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Attorney Grievance Commission of Maryland v. Amber Lisa Maiden, Misc. Docket AG No. 72, September Term 2020, filed July 28, 2022. Opinion by Fader, C.J.

https://www.courts.state.md.us/data/opinions/coa/2022/72a20ag.pdf

ATTORNEY DISCIPLINE — SANCTIONS — INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission of Maryland (the "Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Amber Lisa Maiden, arising out of her representation of Brian Riese. The Commission alleged that Ms. Maiden violated Maryland Attorneys' Rules of Professional Conduct ("MARPC") 19 301.1 (Competence) (Rule 1.1), 19-301.7 (Conflict of Interest — General Rule) (Rule 1.7), 19 301.8 (Conflict of Interest; Current Clients; Specific Rules) (Rule 1.8), 19-301.16 (Declining or Terminating Representation) (Rule 1.16), 19 308.1 (Bar Admission and Disciplinary Matters) (Rule 8.1), and 19 308.4 (Misconduct) (Rule 8.4). The allegations resulted from her: (1) creation of, failure to recognize, and failure to terminate representation due to a conflict of interest that arose when she made herself a co-party to Mr. Riese's administrative appeal of the dismissal of a discrimination complaint and asserted a 50% share of any punitive damages award; (2) sending Mr. Riese a 20 page letter containing numerous antisemitic, personally insulting, profane, and otherwise inappropriate comments; and (3) false claim to Bar Counsel that she had sent the letter by mistake.

A hearing judge found by clear and convincing evidence that Ms. Maiden had committed all the violations alleged by the Commission. The hearing judge also found clear and convincing evidence of the existence of four aggravating factors: dishonest and selfish motive, submission of a false statement during the disciplinary proceeding, refusal to acknowledge the wrongful nature of conduct, and substantial experience in the practice of law. The hearing judge also found by a preponderance of the evidence the existence of two mitigating factors: absence of a prior disciplinary record and personal or emotional problems. Neither party filed exceptions to any of the hearing judge's findings of fact or conclusions of law.

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Held: Indefinitely suspended.

After an independent review of the record, the Court accepted the hearing judge's findings of fact and affirmed the hearing judge's conclusions of law. The Court also sustained the hearing judge's findings of all aggravating and mitigating factors.

Ms. Maiden violated Rules 1.7 and 1.8 when she created a conflict of interest, without obtaining Mr. Riese's written consent, by making herself a co claimant along with Mr. Riese for the purpose of asserting a particular cause of action, and then claiming a 50% share of any punitive damages Mr. Riese might obtain. She also violated Rule 1.1 by failing to recognize that her conduct created an inherent conflict of interest and Rule 1.16 by failing to terminate her representation of Mr. Riese due to the conflict.

Ms. Maiden also engaged in professional misconduct in violation of Rule 8.4 by: (1) sending Mr. Riese the 20-page letter that contained antisemitic and highly offensive comments, (2) misrepresenting to Bar Counsel that the letter had been sent to Mr. Riese by mistake, and (3) violating several of the MARPC. Her false statement to Bar Counsel that she had sent the letter by mistake also resulted in a violation of Rule 8.1.

The Court concluded that, because Ms. Maiden's conduct violated several of the MARPC, including conduct prejudicial to the administration of justice that manifested bias or prejudice based upon harmful religious, racial, and ethnic stereotypes, and significant conflict of interest, competence, and dishonesty violations, indefinite suspension is the appropriate sanction.

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In Re: T.K., No. 60, September Term 2021, filed July 28, 2022. Opinion by Fader, C.J.

Hotten, J., dissents.

https://mdcourts.gov/data/opinions/coa/2022/60a21.pdf

STATUTORY INTERPRETATION – CHILD IN NEED OF ASSISTANCE – REQUIREMENTS FOR EXERCISE OF DISCRETION UNDER COURTS AND JUDICIAL PROCEEDINGS § 3-819(E).

CHILD IN NEED OF ASSISTANCE – BEST INTEREST OF THE CHILD STANDARD.

CHILD IN NEED OF ASSISTANCE – EVIDENTIARY BEST INTEREST HEARING.

Facts:

The Howard County Department of Social Services filed a non-emergency CINA petition seeking to have T.K. declared a child in need of assistance after two alleged incidents of neglect by the child's mother, who was T.K.'s de facto custodial parent ("Mother"). At adjudication, Mother stipulated to facts constituting at least one incident of neglect. T.K.'s other parent, Father, appeared at adjudication, but because the results of a paternity test had not yet been received, did not participate. Once Father's paternity was proven, he requested that the CINA case be dismissed and that he be granted custody of T.K., pursuant to Courts and Judicial Proceedings § 3-819(e). Section 3-819(e) provides that where petition allegations have been sustained against only one parent and another parent is available, able, and willing to provide care, a child cannot be determined to be in need of assistance, but the juvenile court may award custody to the other parent. Mother argued that Father was not an able and willing parent and proffered testimony about Father's past abusive conduct.

The juvenile court found that Father was an able and willing parent and that Mother had stipulated to at least one incident of neglect. On that basis, the court dismissed the CINA case and awarded sole legal and physical custody to Father, with reasonable and liberal visitation to Mother. Mother appealed.

The Court of Special Appeals affirmed, holding that Mother was not entitled to a separate best interest hearing at which she could argue that an award of custody to Father was not in T.K.'s best interest. The intermediate appellate court also held that there was sufficient evidence in the record to support an award of custody to Father.

Mother filed a petition for a writ of certiorari, which this Court granted.

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Held: Reversed

Judgment of the Court of Special Appeals reversed. Order of the juvenile court vacated and remanded for further proceedings.

A juvenile court has discretion to award custody under § 3-819(e) of the Courts and Judicial Proceedings Article if the juvenile court, by a preponderance of the evidence: (a) sustains allegations in a CINA petition that are sufficient to support a CINA disposition against one, but only one, parent; and (b) finds that the other parent is able and willing to care for the child. If a juvenile court finds that the prerequisites required to exercise its discretion under § 3 819(e) have been met, the best interest of the child is the standard that applies to the court's decision whether and, if so, how to exercise that discretion.

A juvenile court must afford a parent who stands to lose custody as a result of an application of Courts and Judicial Proceedings § 3-819(e) an opportunity to present evidence if, after consideration of the evidence already presented or stipulated at an adjudicatory hearing, there are factual disputes as to any consideration that is material to (a) whether the parent to whom the court is considering awarding custody is able and willing to care for the child, or (b) the juvenile court's determination of whether it is in the child's best interest to leave the current custody arrangement in place or to award custody (legal, physical, or both) to the parent against whom allegations were not sustained.

The juvenile court erred in concluding that a hearing was not required in two respects. First, the record before the juvenile court at the time it awarded custody to Father did not contain any evidence to support the court's finding on the contested issue of Father's willingness and ability to care for T.K. Although the Department proffered that its "due diligence" caused it to conclude that Father was able and willing to provide care for T.K. and that Father was a fit and proper parent, neither the Department nor Father introduced evidence to that effect.

Second, even if the juvenile court had properly found that Father was able and willing to provide care for T.K., a hearing was still required to inform the court's best interest analysis in this case. In determining that it did not need to consider any additional evidence to assess T.K.'s best interest, the juvenile court relied primarily on its findings that Mother had neglected T.K. and that Father was able and willing to provide care. However: (1) the court's finding that Father was able and willing to provide proper care for T.K. was not supported by any stipulation or by any evidence in the record; and (2) Mother proffered that she was prepared to present evidence to the contrary. The bare fact that a parent has been indicated for an instance of neglect does not, by itself, automatically disqualify that parent from maintaining custody.

