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SUPREME COURT OF MARYLAND

Attorney Grievance Commission of Maryland v. Sherwood R. Wescott, Misc. Docket AG No. 2, September Term, 2022, filed February 28, 2023. Opinion by Fader, C.J.

https://mdcourts.gov/data/opinions/coa/2023/2a22ag.pdf

ATTORNEY DISCIPLINE – SANCTION – SUSPENSION

Facts:

The Attorney Grievance Commission of Maryland (the "Commission"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Sherwood R. Wescott, arising out of his representation of Antrell L. Johnson. The Commission alleged that Mr. Wescott violated Maryland Attorneys' Rules of Professional Conduct ("MARPC") 1.1 (Competence) (Rule 19-301.1), MARPC 1.4 (Communication) (Rule 19-301.4), MARPC 1.5 (Fees) (Rule 19-301.5), MARPC 1.15 (Safekeeping Property) (Rule 19-301.15), MARPC 1.16 (Declining or Terminating Representation) (Rule 19-301.16), and MARPC 8.4 (Misconduct) (Rule 19-308.4). The allegations resulted from Mr. Wescott's: (1) failure to keep Mr. Johnson reasonably informed about the status of his case, prepare Mr. Johnson for his hearings, and perform meaningful legal services in furtherance of Mr. Johnson's defense; (2) improper collection of a nonrefundable flat fee; (3) failure to deposit fees in an attorney trust account; and (4) failure to return unearned fees upon the termination of representation.

A hearing judge found by clear and convincing evidence that Mr. Wescott had committed all the violations alleged by the Commission. The hearing judge also found clear and convincing evidence of the existence of six aggravating factors: a pattern of misconduct, multiple offenses, substantial prior experience in the practice of law, refusal to acknowledge the wrongful nature of the conduct, indifference to making restitution, and the client was a vulnerable victim. The hearing judge also found by a preponderance of the evidence the existence of two mitigating factors: absence of a prior disciplinary record and no attempt by Mr. Wescott to collect the remaining balance that he alleges was due under the representation agreement. Neither party filed exceptions to any of the hearing judge's findings of fact or conclusions of law.

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Held: The Court imposed a suspension for 60 days.

After an independent review of the record, the Court accepted the hearing judge's findings of fact and concurred with the hearing judge's conclusions of law in all respects but one. The Court also sustained the hearing judge's findings on all aggravating and mitigating factors.

Mr. Wescott violated MARPC 1.1 when he failed to prepare Mr. Johnson for two hearings or inform him about the nature and purpose of the hearings. He also violated MARPC 1.4 when he failed to: (1) properly explain the retainer agreement to Mr. Johnson or Mr. Johnson's mother, who had retained Mr. Wescott on her son's behalf; (2) tell Mr. Johnson that another attorney would be assisting in the representation; and (3) generally keep Mr. Johnson informed about the status of the case.

Mr. Wescott violated MARPC 1.5 when he charged a nonrefundable flat fee that was unreasonable for the services rendered. He failed to maintain those fees in an attorney trust account until the fees were earned or expenses incurred, or to obtain informed, written consent to do otherwise in violation of MARPC 1.1 and 1.15, and did not refund the unearned fees upon termination of the representation in violation of MARPC 1.16. Finally, he violated MARPC 8.4(a) and (d) when he violated multiple rules of professional conduct, the cumulative effect of which brought the legal profession into disrepute. However, although Mr. Johnson was released on pretrial supervision after he terminated Mr. Wescott's representation, there is no evidence in the record that Mr. Wescott's representation caused Mr. Johnson to remain incarcerated; therefore, the Court did not find this to be an additional ground for the 8.4(d) violation.

The Court concluded that, because Mr. Wescott's conduct violated several of the MARPC, including violations involving both incompetent representation and the mishandling of client funds, a definite suspension for 60 days is the appropriate sanction.

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Tyrie Washington v. State of Maryland, No. 15, September Term 2022, filed December 19, 2022. Opinion by Watts, J.

Hotten, J. dissents.

https://www.mdcourts.gov/data/opinions/coa/2022/15a22.pdf

TERRY STOPS – REASONABLE ARTICULABLE SUSPICION – UNPROVOKED, HEADLONG FLIGHT – HIGH-CRIME AREA

Facts:

Tyrie Washington, Petitioner, and another person were standing in an alley in Baltimore City when they saw a marked police vehicle. Both Washington and the other person fled upon seeing the vehicle. After seeing a different unmarked police vehicle at the end of an alley as he fled, Washington turned around, ran, jumped over a fence and tried to hide behind a bush in a backyard. Detective Alex Rodriguez got out of the second vehicle, and Washington ran again and jumped over another fence. Ultimately, Detective Rodriguez stopped Washington, whereupon another detective found a handgun in Washington's waistband.

