's sentencing hearing, the parties informed the court that they had discovered the State's error in stating the wrong maximum sentence. The circuit court then sentenced Ms. Reyes to a one-year suspended sentence and one year of probation.

In August 2019, many years after her conviction, Ms. Reyes filed a petition for writ of error coram nobis. In her petition, she asserted that her conviction was invalid because her guilty plea was accepted in violation of Maryland Rule 4-242(c). She argued that her guilty plea violated Rule 4-242(c) because the circuit court failed to advise her of the maximum sentence that she could face upon pleading guilty, which made her plea not knowing and voluntary. She also argued that she was facing significant collateral consequences because her conviction made her subject to deportation and permanently ineligible for citizenship. The circuit court denied Ms. Reyes's petition, and she noted an appeal.

Held: Vacated and remanded.

The Court of Special Appeals reached two holdings. First, addressing the State's contention that Ms. Reyes's petition was barred by laches, the Court held that the State had waived the defense of laches because the State had expressly conceded in the circuit court coram nobis proceedings that it was not prejudiced by Ms. Reyes's delay in filing the petition.

Second, the Court held that Ms. Reyes's guilty plea was accepted in violation of Rule 4-242(c) because she was misinformed as to the maximum sentence that she faced upon the acceptance of her plea. The Court contrasted Ms. Reyes's case with *Coleman v. State*, 219 Md. App. 339 (2014), in which the Court of Special Appeals affirmed the denial of a coram nobis petition. From the outset of Ms. Reyes's criminal case, she was repeatedly told that she faced a much lower maximum sentence than the actual maximum sentence. This misunderstanding persisted throughout the entire case until after Ms. Reyes pleaded guilty, and the State identified no evidence in the record to contradict that timeline. This is in no way comparable to Coleman's actual knowledge of the true maximum sentence prior to his plea. Further, in *Coleman*, the Court suggested that Mr. Coleman's light sentence counted against him because "the writ [of error coram nobis] is designed to do justice, not to facilitate a miscarriage of justice." The same is not true in Ms. Reyes's case because the two cases are very different. Mr. Coleman knew his maximum sentence before pleading guilty, and he sought coram nobis relief to avoid an enhanced sentence in a subsequent federal case for another offense; but Ms. Reyes was misinformed as to both her maximum sentence and the immigration consequences of her plea, and she sought coram nobis relief to avoid deportation and ineligibility for citizenship. Under these circumstances, the Court concluded that it would not be a miscarriage of justice for Ms. Reyes to be able to remain in this country when she has lived here for almost twenty years without incident (on record) after her single conviction. Accordingly, the Court held that the circuit court abused its discretion in denying her petition for writ of error coram nobis.

Prince George's County Department of Social Services v. Akeem Taharaka, No. 786, September Term 2020, filed February 25, 2022. Opinion by Friedman, J.

https://mdcourts.gov/data/opinions/cosa/2022/0786s20.pdf

INFANTS – CHILD PROTECTION – AGENCIES AND PROCEEDINGS – ADMINISTRATIVE PROCEEDINGS AND REVIEW THEREOF

Facts:

The Prince George's County Department of Social Services received notice from a mandated reporter that A.B., then sixteen years old, had disclosed that her grandmother's boyfriend, Akeem Taharaka, had raped her approximately five years earlier while she was living with her grandmother. Following an investigation, which included two interviews with A.B., the Department found Taharaka "indicated" for child sexual abuse.

Taharaka appealed the decision and requested a hearing before an Administrative Law Judge. During the hearing, Taharaka, Taharaka's sister, and a Department social worker testified. A.B. did not testify, but her prior out-of-court statements, as recorded by the mandated reporter and as told to the Department during two interviews, were admitted into evidence. The ALJ applied the factors under the tender years exception, MD. CODE, CRIM. PROC. ("CP") § 11 304(e)(2), to determine whether A.B.'s statements were sufficiently reliable to be considered credible evidence of child sexual abuse.

The ALJ found: (1) that A.B.'s statements regarding the alleged abuse were not "sufficiently reliable to be considered credible evidence of child sexual abuse;" (2) that the Department's evidence had been rebutted by Taharaka's credible testimony; and (3) that the Department had not proven by a preponderance of the evidence that Taharaka was a regular presence in the home and, thus, could not have committed child sexual abuse as defined by statute. The ALJ ordered that the Department's disposition be modified from "indicated" to "ruled out."