Prince George's County v. Robert E. Thurston Jr., et al., No. 63, September Term 2021, filed July 13, 2022. Opinion by Getty, C.J.

https://www.courts.state.md.us/data/opinions/coa/2022/63a21.pdf

CHARTER FOR PRINCE GEORGE'S COUNTY – COUNCILMANIC DISTRICTS – REDISTRICTING COMMISSION PLAN

Facts:

The Prince George's County Council ("Council") appointed the Prince George's County 2021 Redistricting Commission ("2021 Commission") to prepare and propose a councilmanic redistricting plan following receipt of the 2020 federal decennial census data. The 2021 Commission transmitted its proposed plan and report to the Council on September 1, 2021. The Council, after considering the 2021 Commission's plan, attempted to enact an alternative redistricting plan using a resolution: CR-123-2021 ("Council Resolution 123").

Robert E. Thurston, Jr. and others ("Respondents") challenged Council Resolution 123 in the Circuit Court for Prince George's County. The circuit court invalidated the measure and Prince George's County ("County") noted an appeal. While pending in the Court of Special Appeals of Maryland, the County filed in the Court of Appeals a petition for writ of certiorari, which posed the following question: "Is a Resolution, having the force and effect of law, a valid measure to adopt a decennial County Redistricting Plan?" The Court granted the petition on February 11, 2022, established an expedited briefing schedule, and heard oral argument on March 4, 2022.

Held: Affirmed.

The Court of Appeals held that Article III, § 305 of the Charter for Prince George's County requires the Council, if it chooses to adopt the plan of the redistricting commission, to do so by resolution upon notice and public hearing. The language of § 305, however, does not authorize the Council to enact an alternative redistricting plan by resolution. For the Council to enact a councilmanic districting plan different from the plan proposed by the redistricting commission, the Council must use a "bill" to pass a "law," subject to presentment to the County Executive and executive veto.

The legislative history of the 2012 Amendment to § 305 gives no reason to believe that the Council's alternative redistricting plan, if the Council chooses to disregard or change the redistricting commission's proposal, can be enacted by resolution instead of bill.

The Court noted that, as a general principle of good governance, some form of redress should be available to Prince George's County citizens if the Council passes a plan establishing councilmanic districts contrary to the public will. Every other charter county in Maryland

provides its citizens one or two methods of redress (petition to referendum or executive veto) to challenge councilmanic districting plans. To adopt the County's position would deprive Prince George's County citizens of any method of redress.

The Court of Appeals rejected the County's argument that the Express Powers Act allowed the Council to enact an alternative redistricting plan. Narrow provisions in the Express Powers Act cannot be read in a vacuum to conclude that the Council may skirt duly enacted and ratified provisions of its Charter and act by resolution where another form of legislative action is plainly required.

The County alternatively argued that amendments to § 305 aligned the Council redistricting procedures with the statewide legislative districting process enshrined in Article III, § 5 of the Constitution of Maryland. The Court noted that the State and Prince George's County have separate and distinct redistricting procedures and that the state constitutional provisions governing the legislative districting of the State do nothing to change the reading of the Charter.

Therefore, where the Council passed no other law changing the 2021 Commission's proposal, the 2021 Commission's plan became effective by operation of law on November 30, 2021.

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Anne Arundel County, Maryland v. 808 Bestgate Realty, LLC, No. 38, September Term 2021, filed July 7, 2022. Opinion by Booth, J.

https://mdcourts.gov/data/opinions/coa/2022/38a21.pdf

INTERPRETATION OF LOCAL CODE – ADMINISTRATIVE REVIEW OF BOARD OF APPEALS DECISION – REMAND UNDER MARYLAND RULE 8-131(a) – WHERE PARTIES HAVE STIPULATED THAT THE ISSUE IS UNDISPUTED

Facts:

In this case, the Court considered whether the County Board of Appeals of Anne Arundel County ("Board") erred when it denied a request by a developer, 808 Bestgate Realty, LLC's ("Bestgate"), for transportation impact fee credits in connection with certain road improvements that it made to a county road as part of a redevelopment project. Under the Anne Arundel County Code, § 17-11-207(c), when transportation improvements are constructed in connection with a development project that provide "transportation capacity over and above the adequate road facilities requirements" required by § 17-5-401 of the Code, the County must award the developer transportation impact fee credits.

Bestgate hired a traffic engineer to perform a traffic impact study to determine if the Project complied with the County's adequate public facilities ("APF") standards for roads, which mandate that road intersections at a development site will operate at a minimum "D" level of service and that the road sections will have a rating of 70 or higher. If a traffic impact study reveals that a development project will not meet these requirements, the County may mandate that the developer construct mitigation improvements to bring the transportation facilities up to the standards in the Code. The traffic impact study revealed that after development of the project, the County road intersections would continue to operate at an acceptable level of service, and the road ratings would remain adequate. Based upon these conclusions, the County approved the project without requiring any mitigation.

Even though mitigation was not required to satisfy the APF road requirements, the traffic engineer recommended additional improvements to Bestgate Road across from the entrance to the project to eliminate U-turns at another intersection. The County approved the additional improvements to Bestgate Road, which prompted Bestgate to request transportation impact fee credits since the additional improvements went "over and above" what was required by the APF standards. The County denied the request for transportation impact fee credits primarily because it believed there was no benefit to the County since the intersection was already operating at an "A" level and the additional improvements were not associated with any traffic mitigation required by the County to satisfy the APF road requirements.

Bestgate appealed the denial to the Board. The Board, in a 4-3 decision, denied Bestgate's request for transportation impact fee credits based on its interpretation of § 17-11-207(c). The

Board determined that, under the applicable provisions of the County code, mitigation was a pre-requisite to a finding that development went "over and above" the APF requirements. Bestgate petitioned for judicial review of the Board's decision in the Circuit Court for Anne Arundel County, where the Board's decision was reversed. The circuit court concluded that the plain language of § 17-11-207(c) does not condition the issuance of transportation impact fee credits upon the need for mitigation arising from a developer initially failing to satisfy the APF requirements.

The County appealed the circuit court's decision to the Court of Special Appeals. *Anne Arundel County v. 808 Bestgate Realty, Inc.*, Sept. Term 2019, No. 1156, 2021 WL 1985434 (Md. Ct. Spec. App. May 18, 2021). The intermediate court affirmed the circuit court, also determining that the Board did not correctly interpret the applicable provisions of the County Code. However, the Court of Special Appeals remanded the case to the Board for further findings on an issue that it raised *sua sponte*—specifically, whether the improvements to Bestgate Road were "site-related transportation improvements" under the Code, which would render them ineligible for transportation impact fee credits.

The County and Bestgate each filed a petition for writ of *certiorari* to the Court of Appeals, which was granted. The County appealed on the basis of the Court of Special Appeals holding affirming the circuit court and finding that Bestgate was entitled to transportation impact fee credits. Bestgate appealed on the basis of the Court of Special Appeals decision to remand the case to the Board for a finding of whether the improvements to Bestgate Road were "site-related." The County filed a line in response to Bestgate's petition stating that they did not oppose Bestgate's petition and conceded that the improvements were not "site-related."