Although two of the detectives involved testified as to observing a bulge in Washington's clothing that indicated Washington might have a gun, neither of the detectives had advised Detective Rodriguez of the observations. Detective Rodriguez had not seen any sign of a weapon but had seen Washington fleeing, jumping the two fences, and trying to hide. All three of the testifying detectives testified that the block where Washington was stopped, and the immediate vicinity, constituted a high-crime area.

Facing gun charges, Washington filed a motion to suppress the firearm recovered from him, alleging that he was stopped without reasonable suspicion in violation of the Fourth Amendment to the United States Constitution and Article 26 of the Maryland Declaration of Rights. The Circuit Court for Baltimore City conducted a hearing on the motion to suppress. After hearing argument, ruling orally, the circuit court denied the motion to suppress. The circuit court found that Washington and the other person ran "for no reason" upon seeing uniformed detectives in a marked police vehicle. This occurred, the circuit court noted, in a high-crime area "known for drug dealing, drug robberies, murders, shootings." The circuit court concluded that reasonable articulable suspicion existed in light of Washington running away, jumping over a fence, trying to hide behind a bush, jumping over a fence again, and fleeing from detectives.

Pursuant to a conditional plea agreement reached with the State, Washington stipulated that he would tender a conditional guilty plea to possession of a regulated firearm and retain the right to appellate review of the denial of the motion to suppress. The circuit court accepted the conditional guilty plea and sentenced Washington to ten years of imprisonment, with all but five

years suspended, followed by two years of supervised probation. Later that day, Washington noted an appeal.

The Appellate Court of Maryland affirmed the circuit court's judgment with respect to denial of the motion to suppress. *See Tyrie Washington v. State*, No. 739, Sept. Term, 2021, 2022 WL 873315, at *1 (Md. Ct. Spec. App. Mar. 24, 2022). Washington filed a petition for a writ of *certiorari* and the State of Maryland, Respondent, filed an answer to the petition and a conditional cross-petition. The Supreme Court of Maryland granted the petition and conditional cross-petition. *See Washington v. State*, 479 Md. 456, 278 A.3d 761 (2022). In the Supreme Court of Maryland, Washington contended that Detective Rodriguez lacked reasonable suspicion to stop him based solely on his unprovoked flight in a high-crime area. Washington asserted that young African American men like himself have legitimate fears of mistreatment at the hands of police, providing an innocent reason for his flight, such that his fleeing in a high-crime area was not sufficient to establish reasonable suspicion for a stop. According to Washington, an increased public awareness of police misconduct involving African American men, combined with the specific history of police misconduct in Baltimore City, rendered outdated the conclusion that unprovoked flight is suggestive of wrongdoing.

Held: Affirmed.

The Supreme Court of Maryland determined that, under the totality of the circumstances analysis, a court may consider whether unprovoked flight is an indication of criminal activity that, coupled with evidence of a high-crime area and any other relevant factors, establishes reasonable suspicion for a stop, or whether unprovoked flight, under the circumstances of the case, is a factor consistent with innocence that adds little or nothing to the reasonable suspicion analysis. In *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000), in concluding that reasonable suspicion for a *Terry* stop existed, the Supreme Court explained that people may flee for a variety of reasons, including innocence, and that "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." (Citation omitted); *see also Wardlow*, 528 U.S. at 132-35 (Stevens, J., concurring in part and dissenting in part). As such, in *Wardlow*, the Supreme Court did not establish a per se rule that unprovoked flight in a high-crime area always gives rise to reasonable articulable suspicion for a *Terry* stop.

The Supreme Court of Maryland concluded that, in keeping with the Supreme Court's holding in *Wardlow*, unprovoked flight in a high-crime area does not automatically equal reasonable articulable suspicion for a *Terry* stop. Rather, under the totality of the circumstances assessment, in determining whether reasonable suspicion for a *Terry* stop is established, along with evidence that a location is a high-crime area, a court may consider whether unprovoked flight could reasonably be perceived as a factor justifying a conclusion that criminal activity is afoot or a factor consistent with innocence, including the circumstance that some individuals may fear interactions with police officers in Baltimore City and elsewhere.

The Supreme Court of Maryland held that, applying this analysis, Detective Rodriguez had reasonable articulable suspicion to stop Washington. The specific nature and context of Washington's flight, his other evasive maneuvers, and its occurrence in a location that was established to be a high-crime area led the Court to this conclusion. Washington fled not only at the sight of uniformed detectives in a marked police car, but also at the other end of an alley when he spotted different detectives in an unmarked car. Washington fled, headlong, completely unprovoked, and simultaneously with the other individual standing with him in the alley. He also jumped fences and attempted to conceal himself behind a bush while fleeing.