The Department appealed the ALJ's order to modify the Department's disposition to the Circuit Court for Prince George's County, which affirmed the ALJ's decision.

Held: Reversed and Remanded.

The Department appealed to the Court of Special Appeals to determine whether the ALJ erred in finding that A.B.'s statements were not credible and that Taharaka was credible.

The Court of Special Appeals reversed and remanded the Circuit Court's judgment affirming the ALJ's decision with instructions to the Circuit Court to vacate the decision of the Office of Administrative Hearings and remand the matter to that Office for further proceedings. The Office

of Administrative Hearings was instructed to enter an order that Taharaka was a regular presence in the home and to take whatever evidence it determined was necessary to reconsider the credibility of the witnesses and their statements and weigh whether to affirm or modify the Department's disposition.

The Court of Special Appeals held that the ALJ's determination that A.B.'s statements were not credible was arbitrary and capricious, while the ALJ's determination that Taharaka was credible was based on incomplete information. First, in evaluating the factors under CP § 11 304(e)(2) to determine whether A.B.'s statements were sufficiently reliable to be considered credible evidence of child sexual abuse, the ALJ used the factors in a manner that was not consistent with current understandings of child sexual abuse and trauma informed credibility assessments. The ALJ applied the factors using an outdated perspective that is not supported by social science. Second, the ALJ's determination that Taharaka was credible was based solely on Taharaka's employment history and was, therefore, based on incomplete information.

The Court of Special Appeals also held that the ALJ's determination that, notwithstanding the allegations of abuse, Taharaka could not have committed child sexual abuse as defined by statute because he was not a regular presence in A.B.'s home, and therefore not a "household member," was both unsupported by substantial evidence in the record, and arbitrary and capricious. A "household member" is an individual who lived in, or was a regular presence in, the child's home at the time of the alleged abuse. MD. CODE, FAM. LAW ("FL") § 5-701(k) (2012). The undisputed record revealed that Taharaka was a regular presence in A.B.'s home and was involved in A.B.'s life at the time of the alleged abuse.

City of Hyattsville, et al. v. Prince George's County Council, et al., No. 1261, September Term 2020, filed February 23, 2022. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2022/1261s20.pdf

LAND USE – PIECEMEAL REZONING

Facts:

This case concerns a property located within the City of Hyattsville in Prince George's County. The upper parcel formerly served as the headquarters building for the Washington Suburban Sanitary Commission. A parking lot sits on the lower parcel.

In 2004, the Prince George's County District Council approved a sector plan and sectional map amendment for the Gateway Arts District, which covers Hyattsville and other municipalities. The sectional map amendment imposed an overlay zone known as the Development District Overlay (D-D-O) zone over the entire development district. The sectional map amendment left the upper parcel in the One-Family Residential (R-55) zone and changed the classification of the lower parcel to the Open Space (O-S) zone.

A development company known as Werrlein WSSC, LLC, acquired the property, hoping to build both single-family detached residences and townhouses. Under Prince George's County Code § 27-548.26(b)(1)(B), Werrlein applied for zoning changes that would allow townhouses to be constructed on the property. The application included a conceptual site plan depicting the proposed development.

The Prince George's County Planning Board recommended changing the underlying zone of the lower parcel to R-55 and changing the table of uses to allow townhouses on the property. Sarah Eisen and other Hyattsville residents (the "Eisen parties") and the City of Hyattsville opposed the Planning Board's recommendation.

After a hearing, the District Council remanded the matter to the Planning Board for supplemental analysis. On remand, the Planning Board reached a tie vote on a motion to recommend approval of the application. The Planning Board issued an amended resolution, stating that it was making no recommendation on whether to approve or disapprove the requested zoning changes.

In its final decision, the District Council approved rezoning the lower parcel from the O-S zone to the R-55 zone and adding townhouses to the list of allowed uses. The District Council endorsed densities of "6.7 dwelling units per acre" for single-family detached residences and "9 dwelling units per acre" for townhouses. The District Council expressly found that the proposed changes would further the purposes of the Development District and would not substantially impair the implementation of the 2004 sector plan or any other applicable comprehensive plan.

The City of Hyattsville petitioned for judicial review of the District Council's decision. The Eisen parties separately petitioned for judicial review. After consolidating the petitions, the Circuit Court for Prince George's County ultimately affirmed the decision. The City of Hyattsville and the Eisen parties each filed notices of appeal.