Held: Affirmed in part, reversed in part.

The Court of Appeals affirmed the circuit court and the Court of Special Appeals and held that Bestgate was entitled to transportation impact fee credits. Under the plain language of Anne Arundel County Code ("Code") § 17-11-207(c), a developer is entitled to receive transportation impact fee credits for improvements made to a county road that are "over and above the adequate road facilities requirements" required by the Code. It is undisputed that the road improvements exceeded the requirements of the County's adequate road facilities provisions set forth in § 17-5-401 of the Code and were approved by the County's Engineer Administrator. Under the plain language of the Code, the developer was entitled to receive transportation impact fee credits and the County Board of Appeals of Anne Arundel County ("Board") erred in its interpretation of the Code, which required mitigation as a pre-requisite to a finding that a developer went "over and above" the APF requirements.

After the Court of Special Appeals raised an issue pertaining to the interpretation of the Code *sua sponte* and ordered a remand to the Board for consideration of the same, the parties stipulated that the code provision raised by the intermediate appellate court does not apply to the facts of this case. Given the County's concession that the code provision raised by the intermediate

appellate court does not apply and that it has joined the developer's requested relief on that issue, the Court of Appeals determined that there was no reason for a remand to the Board on that issue.

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Karunaker Aleti, et ux. v. Metropolitan Baltimore, LLC and Gables Residential Services, Inc., No. 39, September Term 2021, filed July 28, 2022. Opinion by Booth, J.

Watts and Wilner, JJ., concur and dissent.

https://mdcourts.gov/data/opinions/coa/2022/39a21.pdf

LANDLORD AND TENANT – LOCAL LICENSING ORDINANCE – FAILURE TO LICENSE RENTAL PROPERTY – PRIVATE RIGHT OF ACTION LANDLORD AND TENANT – ACTION FOR MONEY HAD AND RECEIVED

Facts:

Article 13, Section 5-4 of the Baltimore City Code requires all landlords to obtain a license to rent any dwelling. Prior to August 2018, the Baltimore City residential rental housing inspection and licensing laws only applied to multi-dwelling units. Inspections were performed by the City's inspectors. In 2018, Baltimore City amended the provisions of the Baltimore rental license and inspection law to expand its application to include non-owner occupied one- and two-family dwelling units and required inspections to be performed by licensed third-party inspectors. As part of the amendments, the City Council amended the language contained in Article 13 § 5-4(a)(2) of the Baltimore City Code to prohibit any person from charging, accepting, retaining, or seeking to collect rent for a rental dwelling unless the person was properly licensed at the time of both the offer to provide the dwelling and the occupancy.

On May 31, 2019, the Petitioners, Karunaker and Chandana Aleti ("the Aletis") entered into a lease with the Respondents, Metropolitan Baltimore, LLC, the owner of 10 Light Street, and Gables Rental Services, Inc., the property manager (collectively "Metropolitan") to rent an apartment in a 34-story multi-unit apartment building located at 10 Light Street. Paragraph 44 of the lease included a provision which purported to incorporate any additional rights and remedies provided by local laws or ordinances that were not already contained in the lease. For 302 days during the Aletis' tenancy, Metropolitan did not hold an active rental license for the property, as required by § 5-4(a). The Aletis, unaware of the lack of licensure, paid rent, and other fees, such as water and utility charges, to Metropolitan, which they sought to recoup through this action. When the Aletis did become aware of the lack of licensure, they stopped making their rent payments, and Metropolitan, while still unlicensed, filed complaints in the District Court for nonpayment of rent.

The Aletis filed a putative class action in the Circuit Court for Baltimore City against Metropolitan. While the lack of licensure did not cause the Aletis any harm or injury to themselves or the dwelling, they argued that §5-4(a)(2) established a private right of action whereby they may obtain a judicial remedy of restitution or disgorgement of all rent and fees that they paid during the unlicensed period based on the landlord's lack of licensure alone. The

Aletis' complaint included four counts: Count I requested a declaratory judgment that the leases entered into during the unlicensed period are "void and unenforceable" and that Metropolitan can not file any actions for failure to pay rent during the 302 days it was unlicensed; Count II asserted a private right of action under § 5-4(a)(2) and sought money damages for all rent or compensation paid to Metropolitan during the period it was unlicensed; Count III also sought money damages plus a refund of legal fees paid to defend Metropolitan's failure to pay rent actions under the common law cause of action for money had and received; and finally, Count IV alleged a breach of contract.

Metropolitan moved to dismiss all counts of the Aletis' complaint, which the circuit court granted in its entirety. On Count II, the circuit court agreed with Metropolitan's argument that § 5-4(a) did not create a private right of action. On Count III, the court dismissed the cause of action for money had and received because the court found that the Aletis had failed to plead with specificity that they paid more than they would have if Metropolitan had been properly licensed. On Count IV, because there was no private right of action under § 5-4(a), the court concluded that there was no breach of contract claim based on the incorporation of § 5-4(a) in paragraph 44 of the lease. Finally, on Count I, the court declined to issue a declaratory judgment because there remained no issue of justiciable controversy.

On appeal, the Court of Special Appeals, in the reported opinion of *Aleti v. Metropolitan Baltimore, LLC*, 251 Md. App. 482 (2021), affirmed the circuit court's decision as to Counts II and IV. The intermediate court, however, partially affirmed the circuit court's decision as to Count III and reversed the circuit court's decision as to Count I. The Aletis filed a petition for a writ of *certiorari* to the Court of Appeals as to Counts II, III, and IV, which was granted.

Held: Affirmed.

The Court held that Article 13, § 5-4(a)(2) of the Baltimore City Code does not provide tenants with an implied private right of action to collect a refund of rent and related fees already paid to a landlord who was unlicensed during the rental term. The City Code did not establish a remedy of disgorgement or restitution of voluntary rent payments based solely on the landlord's lack of license. Therefore, the Court held that the circuit court did not err in dismissing Count II of the complaint.

With respect to Count III—for money had and received—the Court of Appeals affirmed the circuit court's judgment in part and reversed it in part. The Court held that circuit court properly dismissed the tenants' claim for money had and received to the extent that the tenants sought to recover rent based solely on the lack of licensure because the landlord had provided all that was bargained for under the lease, and there were no allegations that the property was deficient. However, the Court held that the circuit court erred in dismissing the claim for money had and received to the extent that the tenants sought to recover legal fees the landlord collected from the tenants as part of the landlord's failure to pay rent actions that were filed at a time when the landlord was unlicensed.

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As for Count IV—the breach of contract claim—the Court affirmed the circuit court's dismissal of that count because the tenants failed to plead facts that would establish a material breach of the lease or resulting damages. The Court determined that the tenants did not allege the existence of any deficiencies in the apartment due to the lack of licensure, or that Metropolitan failed to provide them with the full benefit of the bargain.

Finally, the Court addressed the Court of Special Appeals' holding as to Count I—the tenants' request for a declaratory judgment concerning whether Metropolitan, having secured its license, could file failure to pay rent complaints to recover rent attributable to the period in which it was not licensed. The intermediate appellate court remanded that count to the circuit court for that court to declare the rights of the parties. Although that count was not presented to the Court of Appeals as part of the writ of *certiorari* issued in this case, the Court noted that on remand, the circuit court will have the benefit of holdings in *Assanah-Carroll v. Law Offices of Edward J. Maher, P.C.*, ___ Md. ___ (Filed July 28, 2022), which are germane to that count.