The Supreme Court of Maryland concluded that "the reasonable suspicion analysis requires support from specific facts such that testimony concerning a location being a high-crime area must be particularized as to the location or geographic area at issue, the criminal activity known to occur in the area, and the temporal proximity of the criminal activity known to occur in the area to the time of the stop." In addition, the Court stated that "the conduct giving rise to officers' suspicions must not be inconsistent with the nature of the crimes alleged to establish the high-crime area."

The Supreme Court of Maryland explained that testimony at the suppression hearing supported the circuit court's conclusion that the block on which Washington was stopped was a high-crime area. A detective testified that he had seized approximately 10 to 15 handguns on the specific block on which Washington was stopped "within a three-month span last year." Testimony from other detectives concerned drug trafficking, homicides, shootings, and robberies in the immediate vicinity of the block on which Washington was stopped.

For all of these reasons, the Court concluded that Detective Rodriguez had reasonable articulable suspicion to stop Washington and that the stop did not violate Washington's rights under the Fourth Amendment. Declining to disturb its longstanding practice of interpreting Article 26 *in pari materia* with the Fourth Amendment, the Supreme Court of Maryland held that, for the same reasons, Detective Rodriguez did not violate Washington's rights under Article 26 of the Maryland Declaration of Rights.

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Ray Crawford, et al. v. County Council of Prince George's County, Sitting as the District Council, et al., No. 4, September Term 2022, filed February 23, 2023. Opinion by Gould, J.

https://mdcourts.gov/data/opinions/coa/2023/4a22.pdf

JUDICIAL REVIEW – LAND USE – PLANNING AND ZONING

Final decisions of the Prince George's County District Council (the "District Council") are subject to judicial review. Md. Code Ann., Land Use Article § 22-407(a). Here, the final decision under review is the District Council's affirmance of the Prince George's County Planning Board's (the "Planning Board") approval of Amazon's proposed modifications to and use of the Property.

The Supreme Court of Maryland applied the holding in *County Council of Prince George's County v. Zimmer Development Co.*: when the District Council reviews a determination by the Planning Board regarding a Specific Design Plan ("SDP"), it considers whether the decision is legally authorized, supported by substantial evidence of record, arbitrary or capricious, or otherwise illegal. 444 Md. 490, 573, 583 (2015).

AGENCY DEFERENCE – MIXED QUESTIONS OF LAW AND FACT

Mixed questions of law and fact arise when an agency has correctly stated the law, its fact-finding is supported by the record, and the remaining question is whether the agency has correctly applied the law to the facts. We apply the substantial evidence standard of review to mixed questions of law and fact. Here, there was substantial evidence in the record to support the District Council's affirmance of the Planning Board's conclusion that Amazon's proposed use of a property satisfied the definition of "warehouse" under the Prince George's County zoning ordinance ("Zoning Ordinance").

Facts:

This dispute concerns a 28.9-acre property in Prince George's County (the "Property"), which is improved with a 290,225 square-foot building. The Property is zoned as an Employment and Industrial Area that may be used for "warehouses and distribution facilit[ies]."

In 2020, Amazon acquired the Property for use as a "last-mile" delivery station, where Amazon would receive and sort packages around the clock for delivery to customers. Packages would typically be held at the site for less than 12 hours before distribution. Amazon sought to increase the paved area for parking, loading, and circulation, and to add an exterior canopy along the eastern portion of the building. These changes required amending the SDP with the approval of the Planning Board. In March 2020, Amazon applied to amend the SDP.

The Planning Board's technical staff found that the application complied with all requirements, and recommended approval. At a Planning Board public hearing, Crawford argued that the proposed delivery station was a "[parcel] hub"—not a "warehouse" as defined in the Zoning Ordinance—and therefore not a permitted use. Crawford reasoned that the brief storage times of packages, the last-mile delivery model, and the expected volume of vehicle traffic disqualified the proposed use from the definition of "warehouse."

The Planning Board voted unanimously to adopt the staff report findings and approve Amazon's application to amend the SDP. The Planning Board found that the application met the requirements of an SDP under the Zoning Ordinance and that Amazon's proposed use qualified as a "warehouse and distribution facility" use under the Zoning Ordinance.

Crawford appealed the Planning Board's decision to the District Council. The District Council unanimously concluded that the Planning Board correctly determined that Amazon's proposed use qualified as a "warehouse and distribution facility" use under the Zoning Ordinance's definitions of "warehouse unit" and "distribution facility."

Crawford requested judicial review in the Circuit Court for Prince George's County. The circuit court affirmed the District Council's final decision. We granted *certiorari* while the appeal was pending in the Appellate Court of Maryland.

Held:

There was substantial evidence in the record to support the District Council's affirmance of the Planning Board's approval of Amazon's application to amend the SDP for the Property.