Held: Affirmed in part; reversed in part.

The Court of Special Appeals upheld the decision to the extent that it changed the zoning of the lower parcel and added townhouses to the list of allowed uses. The Court set aside the decision to the extent that it approved densities of "6.7 dwelling units per acre" for single-family detached residences and "9 dwelling units per acre" for townhouses.

First, the appellants contended that, under the Maryland-Washington Regional District Act (RDA), the Planning Board had original jurisdiction to approve Werrlein's application. *See generally County Council of Prince George's County v. Zimmer Dev. Co.,* 444 Md. 490 (2015). According to the appellants, therefore, the District Council lacked authority to approve the application after the Planning Board failed to approve it by a majority vote. The Court of Special Appeals rejected this argument.

The RDA expressly empowers the District Council to grant zoning map amendments. The RDA grants the Planning Boards have exclusive jurisdiction to make recommendations to the District Council with respect to zoning map amendments. The decision in this case concerned Prince George's County Code ("PGCC") § 27-548.26(b), which authorizes the District Council to approve changes to the underlying zone or to the list of allowed uses on a property in the development district overlay zone. The Court concluded that a decision to change the underlying zone and list of allowed uses for a property is, in substance, a decision to approve a zoning map amendment, even though a site plan is required as part of the application. The decision, therefore, falls within the District Council's authority under the RDA to approve zoning map amendments.

Second, the appellants contended that the District Council erred in rezoning the lower parcel absent any showing of either a substantial change since the prior comprehensive rezoning or a mistake in the comprehensive rezoning. The Court of Special Appeals rejected this contention. No showing of change or mistake was required in this context.

Generally, piecemeal rezoning of a property from one Euclidean zone to another may be granted only upon a showing of either a mistake of fact in the prior original or comprehensive zoning or a substantial change in the character of the neighborhood since the original or comprehensive zoning. As an exception, no such showing of a change or mistake is required to grant an application for a floating zone.

PGCC § 27-548.26(b) authorizes changes to the underlying zone or list of allowed uses for properties located in the development district overlay zone. To approve an application, the District Council must "find that the proposed development conforms with the purposes and

recommendations for the Development District, . . . meets applicable site plan requirements, and does not otherwise substantially impair the implementation of any comprehensive plan applicable to the subject development proposal." PGCC § 27-548.26(b)(5). The Court concluded that this legislatively-established process for making certain zoning changes is sufficiently analogous to the process of applying for a floating zone that it is an appropriate exercise of the District Council's zoning powers.

Third, the appellants contended that the rezoning decision should be reversed because, they argued, the decision is "inconsistent" with the 2004 sector plan. The Court of Special Appeals explained that land use recommendations from the sector plan were merely advisory, except to the extent that the zoning ordinance made those recommendations mandatory. The zoning ordinance provides that, to approve requested zoning changes under PGCC § 27-548.26(b), the District Council must find that the proposed development conforms with the purposes and recommendations for the development district, as stated in the sector plan, and does not otherwise substantially impair the implementation of the sector plan or any other applicable comprehensive plan. Here, the District Council made express findings that the proposal satisfied these criteria. Because those conclusions were at least fairly debatable, the court was required to uphold the conclusions.

Finally, the appellants contended that the District Council exceeded the maximum residential density permitted under the zoning ordinance. PGCC § 27-548.23(b) provides that, in the development district overlay zone, density may not exceed the maximum permitted in the underlying zone. Throughout the zoning ordinance, density means the number of dwelling units per net acre of net lot or tract area. Net lot area means the total area of the property, excluding: alleys, streets, and other public ways; and land lying within the 100-year floodplain.

In the underlying R-55 zone, the maximum density for one-family detached residences is 6.7 dwelling units per net acre. The District Council erred in approving a density of 6.7 dwelling units "per acre" for one-family detached residences, which exceeds the maximum of 6.7 dwelling units per net acre of net lot or tract area. The District Council also erred in approving a density of 9.0 dwelling units "per acre" for townhouse. Because the zoning ordinance provides no maximum density for townhouses in the R-55 zone, the District Council could establish a density for townhouses that is different from the density for one-family detached residences. The District Council, however, must express that density as a number of dwelling units per net acre of net lot or tract area.