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Alison Assanah-Carroll v. Law Offices of Edward J. Maher, P.C., et al., Misc. No. 11, September Term 2021, filed July 28, 2022. Opinion by Booth, J.

Watts, J., concurs and dissents.
Getty, C.J., and Gould, J. concur and dissent.

https://mdcourts.gov/data/opinions/coa/2022/11a21m.pdf

LANDLORD AND TENANT – LOCAL LICENSING ORDINANCE – FAILURE TO LICENSE PROPERTY – TENANT'S ABILITY TO BRING PRIVATE RIGHT OF ACTION UNDER THE MARYLAND CONSUMER PROTECTION ACT ("MCPA") TO OBTAIN RESTITUTION OF RENT BASED UPON LACK OF LICENSURE – LANDLORD AND TENANT – LOCAL LICENSING ORDINANCE – FAILURE TO LICENSE PROPERTY – LANDLORD'S ABILITY TO COLLECT UNPAID RENT THAT IS DUE AND OWING DURING THE UNLICENSED PERIOD

Facts:

Appellees E.T.G. Associates '94 LP and Roizman Development, Inc. (collectively "Roizman") own and operate an apartment building located at 2601 Madison Avenue in Baltimore, Maryland ("the property"). Roizman entered into a lease with Appellant Alison Assanah-Carroll ("Assanah-Carroll") to rent one of the apartments in the building. Under Article 13, Section 5-4 of the Baltimore City Code, a landlord is required to have a rental license to provide residential rental housing. The property was not licensed, in violation of § 5-4, from August 15, 2019 to July 14, 2020. Assanah-Carroll initially continued to make rental payments, not knowing the property was not licensed. When she discovered that the property was not licensed, she stopped making rental payments. She then resumed making payments when Roizman did obtain a proper license. During the period the property was unlicensed, Roizman continued to collect and retain rent from tenants, refused to return the rent, and sought to collect unpaid rent that was owed during the period when the property was unlicensed. Roizman hired the Law office of Edward J. Maher, P.C. and attorney Edward J. Maher (collectively "the Law Office") to represent Roizman in summary ejectment actions in the District Court of Maryland sitting in Baltimore City to collect unpaid rent that would have been owed during the period that the property was unlicensed.

Assanah-Carroll filed a class action complaint in the United States District Court for the District of Maryland against Roizman and the Law Office. The putative class consisted of other tenants who resided in the 146-unit apartment building during the unlicensed period. Assanah-Carroll asserted a claim for damages under the Maryland Consumer Debt Collection Act ("MCDCA"), Maryland Code (2013 Repl. Vol., 2021 Supp.) Commercial Law Article ("CL") § 14-201, *et seq*. and the Maryland Consumer Protection Act ("MCPA"), CL § 13-101, *et seq*., based solely on the fact that the property was not licensed. Assanah-Carroll did not allege that her dwelling was uninhabitable or that the value of the lease was diminished by any condition of the property

caused by the lack of licensure. She instead alleged that any voluntary rental payments made during the unlicensed period constituted damages under the MCDCA and MCPA. Assanah-Carroll also alleged that § 5-4 prohibited Roizman and the Law Office from maintaining actions to collect unpaid rent during the period the property was unlicensed, and that any payment to satisfy collection actions constituted damages under the MCDCA and MCPA. Roizman filed a motion to dismiss, in which the Law Office joined. Before ruling on the motion to dismiss, the federal district court, with the parties' consent, certified two questions to the Maryland Court of Appeals pursuant to the Maryland Uniform Certification of Questions of Law Act found in § 12-601, *et seq*., of the Courts & Judicial Proceedings Article of the Maryland Code.

The first certified question asked whether a tenant who voluntarily paid rent to a landlord during a period where the landlord lacked a license pursuant to § 5-4 may maintain a private right of action under either the MCDCA or the MCPA to recover restitution of rent where the tenant has not alleged any actual injury or loss caused by the lack of license. The second certified question asked if a currently licensed landlord violates the MCDCA or the MCPA by engaging in debt collection activity or pursuing ejectment actions against a tenant who failed to make rental payments during the period when the landlord was not licensed pursuant to § 5-4.

Held: Certified Questions Answered.

With respect to the first question certified, the Court answered "no". Article 13, § 5-4(a)(2) of the Baltimore City Code, which prohibits a landlord from charging, accepting, retaining, or seeking to collect rent for a rental property unless the property is properly licensed, does not provide Baltimore City tenants with a judicial remedy enabling City tenants to seek restitution of rent under the Maryland Consumer Protection Act ("MCPA"). A tenant may only maintain a private action under the MCPA for deceptive trade practices arising from renting an unlicensed dwelling if the tenant can prove that the unlicensed condition caused them to suffer an "actual injury or loss." Like the MCPA, actual damages are also an element of the MCDCA. Thus, a tenant may also not maintain a private action under the MCDCA based on lack of licensure alone.

As discussed in the Court's opinion in *Aleti v. Metropolitan Baltimore, LLC*, ___ Md. __ (filed July 28, 2022), the Baltimore City Council, in enacting Bill 18-0185, which added § 5-4(a)(2) to the Baltimore City Code, did not intend to create a judicial remedy enabling City tenants to seek restitution of rent as part of a private action filed under the MCPA. Even if the City Council had intended to create such a remedy, the City Council lacks the authority to adopt a local law that modifies the remedies established by the MCPA—a State statute that provides uniform remedies to consumers on a state-wide basis who are subject to unfair, abusive, or deceptive trade practices.

With respect to the second certified question, the Court answered "yes". The Court applied common law principles and held that where a municipality or county enacts a rental license law, which conditions the performance of a residential lease upon the issuance of a rental license, a

landlord may not file an action against a tenant to recover unpaid rent that is attributable to the period when the property was not licensed. This prohibition, however, shall not apply where the landlord can demonstrate that the actions of the tenant caused the licensing authority to suspend, revoke, or refuse to grant or renew the rental license Accordingly, where a landlord attempts to collect unpaid rent from a tenant during a period when the landlord lacked a license to engage in such activity, a tenant may have a claim under the MCPA or the MCDCA to the extent that the landlord's unlawful collection activity caused the tenant to suffer damages.

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Administrative Office of the Courts, et al. v. Abell Foundation, No. 48, September Term 2021, filed July 28, 2022. Opinion by McDonald, J.

Hotten and Biran, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2022/48a21.pdf

MARYLAND PUBLIC INFORMATION ACT – RULES ON ACCESS TO COURT RECORDS – ADMINISTRATIVE RECORDS – CODE KEY FOR PUBLIC ACCESS DATABASE.

Facts:

In July 2018, Petitioner Administrative Office of the Courts ("AOC") denied Respondent Abell Foundation's request, made under the Public Information Act, for the key to the alphanumeric codes that the District Court of Maryland had assigned to the District Court judges sitting in Baltimore City. Those and other codes and abbreviations appear in the case summaries that AOC posts on Case Search, the online database that AOC makes available to the public as a means of providing it with basic information about filings and proceedings in cases in Maryland courts. AOC posts a guide to Case Search that explains various codes and abbreviations, but the guide does not provide a key to the code used for District Court judges. AOC does not keep confidential the identity of the District Court judge or judges associated with a case; to the contrary, case records are public, and that information can be found by going to a courthouse and accessing the records of the particular case on one of the computers provided for that purpose. In denying Abell Foundation's request for the code key, AOC cited former Maryland Rule 16-905(f)(3), which contains a mandatory exception for administrative records that are not a local rule, policy, or directive. Some months later, Abell Foundation sued AOC in the Circuit Court for Baltimore City.