Final decisions of the District Council are subject to judicial review. Mixed questions of law and fact arise when an agency has correctly stated the law, its fact-finding is supported by the record, and the remaining question is whether the agency has correctly *applied* the law to the facts. Here, the applicable law was not in dispute; the parties agree that the Zoning Ordinance's definitions of "warehouse unit" and "distribution facility" governed. Rather, the dispute here was whether, on the specific facts of this case, Amazon's proposed use of the Property qualified as a "warehouse" under the Zoning Ordinance.

We apply the substantial evidence standard of review to mixed questions of law and fact. As we stated in *Zimmer*:

> The reviewing court may not substitute its judgment for that of the administrative agency. Rather, the court must affirm the agency decision if there is sufficient evidence such that "a reasoning mind reasonably could have reached the factual conclusion the agency reached."

444 Md. at 573 (citations omitted).

Under the Zoning Ordinance, the Property may be used for "warehouses and distribution facilit[ies]." Thus, use of the Property as either a warehouse or a distribution facility would satisfy the ordinance. To satisfy the definition of a "warehouse" under the Zoning Ordinance: (1) the building must be used to store goods and materials; and (2) the storage of the goods and materials must be in service of the daily operations of either a wholesale or distribution business.

The District Council's finding that Amazon's proposed use constituted "storage" under the Zoning Ordinance was supported by substantial evidence. The building would, indeed, be used to "hold" products, however briefly. Substantial evidence in the record also supported the conclusion that the proposed use of the Property satisfied the definition of "distribution facility."

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APPELLATE COURT OF MARYLAND

EBC Properties, LLC v. Urge Food Corporation, Case No. 1952, September Term 2021, filed February 28, 2023. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2023/1952s21.pdf

TRADE FIXTURES – INTENT CONTROLS TRADE FIXTURE CHARACTERIZATION – TRANSFER OF TITLE TO TRADE FIXTURES – CONTRACT INTERPRETATION – PRESUMPTION OF ABANDONMENT – LIMITED REMAND

Facts:

This case arises from a dispute between landlord EBC Properties, LLC ("EBC"), and its tenant, Urge Foods Corp. ("Urge"), regarding the possession of chattels installed in rented commercial realty, as well the obligation to restore and repair the rented realty at the conclusion of the lease. In preparing the realty for use, Urge installed numerous chattels related to operating a grocery, making the requisite improvements to the plumbing, electrical, and HVAC systems to accommodate these installations. The lease stipulated that Urge could make such installations and alterations, including trade fixtures, and that such installations would remain Tenant's Property, so long as they were not permanently affixed to the building nor abandoned in the event of default or termination of the lease's term. The lease further provided EBC the right to terminate the lease and enter and repossess the premises, including all Tenant's Property still therein, upon Urge's default.

Disputes regarding EBC's obligation to provide adequate security, and Urge's obligation to pay for security and additional costs, led to EBC informing Urge it was in default and that the lease would not be renewed. Prior to the end of the lease term, Urge began removing its Tenant's Property, including its grocery store installations, which EBC alleged was in violation of the lease. Urge alleged that when it attempted to return to the realty to remove the remainder of its property and to make the necessary repairs, EBC prevented Urge personnel from doing so.

Urge proceeded to file a complaint in the Circuit Court for Prince George's County, alleging EBC breached the contract by preventing Urge from removing all of its installations, and seeking declaratory and injunctive relief in the form of the court declaring the installations were trade fixtures. Urge further maintained that it was the sole owner of all such property, and that EBC would be enjoined from preventing such removal. EBC filed a counterclaim alleging Urge

breached the Lease by failing to pay additional charges related to security and utilities, then further breached by removing its Tenant's Property, including alleged trade fixtures, and by failing to make the necessary repairs to the Premises. As such, EBC sought damages, as well as the return of such property removed by Urge.

The circuit court determined that Urge was in default regarding its obligation to pay the additional costs related to security and utilities. The court further found that Urge's installations were "trade fixtures," and as such they remained Urge's property and could be removed before the end of the lease's term. Additionally, the court found Urge was obligated to repair the realty, but that by locking Urge out of the building, EBC prevented Urge from fulfilling this obligation. EBC timely appealed to the Appellate Court of Maryland

Held:

Judgment of the Circuit Court for Prince George's County affirmed in part, vacated and remanded in part for further proceedings.

The Appellate Court of Maryland affirmed that the circuit court ruling that the chattels installed by Urge were trade fixtures. The Court utilized the three-factor fixture test articulated in *Dudley v. Hurst*, 67 Md. 44, 47 (1887) and relied upon by Maryland courts for nearly a century-and-a-half, which focusing the analysis on the tenant's intent when determining if the chattels installed are "trade fixtures," and in so doing strictly construing the chattel's attachment to the realty such that even structures requiring tremendous effort to remove, and significant repairs following their removal, remain "trade fixtures." The Court reasoned that because Urge installed the chattels for the purpose of operating its grocery business, they remained trade fixtures.