Phyllis M. Jones v. Carrie M. Ward, et al., No. 1071, September Term 2020, filed February 24, 2022. Opinion by Ripken, J.

https://www.courts.state.md.us/data/opinions/cosa/2022/1071s20.pdf

MORTGAGES AND DEEDS OF TRUST – FORECLOSURE – PERSONS ENTITLED TO FORECLOSE

MORTGAGES AND DEEDS OF TRUST – ASSIGNMENT OR OTHER TRANSFER OF MORTGAGE INTEREST – ENFORCEMENT, REMEDIES, AND PROCEEDINGS – LOST, STOLEN, OR DESTROYED INSTRUMENTS

MORTGAGES AND DEEDS OF TRUST – ASSIGNMENT OR OTHER TRANSFER OF MORTGAGE INTEREST – RIGHTS OF TRANSFEREE

Facts:

In June 2004, Phyllis Jones (Jones) obtained a loan from World Savings Bank in the form of a promissory note (the Note) secured by a Deed of Trust for Jones's residential property. In August 2004, World Savings Bank executed a lost note affidavit stating that it was the lawful owner of the Note and that the Note was lost. Through a series of acquisitions, Wells Fargo came to own the Note. In 2014, Jones entered into a loan modification agreement with Wells Fargo. Wells Fargo executed lost note affidavits in July 2016, September 2016, and May 2017 affirming that it was the lawful owner of the Note and that the Note was lost.

In August 2017, Wells Fargo transferred its ownership of the Note to Truman 2016 SC6 Title Trust (Truman I), which in March of 2018 transferred its ownership in the Note to Truman 2016 SC6 MD ML, LLC (Truman II). Appellees were appointed as Substitute Trustees on behalf of Truman II.

Jones defaulted on her mortgage payments due under the Note in February 2016. Substitute Trustees initiated a foreclosure action in the Circuit Court for Prince George's County. Included with the Order to Docket were a copy of the Note and an affidavit certifying that the copy was true and accurate and that Truman II owned the Note. Jones moved to dismiss the foreclosure action, asserting that Substitute Trustees could not demonstrate that Truman II owned the Note and therefore lacked standing to bring the action. Prior to the hearing on Jones's motion, in January 2020, Truman II executed a lost note affidavit stating that it was the lawful owner of the Note and detailing its transfer history.

The court held a full evidentiary hearing on Jones's motion and accepted into evidence copies of the Note, deed of trust, and loan modification agreement as well as the lost note affidavits. Jones argued that because the Note was lost and because breaks in the chain of title existed, Substitute Trustees could not enforce the Note.

The court issued an order in February 2020 denying Jones's motion. Jones appealed, arguing that the circuit court erred because, pursuant to Maryland Commercial Law (CL) § 3-309 governing enforcement of lost notes, Substitute Trustees could not prove that they were in possession of the note at the time that loss occurred.

Held: Affirmed.

The Court of Special Appeals affirmed the circuit court's holding that Substitute Trustees had standing to initiate foreclosure proceedings pursuant to CL § 3-309. The Court held that Jones did not raise a valid factual or legal defense to the validity of the lien instrument or the right of Substitute Trustees to foreclose.

In reaching this holding, the Court examined CL § 3-309, which provides that a person may enforce a lost note if "the person was in possession of the instrument and entitled to enforce it when loss of possession occurred." The Court considered other jurisdictions' interpretations of the 1990 revision to UCC § 3 309, which Maryland had adopted. The D.C. District Court in *Dennis Joslin Co. v. Robinson Broadcasting Corp*., 977 F. Supp. 491 (D.D.C. 1997), held that an entity assigned a lost note could not enforce the note because it was not the entity that was in possession at the time loss occurred. In response to the *Joslin* decision, the Uniform Law Commission amended UCC § 3-309 to clarify that persons assigned lost notes may enforce those notes. A number of jurisdictions amended their counterpart codes to reflect the UCC amendment. The Court noted that among the jurisdictions that retain the pre-amendment language, there was a split as to whether lost notes may be enforced by subsequent assignees.

The Court of Special Appeals also examined the purpose behind CL § 3-309 and reviewed Maryland statutes and common law regarding the transfer of mortgage instruments. Because the explicit language of CL § 3-309 was silent as to the rights of a transferee or assignee of a lost note, because § 3 309 was intended to protect borrowers from competing claims while simultaneously allowing lenders to enforce notes, and because Maryland law has long allowed the transfer of mortgage instruments, the Court held that an assignee of a lost note may enforce that note.