The Circuit Court for Baltimore City found that the code key was an administrative record that was the functional equivalent of a policy, and it granted summary judgment in Abell Foundation's favor. The Court of Appeals affirmed the judgment.

Held: Affirmed.

Applying the Court Access Rules in effect at the time of the request, the Court held that the code key that matches the alphanumeric codes to District Court judges is disclosable in response to a public records request and that former Rule 16-905(f)(3) did not except the code key from disclosure.

The Court found that former Rule 16-905(f)(3) was ambiguous in the context of the request for the code key. To resolve the ambiguity, the Court interpreted the Rule in accordance with the

common law principle that court proceedings and records are presumptively open to the public and also with principles that are provided by the Maryland Rules and the PIA. The Court of Appeals noted that its rules governing access to judicial records, including case records and administrative records, reflect the longstanding principle of the openness of case records. The PIA sets a policy that public records that are clearly disclosable should be made available for public inspection without unnecessary cost or delay.

As an additional interpretive aid, the Court looked to the history of the rule. That history showed that, at the time of adoption, the intent behind the Court Access Rules was to generally treat administrative records similarly to the way the PIA treats the records of agencies in the Executive Branch. The history also showed that the intent behind Rule 16-905(f)(3) was to provide for the Judiciary's administrative records a mandatory exception analogous to the discretionary exemption that the PIA provides for executive-branch agency records falling within the deliberative process privilege. The Court then concluded that the code key was not deliberative in nature and did not fall within the mandatory exception contained in former Rule 16-905(f)(3).

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Terence Williams v. Dimensions Health Corporation, No. 42, September Term 2021, filed July 28, 2022. Opinion by McDonald, J.

Getty, C.J., and Biran, J., dissent.

https://www.courts.state.md.us/data/opinions/coa/2022/42a21.pdf

MEDICAL MALPRACTICE – VICARIOUS LIABILITY – HOSPITAL EMERGENCY ROOM – APPARENT AGENCY

Facts:

Petitioner Terence Williams crashed his motor vehicle on the Capital Beltway and suffered severe injuries to his legs and left arm. EMS personnel arrived and, under State emergency protocol, brought Mr. Williams to the nearest trauma center at the Prince George's Hospital Center of Respondent Dimensions Health Corporation ("the Hospital"). Mr. Williams testified that he knew the Hospital was a trauma center and relied on the Hospital to provide proper care. After he arrived, he was intubated and never saw nor signed the Hospital's Consent to Treatment form, which stated that the physicians were not agents nor employees of the Hospital. Mr. Williams underwent various surgeries and suffered further injuries when the orthopedic surgeon at the trauma center failed to exercise the appropriate standard of care.

Mr. Williams sued both the negligent surgeon and the Hospital in the Circuit Court for Prince George's County for his additional injuries. The Hospital contended that the orthopedic surgeon was an independent contractor and not an employee. Mr. Williams proceeded with his case against the Hospital under an apparent agency theory. Under Maryland common law, a principal may be vicariously liable for the tortious acts of its non-agents through apparent agency when the principal manifests the appearance of an agency relationship and the third-party reasonably relies on that apparent agency relationship in obtaining the services of the apparent agent. The jury found that the surgeon was an agent of the Hospital and awarded Mr. Williams more than six million dollars in damages.

The Hospital moved for judgment notwithstanding the verdict, arguing that Mr. Williams failed to prove his claim because he did not establish evidence that he subjectively believed the orthopedic surgeon was an agent of the Hospital and relied on that belief. The trial court granted the motion and reversed the jury's finding. The Court of Special Appeals affirmed.

Held: Reversed

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The Court of Appeals reversed and held that there were sufficient facts for a reasonable jury to find that the orthopedic surgeon was an apparent agent of the Hospital. In obtaining a Level II trauma center designation, the Hospital represented itself to the community that it had an orthopedic surgeon on call for emergency situations; Mr. Williams, and those acting in his interest, relied on the Hospital to provide appropriate care; and this reliance was reasonable.

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Scott Wadsworth, et al. v. Poornima Sharma, et al., No. 40, September Term 2021, filed July 15, 2022. Opinion by Getty, C.J.

Watts and Harrell, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2022/40a21.pdf

TORTS – WRONGFUL DEATH – LOSS OF CHANCE DOCTRINE – CAUSATION

Facts:

In 2006, doctors diagnosed Stephanie Wadsworth with Stage IIIC breast cancer in her left breast. Ms. Wadsworth underwent treatment, including a left mastectomy, chemotherapy, and radiation therapy. Following her treatment, Ms. Wadsworth received follow up PET/CT scans on several occasions, which did not show signs of metastatic disease. On April 1, 2013, Ms. Wadsworth produced an abnormal PET/CT scan depicting a potentially cancerous lesion on her clavicle. Dr. Poornima Sharma, Ms. Wadsworth's oncologist, reviewed the scan but did not report the results to Ms. Wadsworth or conduct further testing.

Three years after the April 1, 2013 scan, Ms. Wadsworth fell and injured her right shoulder. Ms. Wadsworth went to the hospital for her shoulder injury, and a bone scan depicted a malignant bone lesion on her right clavicle. An open biopsy revealed that Ms. Wadsworth's left breast cancer metastasized to her right clavicle. Ms. Wadsworth continued treatment but passed away on June 10, 2017.

Ms. Wadsworth's husband, Scott Wadsworth brought wrongful death and survival claims in the Circuit Court for Baltimore County against Dr. Sharma, University of Maryland Oncology Associates, P.A., and others involved in Ms. Wadsworth's medical care. Ms. Wadsworth's children and father joined the wrongful death action. Dr. Sharma and others filed a motion for summary judgment on the grounds that Mr. Wadsworth's lawsuit implicated the loss of chance doctrine, which is not recognized in Maryland.

On October 7, 2019, the circuit court held a hearing regarding the motion for summary judgment. At the hearing, two experts testified that there is no cure to metastatic breast cancer. Relying on the unopposed expert testimony, the circuit court granted the motion for summary judgment with respect to the wrongful death and survival claims after finding that Mr. Wadsworth pleaded a loss of chance case, which is not recognized in Maryland. The Court of Special Appeals affirmed the circuit court's grant of summary judgment with respect to the wrongful death claim. Mr. Wadsworth petitioned for writ of *certiorari* to the Court of Appeals regarding the wrongful death claim, which the Court of Appeals granted.

The Court of Appeals considered whether the Md. Code (1974, 2020 Repl. Vol.), Courts and Judicial Proceedings Article ("CJ") § 3-902(a) allows wrongful death beneficiaries to recover

from a healthcare provider where the healthcare provider's alleged negligence shortened the life of the terminally ill decedent.

Held: Affirmed.

The Court of Appeals held that CJ § 3-902(a) requires that the plaintiff in a wrongful death claim prove by a preponderance of the evidence that the defendant's alleged negligence proximately caused the decedent's death.