Regarding Urge's alleged breach of the lease by removing such trade fixtures after defaulting on its obligation to pay the additional fees, the Appellate Court held that because Urge was in default, under the terms of the lease EBC could have exercised its right to re-enter and repossess the premises at any point between Urge's failure to correct its default and the termination date of the lease. In so doing, EBC could have taken possession of any property left within the premises and thus considered abandoned. The Court held that title to such Tenant's Property did not transfer to EBC immediately upon Urge's default. The Court distinguished this dispute from prior cases in which a lease term explicitly stated title to trade fixtures transferred to the landlord upon the tenant's default.

Additionally, applying Maryland common law regarding trade fixtures, the Court strictly construed the lease provisions restricting Urge's right to remove its trade fixtures. The Court held that the "presumption of abandonment" for trade fixtures arises only after the tenant does not remove its chattels prior to the termination of the lease, or prior to the landlord retaking possession of the premises upon default. The Court distinguished this case from *Cabana, Inc. v. Eastern Air Control, Inc.*, 61 Md. App. 609, 616–17 (1985), in which the landlord obtained possession of the tenant's abandoned trade fixtures by repossessing the property and preventing

re-entry by the tenant following its default. Accordingly, because EBC took no such steps to exercise its rights under the lease, nor under the common law, Urge was free to remove the trade fixtures prior to the end of the Lease term.

Therefore, the Appellate Court affirmed the circuit court's ruling that title to the trade fixtures remained with Urge, who could thus freely remove its property prior to the end of the lease term. Accordingly, Urge did not commit further breach by removing its trade fixtures prior to the end of the lease.

The Appellate Court vacated the circuit court's ruling that EBC relieved Urge from its duty to repair the premises -- an obligation of the tenant under both by the terms of the lease and under the common law regarding the removal of trade fixtures -- when EBC prevented Urge from re-entering the building and making such repairs. The Court held that it was unable to determine from the record before it or from the circuit court's bench ruling whether or how EBC frustrated Urge's attempts to re-enter and repair the premises. As such, the Court remanded to the circuit court for further proceedings the issue of Urge's potential breach of the lease, as well as any potential damages, regarding the tenant's duty to repair the premises.

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Michael Herman Timberlake v. State of Maryland, No. 585, September Term 2022, filed February 2, 2023. Opinion by Wells, C. J.

https://mdcourts.gov/data/opinions/cosa/2023/0585s22.pdf

CRIMINAL PROCEDURE – INTERSTATE AGREEMENT ON DETAINERS ACT (IADA) – CHIEF JUDGE'S ADMINISTRATIVE ORDERS DURING THE PANDEMIC – 180-DAY RULE UNDER THE IADA – SPEEDY TRIAL – HICKS' 180-DAY RULE UNDER MARYLAND RULE 4-271 AND CRIMINAL PROCEDURE § 6-103 – CRITICAL DAY THAT SETS A DEFENDANT'S TRIAL BEYOND THE 180-DAY LIMIT

Facts:

In 2019, Michael Timberlake was a federal prisoner. He sought to be tried on outstanding burglary charges in Maryland under the Interstate Agreement on Detainers Act (IADA). Timberlake was transferred to Maryland under the IADA and was to be tried in the Circuit Court for Howard County, but his trial was delayed numerous times—most significantly, due to court closures ordered by the Honorable Mary Ellen Barbera, at the time, the Chief Judge of the Court of Appeals of Maryland (now called the Supreme Court of Maryland[1]) during the COVID-19 pandemic. In fall 2020, several months prior to Timberlake's rescheduled trial date in February 2021, but nearly a year after he had been brought to Maryland, Timberlake moved to dismiss on two grounds related to the trial delay. The circuit court denied the motion to dismiss. Timberlake appealed, claiming that the delay 1) violated the IADA's provision requiring a transferee such as him to be tried within 180 days of the State's receipt of his request to be tried on outstanding charges and 2) ran afoul of the 180-day deadline established in Maryland Rule 4-271, section 6-103 of the Criminal Procedure Article ("CP") of Maryland Code, and *State v. Hicks*, 285 Md. 310 (1979).

Held: Affirmed.

IADA

Timberlake argued that the judge who continued his trial beyond the IADA's 180-day deadline, did so without finding good cause to postpone the hearing under Maryland Code Annotated, Correctional Services ("CS") Article § 8-405(a). His subsidiary argument was that Chief Judge

[1] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See, also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland…."). The Judges of the Court are now called "Justices."

Barbera had no authority to toll the IADA clock merely by administrative order closing the courts in Maryland due to the COVID-19 pandemic. Timberlake maintained that he was ready to stand trial under CS § 8-408(a)[2].