The Court held that Substitute Trustees were entitled to enforce the Note because the terms of the Note were uncontroverted, the original entity, World Savings Bank, was in possession of the Note and had the right to enforce the Note at the time loss occurred, and Truman II established that it had validly been assigned the Note.

Montgomery Park, LLC v. Maryland Department of General Services, Case Nos. 35 & 48, September Term 2021, filed February 23, 2022. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2022/0035s21.pdf

STATE FINANCE AND PROCUREMENT – MARYLAND STATE BOARD OF CONRACT APPEALS – LEGAL STANDARD FOR CANCELLATION OF A PROCUREMENT

STATE FINANCE AND PROCUREMENT – BID PROTESTS – STANDING

Facts:

In 2008, the Maryland Insurance Administration ("MIA") entered into a lease agreement with St. Paul Plaza for office space. In August 2017, MIA asked the Department of General Services ("DGS") to issue a Request for Proposal ("RFP") for office space. Montgomery Park submitted its proposal and was selected for award of the MIA lease. On April 23, 2019, before the lease was to be submitted to the Board of Public Works for approval, MIA sent a letter to DGS asking it to cancel the procurement of the MIA lease with Montgomery Park. MIA provided reasons and concluded it was in the best interests of the State to cancel the procurement. On behalf of MIA, the procurement officer sent a letter to Montgomery Park cancelling the RFP. DGS's letter did not state a reasoning for cancelling the procurement, but it did attach MIA's April 23 letter to DGS detailing the reasons why MIA wanted to cancel the procurement. DGS then requested to renew MIA's lease with St. Paul Plaza, which the Board of Public Works approved on January 8, 2020.

Montgomery Park protested ("First Protest") the procurement officer's decision to cancel the procurement, arguing that DGS's decision was arbitrary and capricious because the procurement officer did not independently determine that it was in the State's best interest to cancel. Montgomery Park also protested ("Second Protest") DGS's decision to renew MIA's lease with St. Paul Plaza. Both bid protests were denied, and Montgomery Park appealed to the Maryland State Board of Contract Appeals (the "Board").

Regarding the First Protest, the Board found that the standard of review when reviewing a procurement agency's decision to cancel a procurement is whether the decision was unreasonable, arbitrary, and capricious. The Board found that DGS's decision to cancel the procurement was flawed because the procurement officer failed to investigate MIA's reasons for wanting to cancel the procurement. The Board held that DGS could not have reasonable concluded that cancelling the procurement with Montgomery Park was in the best interests of the State. Therefore, DGS's decision to cancel the procurement was unreasonable, arbitrary, and capricious. The Board sustained Montgomery Park's first appeal.

As for the Second Protest, the Board found that Montgomery Park was an interested party, and thus had standing to challenging DGS's decision to enter into a sole-source renewal lease with

St. Paul Plaza. On the merits, the Board held that the DGS procurement officer violated Procurement Law by failing to document separately its reasons for determining that it was in the State’s best interest to renew the lease with St. Paul Plaza. The Board sustained Montgomery Park’s second appeal.

DGS requested judicial review of the Board’s opinions in the Circuit Court for Baltimore City. With regard to the First Protest, the court held that the Board applied the wrong legal standard in reviewing DGS’s decision to cancel the procurement. The court found the correct legal standard to be whether DGS’s decision to cancel was fraudulent or so arbitrary as to constitute a breach of trust. The court also held that the Second Protest was untimely and therefore the Board lacked jurisdiction to hear the appeal. The court reversed the Board’s decisions, and Montgomery Park filed timely appeals from both.

Held: Affirmed.

First, the Court of Special Appeals held that although the Board was correct in characterizing the standard of review in cancellation protests as whether the procurement officer’s decision was unreasonable, arbitrary, and capricious, it erred in its application of this standard to the procurement officer’s decision to cancel the procurement. The Court concluded that the Board may not substitute its judgment for the procurement officer’s. In this case, the Board shifted to DGS a burden that it didn’t have (and that Montgomery Park did): a burden to investigate independently MIA’s reasons for wanting to cancel the procurement.