First, the Court of Appeals reviewed the plain language and legislative history of CJ § 3 902(a), which provides that "[a]n action may be maintained against a person whose wrongful act causes the death of another." The Court of Appeals held that the definition of "causes" is informed by the proximate cause requirement in negligence actions where plaintiffs are required to prove by a preponderance of the evidence that the alleged negligence proximately caused the harm. The Court of Appeals also held that the legislative history does not contradict its plain language interpretation of CJ § 3 902(a).

Second, the Court of Appeals discussed its decisions in two foundational loss of chance cases in Maryland: *Weimer v. Hetrick*, 309 Md. 536 (1987) and *Fennell v. Southern Maryland Hospital Center, Inc.*, 320 Md. 776 (1990). Under the doctrine of *stare decisis*, the Court of Appeals held that Mr. Wadsworth pleaded a loss of chance case, which is not recognized in Maryland. Accordingly, the Court of Appeals affirmed the Court of Special Appeals.

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COURT OF SPECIAL APPEALS

State of Maryland v. Damien Gary Clark, No. 1614, September Term 2021, filed July 28, 2022. Opinion by Graeff, J.

Nazarian, J., dissents.

https://mdcourts.gov/data/opinions/cosa/2022/1614s21.pdf

CONSTITUTIONAL LAW – RIGHT TO ASSISTANCE OF COUNSEL – COMMUNICATION WITH ATTORNEY

Facts:

At trial, the court instructed Clark not to speak with his attorney during the overnight recess between his direct examination and his impending cross-examination. Counsel for the defense did not object to this instruction. Clark argued in a post-conviction petition that his counsel's failure to object constituted ineffective assistance of counsel and entitled him to a new trial. The post-conviction court granted Clark a new trial.

Held: Reversed and remanded.

In *Geders v. United States*, 425 U.S. 80 (1976), the Supreme Court held that an order restricting an accused from consulting with counsel "about anything" during a lengthy, overnight recess, over objection by defense counsel, denied the defendant his Sixth Amendment right to counsel. In this case, counsel did not object to the court's instruction not to confer with counsel during an overnight recess, and Clark contends that, due to this failure to object, he received ineffective assistance of counsel.

In the context of a post-conviction claim that a defendant received ineffective assistance of counsel, we do not address the merits of trial court error. Rather, we look at whether the petitioner satisfied his burden to show (1) "that his or her counsel performed deficiently" and (2) "that he or she has suffered prejudice because of the deficient performance." *State v. Syed*, 463 Md. 60, 75, *cert. denied*, 140 S. Ct. 562 (2019).

A showing of prejudice is not required when a defendant is denied his right to counsel. An instruction not to communicate, however, by itself, does not establish a Sixth Amendment violation. Rather, to show a deprivation of the right to counsel in this context, there must be a showing that the instruction actually prevented the defendant and defense counsel from communicating. Here, there was no showing of an actual deprivation of appellee's right to counsel, given that there was no objection to the instruction and there was no other evidence showing that appellee would have talked with counsel absent the instruction. Accordingly, appellee was not entitled to a presumption of prejudice.

Absent a presumption of prejudice, Clark had the burden to show that counsel's failure to object to the instruction was prejudicial. He failed to do so. Accordingly, the circuit court erred in granting his petition for post-conviction relief.

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Steven J. Grebow v. Client Protection Fund of the Bar of Maryland, No. 1392, September Term 2020, filed June 29, 2022. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2022/1392s20.pdf

MARYLAND RULES – CLIENT PROTECTION FUND OF THE BAR OF MARYLAND – CLAIMS FOR REIMBURSEMENT

Facts:

In 2009, the McCloskey Group ("Company") was pursuing a loan from the United States Department of Housing and Urban Development to fund a large development project in York, Pennsylvania. To increase the Company's chances of obtaining the loan, Brian McCloskey, the Company's sole member, asked Steven Grebow to temporarily deposit money into an escrow account to supply the Company with "liquidity."

The Escrow Agreement, signed by the parties on December 11, 2009, was drafted by Mr. Grebow's attorney and Mr. Kevin Sniffen, an attorney affiliated with the Company. The Escrow Agreement named Kevin Sniffen, then a Maryland Attorney, as the escrow agent. In exchange for temporarily depositing several million dollars into the escrow account, the Escrow Agreement specified that Mr. Grebow was to receive a handsome fee of two million dollars. Notwithstanding the Escrow Agreement's provision that it was consummated "solely for the purpose of satisfying the Company's closing requirements of that certain loan," it established that Mr. Grebow was "the sole beneficiary of the Escrow Account, and neither McCloskey, the Company, nor their respective creditors, [were] acquiring any right, title or interest in the Escrow Funds." Additionally, Mr. Sniffen was not permitted to "withdraw or disburse the Escrow Funds or any portion thereof or allow the withdrawal or disbursement of the Escrow Funds or any portion thereof[.]" The original Escrow Agreement was amended nine times, during which Mr. Grebow made several additional deposits into the escrow account. Under the ninth amendment to the Escrow Agreement, Mr. Grebow was scheduled to receive a fee of $2,000,000.00 by April 15, 2011—just over sixteen months after the original Escrow Agreement was signed.

Mr. Grebow, however, never received the fee because Mr. Sniffen and Mr. McCloskey embezzled the money in the perpetration of a complex wire fraud scheme. He learned of the scheme in August 2011 after his attorney received a copy of a civil complaint alleging that Mr. McCloskey and Mr. Sniffen had embezzled the escrow funds. For his role, Mr. Sniffen was convicted in the United States District Court for the District of Maryland of conspiracy to commit wire fraud, and he was subsequently disbarred by the Court of Appeals from the practice of law in Maryland.

Mr. Grebow filed a claim with the Client Protection Fund of the Bar of Maryland in February 2012 claiming that he was entitled to reimbursement of the embezzled escrow funds because under the Escrow Agreement, Mr. Sniffen, formerly a member of the Maryland bar, was acting

in a fiduciary capacity that was "traditional and customary in the practice of law in Maryland." Md. Rule 19- 602(b). The Trustees of the Fund denied Mr. Grebow's claim in April 2019. They determined, among other things, that Mr. Sniffen, in his capacity as escrow agent, was not acting as an attorney or in a fiduciary capacity that is traditional and customary in the practice of law in Maryland. The Circuit Court for Baltimore County subsequently denied Mr. Grebow's petition for judicial review, and he noted a timely appeal to this Court.

Held: Affirmed.

The Court of Special Appeals held that Mr. Grebow is not eligible to recover from the Fund as the Trustees correctly determined that Mr. Grebow's dealings with Mr. Sniffen did not rise to an attorney-client relationship and that Mr. Sniffen was not acting in a fiduciary capacity that is "traditional and customary in the practice of law in Maryland." Unlike the defalcating attorneys involved in the compensable claims discussed in *Advance Finance Co. v. The Trustees of the Clients' Security Trust Fund of the Bar of Maryland*, 337 Md. 195, 208 (1995) and *American Asset Finance, LLC. v. Trustees of the Client Protection Fund of the Bar of Maryland*, 216 Md. App. 306 (2014), the Court determined that Mr. Sniffen was not acting as an "intermediary," as he was holding funds on behalf of a non-client, Mr. Grebow, for the benefit of the same non-client, Mr. Grebow. The Court also explained that Mr. Sniffen's role bore no resemblance to the example fiduciary capacities listed in Rule 19-602(b), all of which involve a fiduciary interacting with third parties for the benefit of a client. And, finally, unlike the compensable claims in *Advance Finance* and *American Asset Finance*, Mr. Sniffen's duties as escrow agent were not adjacent to any legal services that he was providing to either Mr. Grebow or Mr. McCloskey. Accordingly, the Trustees correctly determined that Mr. Grebow was not eligible to recover from the Fund.