The Appellate Court of Maryland held that the COVID-related court closures ordered by Chief Judge Barbera constitute an example of administrative unavailability under CS § 8-408. Further, the Court concluded that the circuit court need not have made a finding on the record using the exact words of CS § 8-408 in order for Timberlake's IADA clock to have been tolled by the COVID-19 closures. The circuit court's determination that he was administratively unavailable to stand trial due to the court closures during a world-wide pandemic was implicit.

HICKS

Timberlake's second assignment of error centered on his claim that a judge who was not the county's administrative judge reset Timberlake's trial beyond the 180-day requirement of Md. Rule 4-271 and CP § 6-103, commonly referred to as the *Hicks* date. Significantly, eleven days later and well before the 180th day, the county administrative judge reviewed the resetting of Timberlake's trial date. At that time, the administrative judge found good cause to reschedule Timberlake's trial to the date beyond *Hicks*. On appeal, Timberlake argued that the administrative judge's subsequent good cause finding was ineffective since, in Timberlake's estimation, "the damage had been done" by the first judge in setting the trial date beyond the 180-day time limit.

The Appellate Court of Maryland reaffirmed that only the county administrative judge (or their designee) has the authority to schedule a criminal defendant's trial beyond the *Hicks* date. Further, the Court held that the administrative judge may remedy or "fix" an erroneously set trial date beyond *Hicks* with a good cause finding at any time before the 180th day. That was the case here. The administrative judge reviewed the circumstances for rescheduling Timberlake's trial at a hearing with the State and Timberlake well before the 180th day. Further, at the hearing, although the judge made a good cause determination to reset the trial beyond the 180th day, the administrative judge offered to find a trial date within *Hicks*, but Timberlake declined the court's offer and kept the trial date beyond *Hicks*, thereby consenting to the resetting of the trial date.

[2] CS § 8-408(a), in relevant part, states: "In determining the duration and expiration date[] of the time period[] provided in §[] 8-405 . . . the running of [this] time period[] shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter."

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In the Matter of Andrea Jacobson, No. 1741, September Term 2021, filed December 6, 2022. Opinion by Leahy, J.

https://www.courts.state.md.us/data/opinions/cosa/2022/1741s21.pdf

ESTATES & TRUSTS LAW – WILLS AND REVOCABLE TRUSTS – STANDING – PRE-MORTEM UNDUE INFLUENCE CONTEST

ESTATES & TRUSTS LAW – POWERS OF ATTORNEY – ESTATES AND TRUSTS ARTICLE § 17-103 – STANDING

Facts:

Appellant, Amy Silverstone ("Amy"), is the daughter of appellee Andrea Jacobson ("Andrea"), an elderly woman diagnosed with memory impairment. Amy and Andrea became estranged and Amy initiated the present litigation to challenge the validity of several of Andrea's estate planning documents on the grounds of undue influence. Those documents, including wills, trust agreements, and powers of attorney, either benefitted or conferred authority upon Lisa Jacobson ("Lisa"), Andrea's sister and Amy's aunt.

Specifically, in 2015, Andrea executed a durable power of attorney, Maryland Statutory Form Financial Power of Attorney, and advanced medical directive naming Lisa as her agent and providing her with broad powers to manage Andrea's affairs. Each document also named Julia Lipps-Joachim ("Julia"), Lisa's daughter and Andrea's niece, as the successor agent in the event Lisa could no longer serve. In June of 2019, those documents were amended to swap Lisa's other daughter, Emily Treanor ("Emily"), for Julia as the successor agent.

From 2016 through 2019, Andrea also restructured her estate. On April 27, 2016, Andrea executed an Amended Trust Agreement for the Andrea Susan Jacobson Revocable Trust naming Lisa as trustee and remainder beneficiary, with Bryce, Amy's son and Andrea's grandson, as contingent remainder beneficiary if Lisa were to predecease Andrea. On the same day, Andrea executed a pour-over will devising her remaining assets to the revocable trust.

Then, on August 29, 2018, shortly after her falling out with Amy, Andrea executed a Second Amended Trust Agreement naming Lisa as remainder beneficiary, with Lisa's heirs (i.e., Julia and Emily) named as contingent remainder beneficiaries. The August 2018 Trust Agreement, currently in effect, includes a clause that explicitly disinherits both Amy and her only son, Bryce. A second pour-over will devising all remaining assets to the revocable trust and adding a parallel clause disinheriting Amy and Bryce was executed the same day.

Amy then initiated the present litigation against Andrea and Lisa in the Circuit Court for Montgomery County, Maryland while Andrea remained alive. Andrea and Lisa moved to dismiss Amy's complaint on the grounds that (1) Amy lacked standing to bring an undue

influence challenge to Andrea's estate planning documents while Andrea remained alive and (2) the complaint failed to state a claim upon which relief could be granted. The circuit court granted Andrea and Lisa's motion and Amy noted a timely appeal.