Second, the Court held that a party is not an interested party, and thus lacks standing, when it is not in line for award of a sole source procurement. When a party is not an actual or prospective bidder, a procurement agency may deny the party’s bid protest on standing grounds. When the procurement officer cancelled the RFP with Montgomery Park, the cancellation severed the relationships among Montgomery Park, DGS, and MIA for procurement purposes. Montgomery Park was no longer an actual or prospective bidder. Therefore, the Board erred in finding that Montgomery Park had standing to file its Second Protest.

United Parcel Service, et al. v. David Strothers, No. 743, September Term 2020, filed February 4, 2022. Opinion by Shaw, J.

https://mdcourts.gov/data/opinions/cosa/2022/0743s20.pdf

STATUTES – WORKERS' COMPENSATION ACT

Facts:

On September 17, 2019, David Strothers, during the course of his employment with United Parcel Service ("UPS"), sustained a hernia injury, while using a power jack to move a load of pallets. Following the injury, he presented to Howard County General Hospital with complaints of right-side abdominal pain and nausea and reported a history of hernias and surgeries. During appellee's emergency room visit, he was diagnosed with a right-side paraumbilical hernia. It was recommended that he follow up with his primary care physician and/or a general surgeon within 7 days.

Strothers filed a First Report of Injury or Illness with his employer the next day. On September 23, 2019, Strothers went to Columbia Medical Practice where he was diagnosed and recommended for a surgery scheduled for September 30, 2019. UPS and Liberty Mutual Insurance ("LMI"), however, contested the injury and did not authorize the surgery or request that appellee be evaluated by an independent physician of their choice. As a result, the surgery was cancelled. Appellee subsequently met with Dr. Alan Kravitz for further assessment, and he performed the hernia repair on November 14, 2019. Another evaluation was conducted by Dr. Robert Macht on January 15, 2020. In his report, Dr. Macht opined to a reasonable degree of medical probability that appellee "developed a new onset of an umbilical hernia at the time of his accident," and he underwent "urgent surgery" due to the umbilical hernia.

Strothers filed a claim against UPS and LMI with the Workers' Compensation Commission, seeking compensation. The Commission found that Strothers sustained a compensable accidental injury, and that the hernia was the result of the accident. UPS and LMI filed a Request for Rehearing with the Commission, which was denied. An "on the record" judicial review hearing occurred in the Circuit Court for Howard County where the trial judge affirmed the Commission's decision.

Held: Affirmed.

The Court of Special Appeals affirmed. The Court first noted the statutory language, legislative histories, and judicial interpretations of the Workers' Compensation Act, specifically Section 9-504 of the Labor and Employment Article. The Court explained that the term "definite proof" in the Maryland Workers' Compensation Act is distinct from language used for accidental injury

claims. While the statute provides no explicit definition of the term, the Court held that the language of the statute is clear and expresses a simple meaning and it does not equate "definite proof" with any standard of proof. Moreover, the Court noted that if the General Assembly wanted to heighten the standard of proof for hernia compensation, they would have done so expressly. A review of twelve other states that have similar hernia workers' compensation statutes conclude that the phrase is not used as a standard of proof.

The Court held that the phrase "definite proof" refers to the quality of evidence needed to successfully assert a compensable hernia claim. The legislative history and caselaw confirm that the term was included in the statute in response to the need to ensure that compensation for hernias is based on testimony and evidence, most often medical evidence, that substantiates a worker's claim.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated February 1, 2022, the following attorney has been placed on disability inactive status:

STUART JAY ROBINSON

*

This is to certify that the name of

JOHN WAYNE WALKER-TURNER SR.

has been replaced upon the register of attorneys in this State as of February 18, 2022.

*

By an Order of the Court of Appeals dated February 23, 2022, the following attorney has been disbarred by consent:

MYESHA RUTH CRADDOCK

*

By an Order of the Court of Appeals dated February 23, 2022, the following attorney has been disbarred by consent:

DAVID ALAN DUNWIDDIE

*

By an Opinion and Order of the Court of Appeals dated February 25, 2022, the following attorney has been indefinitely suspended:

NATALIE THRYPHENIA COLLINS

*

*

This is to certify that the name of

MARY THERESA KEATING

has been replaced upon the register of attorneys in this State as of February 25, 2022.