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In the Matter of William Rounds, Case No. 1533, September Term 2021, filed July 27, 2022. Opinion by Wells, C.J.

https://mdcourts.gov/data/opinions/cosa/2022/1533s21.pdf

PUBLIC SAFETY– HANDGUN CARRY PERMITS – GOOD AND SUBSTANTIAL REASON

Facts:

On previous occasions, William Rounds had applied to the Maryland State Police (MSP) for a permit to carry a handgun. The Public Safety ("PS") Article of the Annotated Code of Maryland § 5-306(a)(6)(ii) states that to obtain a permit, an applicant must meet several criteria, including having "a good and substantial reason." The permit must be renewed every three years. When Mr. Rounds sought to renew his permit in 2020, MSP denied his request citing that Mr. Rounds had not demonstrated that he had been threatened or assaulted in the past. MSP decided that Mr. Rounds' sole reason for wanting the permit, frequently buying and selling silver coins, was insufficient. Mr. Round's appeal to the Office of Administrative Hearings was denied, as was his request for judicial review in the circuit court. He appealed to the Court of Special Appeals.

Held: Reversed.

On appeal, Mr. Rounds argued that there was no legal basis for MSP to declare that "good and substantial reason" requires an applicant for a handgun permit to have been threatened or assaulted in the past. He asserted that MSP was arbitrarily denying him a permit based on its subjective view of what was meant by "good and substantial reason." Further, he noted that the constitutionality of New York's statute, analogous to PS § 5-306(a)(6)(ii), was under review in the United States Supreme Court. MSP responded that the circuit court should be affirmed because appellate cases in Maryland have interpreted the "good and substantial reason" requirement to mean that an applicant must demonstrate having received actual threats or assaults. *Scherr v. Handgun Permit Review Board*, 163 Md. App. 417, 436–37 (2005); *Snowden v. Handgun Permit Review Board*, 45 Md. App. 464, 466–67, 70 (1980).

Several days after oral argument in Mr. Rounds' case, the U.S. Supreme Court released its decision in the case to which Mr. Rounds had alluded, *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-843, 597 U.S. __ (June 23, 2022). There, Justice Thomas, writing for the majority, declared unconstitutional New York's statutory requirement that applicants for unrestricted concealed handgun carry permit demonstrate "proper cause." (N.Y. Penal Law § 400.00(2)(f)). Petitioners had been denied such permits where they failed to claim any unique danger to their personal safety, thereby failing to satisfy the "proper cause" requirement. *Id*. at 6–7. *Bruen* held that "[w]hen the Second Amendment's plain text covers an

individual's conduct"—as it does in the case of publicly carrying a handgun for personal protection—"the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*. at 15, 23. The Court concluded there was no "such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense." *Id*. at 29–30. Thus, the Court held New York's "proper cause" requirement violates the Fourteenth Amendment. *Id.* at 63.

In light of this decision, the Court of Special Appeals was constrained to hold that Maryland's "good and substantial reason" requirement was also unconstitutional. And if there was any doubt as to the similarity between Maryland and New York's statutes, *Bruen* noted that Maryland was one of six states to "have analogues to the 'proper cause' standards,'" citing Md. PS § 5-306(a)(6)(ii) and quoting its "good and substantial reason" language. *Id*. at 5–6, 6 n. 2. Finally, because the only ground upon which MSP based its denial of Mr. Rounds' permit was the "good and substantial reason" provision, the Court held that Mr. Rounds qualified for a handgun carry permit under the remaining provisions of the statute.

David P. Bogert, et al. v. Thomas A. Thompson, Jr., et al., No. 1171, September Term 2021, filed July 28, 2022. Opinion by Salmon, J.

https://mdcourts.gov/data/opinions/cosa/2022/1171s21.pdf

DAMAGES – EMOTIONAL DISTRESS CAUSED BY NEGLIGENT DAMAGE TO PROPERTY – Ordinarily, a plaintiff cannot recover for emotional injury caused by witnessing or learning of negligent injury to the plaintiff's property. One exception to that rule is the personal safety exception, which provides that there may be recovery when the defendant's negligence causes property damage that results in emotional injuries that are due to the plaintiff's reasonable fear for the safety of himself/herself or for the member(s) of his or her family. For the personal safety exception to be applicable, the plaintiff need not witness the accident so long as he or she was aware of it immediately after the accident occurred and that awareness caused the plaintiff to reasonably fear for his/her own safety or the safety of his or her family member(s).

Facts:

In the early morning hours of September 22, 2019, Thomas A. Thompson, Jr. ("Mr. Thompson") crashed his truck into the house where the appellants resided. None of the appellants were struck by the truck, but they claim that the crash caused them emotional injuries.

Ordinarily, a plaintiff "cannot recover for emotional injury caused by witnessing or learning of negligently inflicted injury to the plaintiff's property." *Dobbins v. Washington Suburban Sanitary Com'n*, 338 Md. 341, 345 (1995). One exception to this rule is known as the personal safety exception, which provides that there may be recovery when the defendant's negligence causes property damage that results in emotional injuries that are due to the plaintiff's reasonable fear of safety for himself/herself or for members of his or her family. *See Dobbins v. WSSC*, 328 Md. 341, 345-46 (1995) n.1 and 351 n.4.

The plaintiffs/appellants in this case are David P. Bogert; his wife, Holyn R. Bogert; David P. Bogert and Holyn R. Bogert as Husband and Wife; David P. Bogert as Father and Next Friend of A. A. Bogert, a minor and David P. Bogert as Father and Next Friend of A. E. Bogert, a minor. On September 22, 2019, the Bogert family lived in a four-bedroom townhouse that was connected to a row of four other townhouses in Forest Hill, MD. The first floor of the home included a two-car garage. On the second floor, there were two bedrooms directly on top of the garage. On the night that Mr. Thompson crashed his truck into the Bogert's garage, the two bedrooms above the garage were occupied by Mr. and Mrs. Bogert's daughters, A. A. and A. E. The daughters were 11 and 7 respectively. The master bedroom occupied by Mr. and Mrs. Bogert, was located on the second floor but down the hallway from the girls' rooms toward the back side of the house.

On the night of September 21, 2019, the Bogert family all went to bed at approximately 10:30 p.m. A. A. and A. E. went to sleep in the bedrooms directly above the garage, while Mr. and

Mrs. Bogert went to sleep in the master bedroom. At approximately 2:00 a.m. on September 22, 2019, Mr. Thompson lost control of his truck, which went airborne, canted to the side, and then crashed through the Bogert's garage before knocking out the full left wall of the garage and coming to rest directly under the girls' bedroom.

When the truck struck the Bogert's house, everyone in the household was asleep, but all were awakened by the loud noise the crash made, which Mr. Bogert later described as an "explosion" akin to a "mortar round hitting [the] house." The noise caused Mr. Bogert to experience a flashback to an incident that occurred in 2005 when he was serving in Iraq as a member of the U.S. Army. In that incident, he survived a mortar attack on his housing unit that killed a fellow soldier. Initially, when the crash woke him, he thought that he was having an auditory hallucination. He then realized that the sound that he heard was real and he thought, for an instant, that the house had been attacked. Mrs. Bogert was also awakened by the crash. To her, the noise sounded like "crumbling metal and a big boom." She sat up in bed and asked her husband if he had heard the noise; when he responded in the affirmative, both she and her husband realized the noise seemed to come from the direction of their daughters' bedrooms. They jumped out of their bed and ran down the hall to check on the safety of the children.