Held: Affirmed.

The circuit court correctly concluded that Amy lacked standing to challenge Andrea's wills and revocable trust agreements while Andrea remained alive. To have standing, a plaintiff must have a legally protected interest, whether provided by statute or arising out of contract, tort, or property ownership. *State Ctr., LLC v. Lexington Charles P'ship*, 438 Md. 451, 500-02 (2014). Amy sought to bring a pre-mortem contest to her mother's wills and revocable trust agreements on the grounds of Lisa's alleged undue influence. As merely a presumptive heir, however, Amy possessed no property interest in her mother's assets because it is "only after the death of the ancestor that [her] children are entitled to the *status* of very heirs, which will enable them to assert a right to property derived through [her] by inheritance." *Sellman v. Sellman*, 63 Md. 520, 525 (1885). Accordingly, Amy lacked standing to challenge her mother's wills and revocable trust agreements because she had no property interest in her mother's trust assets or potential probate estate.

The circuit court also correctly concluded that Amy lacked standing to challenge the validity of her mother's powers of attorney. Estates and Trusts Article ("ET") § 17-103(a)(4) confers standing on a principal's descendant to petition a court to review the actions of an attorney-in-fact and "construe" a power of attorney. Considering ET § 17-103's main purpose to detect and stop agent abuse, an action to "construe" a power of attorney under ET § 17-103 must be filed in the context of a dispute concerning abuses of power by the attorney-in-fact while the principal is incapacitated. Here, although appellant could qualify as a proper party to bring a claim under ET § 17-103(a)(4) insofar as she is a descendant, her complaint did not allege any misuse or abuse of power by the attorney-in-fact and therefore failed to properly state a cause of action under ET § 17-103. Accordingly, under our "cause of action" approach to standing, because appellant was not "not entitled to invoke the judicial process in [this] particular instance[,]" her claim was properly dismissed for lack of standing. *State Ctr.*, 438 Md. at 502.

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Selective Way Insurance Company v. Fireman's Fund Insurance Company, et al., No. 753, September Term 2021, filed February 2, 2023. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2023/0753s21.pdf

INSURANCE – EQUITABLE CONTRIBUTION AMONG INSURERS

Facts:

In 2006, the purchaser of an apartment complex sued the general contractor for alleged construction defects. The general contractor maintained liability insurance coverage from two Nationwide insurance companies. The general contractor was an additional insured under various liability insurance policies maintained by subcontractors for the construction project. Nationwide agreed to defend the general contractor under a reservation of rights. Nationwide paid about $1 million of defense costs before the general contractor resolved the construction-defect lawsuit.

In 2008, Nationwide initiated a declaratory judgment action against various insurance companies that allegedly insured subcontractors for the project. Nationwide claimed that the subcontractors' insurers breached a duty to defend the general contractor in the construction-defect lawsuit. Through subrogation, Nationwide sought reimbursement for all defense costs from the construction-defect lawsuit and all attorneys' fees incurred in prosecuting the declaratory judgment action against the other insurers.

Nationwide reached monetary settlement agreements with 11 of the subcontractors' insurers. One of the subcontractors' insurers, Selective Way Insurance Co., did not reach any settlement agreement with Nationwide. The declaratory judgment action proceeded to trial against Selective Way alone.

A jury determined that Selective Way is liable for $994,719.54 of defense costs from the construction-defect lawsuit. The trial judge, proceeding without a jury, ordered Selective Way to pay $802,556.72 for attorneys' fees incurred by Nationwide in prosecuting the declaratory judgment action. The court reduced the total amount of liability by $588,152.00 to account for amounts that Nationwide had already received from settlements with other insurers.

Selective Way appealed. The intermediate appellate court upheld the award for defense costs, but vacated the award for attorneys' fees incurred in prosecuting the declaratory judgment action and remanded the case for a jury trial on those damages. *Selective Way Ins. Co. v. Nationwide Prop. & Cas. Ins. Co.*, 242 Md. App. 688 (2019), *aff'd*, 473 Md. 178 (2021). The declaratory judgment action remains pending in the circuit court, awaiting a jury trial to determine the amount of Selective Way's liability for attorneys' fees incurred by Nationwide in prosecuting the declaratory judgment action.

In 2020, Selective Way initiated a separate action in the Circuit Court for Baltimore County against various insurance companies, including 11 insurers that had reached settlement agreements with Nationwide in the previous declaratory judgment action. Selective Way asserted claims for contribution against those insurers. From each insurer, Selective Way demanded a "proportionate share" of the defense costs from the construction-defect lawsuit, as well as a "proportionate share" of Selective Way's liability for attorneys' fees incurred in prosecuting the declaratory judgment action.