*

By an Order of the Court of Appeals dated February 25, 2022, the following attorney has been placed on disability inactive status:

SONIA K. KOCHHAR

*

JUDICIAL APPOINTMENTS

*

On January 6, 2022, the Governor announced the appointment of **WILLIAM HAMBLER JONES** to the Circuit Court for Dorchester County. Judge Jones was sworn in on February 4, 2022 and fills the retirement created by the retirement of Hon. Brett W. Wilson.

*

On January 12, 2022, the Governor announced the appointment of **PATRICK JEFFREY MAYS** to the District Court for Montgomery County. Judge Mays was sworn in on February 4, 2022 and fills the vacancy created by the elevation of the Hon. Carlos F. Acosta to the Circuit Court for Montgomery County.

*

On January 12, 2022, the Governor announced the appointment of **MAGISTRATE MONISE ALEXIS BROWN** to the Circuit Court for Charles County. Judge Brown was sworn in on February 15, 2022 and fills the vacancy created by the resignation of the Hon. Amy J. Bragunier.

*

RULES ORDERS AND REPORTS

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A Rules Order pertaining to the 209th Report of the Standing Committee on Rules of Practice and Procedure was filed on February 9, 2022.

http://mdcourts.gov/sites/default/files/rules/order/ro209.pdf

*

A Rules Order pertaining to the Second Supplement to the 209th Report of the Standing Committee on Rules of Practice and Procedure was filed on February 25, 2022.

http://mdcourts.gov/sites/default/files/rules/order/ro209supplement2.pdf

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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		
Ackers, Milica v. Ackers	0042	February 28, 2022
Beasley, Eric v. Beasley	0998	February 15, 2022
Beckwitt, Daniel v. State	0896	February 25, 2022
Benitez, Jonathan Hanani v. State	2171 **	February 1, 2022
Bridges, Robert Michael v. State	0011	February 3, 2022
Brown, Chevera A. v. Wilmington Savings Fund Soc.	0141	February 15, 2022
BWI II, LP v. Supervisor of Assessments	0773 *	February 2, 2022
C		
Chetty, Gokul v. Spitzer	0254	February 9, 2022
Christian Healthcare Ministries v. Md. Ins. Comm'r	0287	February 11, 2022
Collins, Theresa Lynn v. State	1328 *	February 1, 2022
Comptroller of Md. v. FC-GEN Operations Investments	0946 *	February 3, 2022
Cook, Winston Alfonso, Jr. v. State	0128 *	February 3, 2022
Creighton, Audrey v. Montgomery Cnty.	0999 *	February 1, 2022
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Dallas, Johnnie, III v. State	0384	February 2, 2022
Donald Excavating v. Comm'r of Labor & Industry	1260 *	February 2, 2022
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East Over Car Wash v. Carbajal	1154 *	February 18, 2022
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Gaines, Edward Carroll, III v. State	1117	February 28, 2022
Garrett, C. Eugene v. Holloway	0677 *	February 8, 2022
Gould, Jameal Rashawn v. State	1068 *	February 25, 2022

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Gritz, Shawn A. v. 1116 Dunoon Rd.	1007 *	February 11, 2022
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Harrison, Vanessa v. Neiswagner	0787	February 10, 2022
Haughton, Leon v. Katcef	0223	February 24, 2022
Hicks, Steven v. Royer House, LLC	0215 *	February 1, 2022
Hoey, Derek v. State	1282 *	February 3, 2022
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Houck, James v. State	0723	February 28, 2022
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In re: J.D. & R.W.	1044	February 22, 2022
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Johnson, Tomeka v. Nunn	0735	February 22, 2022
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Lawrence, Hakim Zan v. State	0204 *	February 9, 2022
Lewis, Adrian v. State	0552	February 4, 2022
Lewis, Alfred, Jr. v. State	1738 **	February 3, 2022
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M.N. v. A.N.	0564	February 3, 2022
M.T. v. G.T.	0216	February 9, 2022
Major, Howard v. United Services Auto. Assoc.	0046	February 8, 2022
Marleny Market v. Johnny & Prum, Inc.	0580	February 17, 2022
Mason, Karen v. Elrich	0100	February 16, 2022
Matter of Dent, Timothy M. & Amy E. v.	0335	February 14, 2022
Matter of the Petition of Guilford Ave. LLC v.	0549	February 3, 2022
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McLean, Clint A. v. Yacko	0939 *	February 15, 2022
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Stevenson, Antoine v. State	0965 **	February 2, 2022
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Walker, James T. v. Centre Insurance	0187	February 23, 2022
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