When Mr. Bogert arrived at A. E.'s room, he found his daughter sitting up in bed, "terrified." Mr. Bogert ran downstairs, disoriented, to find out what had caused the explosion-like noise. Meanwhile, Mrs. Bogert ran into A. A.'s room. She then ran down to the garage to look outside towards the street. At that point her "brain couldn't process what had happened" and all she could see was smoke, dust and red flashing lights. Mrs. Bogert then called 911. At that point, the electricity was off because the crash had damaged the power box that was located on the left side of the garage.

After the firemen and police arrived, the breaker box in the garage exploded and a building inspector noticed that the I-beam that supported the garage was lying on the floor of the garage. This caused the inspector to order everybody out of the house.

Shortly after the two girls left the house, they vomited as did Mrs. Bogert. Mr. Bogert testified at deposition that the incident "reactivated" his post-traumatic stress disorder (PTSD) that he initially experienced in Iraq. He testified that when he heard the crash, he "legitimately thought [he] was redeployed and [the family was] under attack." He said in an interrogatory answer that "the [d]efendant's negligence and the traumatizing accident has brought all these past PTSD events back into focus, in addition to new anxiety issued because of the devastating thoughts that his whole family was at risk."

Post-accident, he told his mental health counselor that he reacted to the accident the same way that he had reacted to the prior mortar attack and that post-accident, he subsisted on very little sleep and "ran on adrenaline[.]"

Mrs. Bogert testified that she personally experienced anxiety, heart palpitations, migraines, vertigo, nausea, ringing in her ears, difficulty sleeping, exhaustion, shortness of breath and difficulty in concentrating in the days following the accident. She visited her family medical

practitioner to address the symptoms of vertigo and nausea. Both of her daughters also sought treatment because they experienced depression, sadness, anger and nervousness due to the accident in question.

Counsel for the defendant moved for summary judgment contending that the personal safety exception to the usual rule was inapplicable and that Mr. and Mrs. Bogert and their two children were all barred from recovery for their alleged emotional distress because such stress was not the foreseeable result of his client's negligence. The trial judge agreed with the defendant and granted his motion for summary judgment.

Held: Reversed

The Court of Special Appeals reversed the grant of summary judgment.

The Court held that, taking the evidence in the light most favorable to the non-moving party, there was evidence, if credited, that the personal safety exception was amicable. All plaintiffs were in a position where the destruction to property caused them to have a reasonable fear for their own safety. As to Mr. and Mrs. Bogert, again taking the evidence in the light most favorable to the appellants, there was evidence sufficient to show that as a result of the accident, they had a reasonable fear for the safety of their daughters. For those reasons, summary judgment was reversed and the case was remanded to the Circuit Court for Harford County for trial.

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Meghan Handy, et al. v. Box Hill Surgery Center LLC, et al., Case No. 973, September Term 2021, filed July 27, 2022. Opinion by Wells, C.J.

https://mdcourts.gov/data/opinions/cosa/2022/0973s21.pdf

TORT – NEGLIGENCE – INTERVENING AND SUPERSEDING CAUSES

Facts:

Brenda Rozek was a patient of Dr. Ritu Bhambhani, M.D., a licensed anesthesiologist and pain management physician. Ms. Rozek complained of chronic neck and arm pain, so with Ms. Rozek's consent, Dr. Bhambhani injected her with a steroid. The steroid had come from a compounding pharmacy, which manufactures drugs that are specifically tailored to the needs of individual patients. In this case, the steroid was contaminated with fungus, which ultimately killed Ms. Rozek. Megan Handy, one of Ms. Rozek's representatives, sued Dr. Bhambhani and asserted at trial that the doctor was negligent at several points, starting with the ordering of the steroid from the compounding pharmacy, to the moment Dr. Bhambhani injected the steroid into Ms. Rozek. Dr. Bhambhani argued that the pharmacy, which knew that its facilities were not following proper sterilization procedures, posed an intervening and superseding cause, and asked for the relevant instruction, which the court gave, over objection. A jury ultimately found that Dr. Bhambhani was negligent but that the pharmacy's negligence was superseding, thus releasing Dr. Bhambhani from liability. Ms. Handy appealed.

Held: Affirmed.

Ms. Handy argued that the court's instruction on intervening/superseding cause was reversible error. Ms. Handy asserted that the pharmacy's knowing release of an adulterated drug cannot be an intervening or superseding cause because the doctor's critical act of negligence was injecting Ms. Rozek with the tainted steroid. Releasing the contaminated steroid occurred before the injection, therefore, Ms. Handy argued, cannot intervene or supersede the doctor's negligence. Dr. Bhambhani disagreed, arguing that the evidence supported the court giving the instruction.

Section 441 of the Restatement (Second) of Torts defines an intervening force as a force "which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Importantly, an intervening force "may or may not be a superseding cause which relieves the actor from liability for another's harm occurring thereafter." *Id*. cmt. d. Section 440 of the Restatement (Second) of Torts defines a superseding cause as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

Over Ms. Handy's objection, the court read Maryland Pattern Jury Instruction (Civil) 19:11 which says:

> There can be additional causes for the injury that occur after the defendant's conduct. If a later event or act could have been reasonably foreseen, the defendant is not excused for responsibility for any injury caused by the defendant's negligence. But if an event or act is so extraordinary that it was not reasonably foreseeable, the defendant's conduct is not a legal cause of the injury.

In explaining why the instruction was appropriate, the Court of Special Appeals noted that Ms. Handy had presented expert testimony that claimed that Dr. Bhambhani's use of a compounding pharmacy constituted a breach of the standard of care and that the doctor's negligence occurred multiple times, spanning from the time that she placed the order for the steroid until she injected the drug into Ms. Rozek. The Court had to determine whether the evidence met the minimum threshold that would allow a jury to rationally conclude that the evidence supported Dr. Bhambhani's theory of an intervening cause. The Court held that the testimony, both from Ms. Handy's expert that the doctor breached the standard of care by purchasing the steroid from a compounding company and from Dr. Bhambhani's expert who testified about the pharmacy's negligence, met the minimum amount of evidence to establish an intervening cause.

Additionally, the Court held that the evidence sufficiently established that the compounding pharmacy's act of intentionally selling the contaminated steroid constituted a superseding cause. The question is the foreseeability of the superseding act. If the act is foreseeable, it cannot be superseding; only "extraordinary" acts can be said to be unforeseen. Here, Dr. Bhambhani testified that her use of the compounding pharmacy in the past did not alert her to the potential that the drugs she received could have been tainted. Coupled with the testimony of an expert on the FDA as to the criminal conduct of the pharmacy in knowingly releasing an adulterated drug into the marketplace, these acts constituted the type of "extraordinary" conduct to generate a jury question for superseding cause.

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ATTORNEY DISCIPLINE

*

This is to certify that the name of

JOHN FRANKLIN BLEVINS

has been replaced upon the register of attorneys in this State as of July 22, 2022.

*

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

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