The defendant insurers filed motions to dismiss or, in the alternative, for summary judgment. The defendant insurers offered evidence related to their settlement agreements from the previous declaratory judgment action. Some defendant insurers also asked the court to stay the action, arguing that any contribution claim was not ripe because Selective Way had not yet paid any amounts to Nationwide.

The circuit court granted summary judgment in favor of the defendant insurers. In its written opinion, the court observed that the defendant insurers had reached settlement agreements releasing them from their contractual obligations before Selective Way initiated the action for contribution. The court concluded that, because the alleged common obligation no longer existed, Selective Way had no right of contribution from the defendant insurers.

The court further concluded that Selective Way had no right of contribution with respect to the unresolved claim to recover attorneys' fees incurred by Nationwide in prosecuting the declaratory judgment action against Selective Way.

The court entered a declaratory judgment stating that Selective Way has no right of contribution from the defendant insurers. Selective Way appealed.

Held: Affirmed in part; reversed in part.

The Appellate Court of Maryland held that the circuit court erred in granting summary judgment in favor of the defendant insurers on the ground that the defendant insurers had reached settlement agreements releasing them from their contractual obligations before Selective Way asserted its contribution claims.

In order for a party to have a right of equitable contribution, (1) the parties must share a common liability or burden, and (2) the party seeking contribution must have paid, under legal compulsion, more than the party's fair share of the common obligation. In the majority of states, courts have recognized claims for contribution where two or more insurers cover the same insured for the same risk. Where multiple insurers provide coverage, an insurer that pays more than its share of defense costs may require a proportionate payment from the other coinsurers.

A settlement agreement that absolves an insurer of its contractual obligations to the insured does not extinguish the rights of other insurers to receive equitable contribution from the settling

insurer. The right of equitable contribution belongs to each insurer individually and exists independently of the rights of the insured. Accordingly, an insurer's right to equitable contribution is not the insured's right to disclaim. Although the insured is able to release its own claims against an insurer for defense costs, the insured is not in a position to release an insurer's claims against another insurer for equitable contribution.

The Appellate Court did, however, uphold the circuit court's separate determination that Selective Way had no right of contribution with respect to its liability for attorneys' fees incurred by Nationwide in prosecuting the declaratory judgment action against Selective Way. The authorities relied on by Selective Way failed to establish that its claimed right of contribution should extend beyond the alleged common obligation for defense costs to include the attorneys' fees incurred in a separate action to establish that an insurer breached its duty to defend.

Finally, the Appellate Court addressed the defendants' arguments that the contribution action should be stayed or dismissed for lack of ripeness. Under Maryland law, a contribution claim accrues when the party seeking contribution has actually paid more than its proportionate share of an alleged common obligation. Alternatively, a contribution claim may accrue when a judgment is entered against the party for more than its share of an alleged common obligation.

In this case, the contribution claim was not fully ripe because Selective Way had not yet paid any defense costs and the order imposing liability on Selective Way for defense costs lacked the full force and effect of a final judgment. Nevertheless, the circuit court was not required to dismiss the action. The court, in its discretion, could decide whether it should stay the action pending either actual payment of the alleged common obligation or the entry of a judgment imposing liability against Selective Way. Alternatively, the court could allow the contribution action to proceed in some fashion and to resolve any issues in the contribution action that did not depend on a final resolution of the other action.

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Melissa Phillips Jordan v. Elyassi's Greenbelt Oral & Facial Surgery, P.C., et al., No. 1049, September Term 2021, filed December 29, 2022. Opinion by Albright, J.

https://www.courts.state.md.us/data/opinions/cosa/2022/1049s21.pdf

HEALTHCARE MALPRACTICE CLAIMS ACT – CERTIFICATE OF QUALIFIED EXPERT – SUFFICIENCY

HEALTHCARE MALPRACTICE CLAIMS ACT – CERTIFICATE OF QUALIFIED EXPERT – DISMISSAL FOR FAILURE TO FILE

Facts:

Under the Healthcare Malpractice Claims Act ("HCMCA"), a plaintiff in a medical malpractice case typically must file a valid Certificate of Qualified Expert ("CQE"), signed by an attesting expert, stating that there was a departure from the standards of care. Maryland Code, Courts and Judicial Proceedings Article ("CJ"), § 3–2A–02(c)(2)(ii)(1)(A) sets forth certain requirements that the attesting expert must have met within five years of the alleged malpractice. Among other things, if the defendant is board certified and no exception applies, the expert must also be board certified in the defendant's specialty or a related field. CJ § 3–2A–02(c)(2)(ii)(2)(B), however, exempts experts who "taught medicine" in that specialty or a related field from the board certification requirement. In turn, CJ § 3–2A–04(b)(1) provides for dismissal without prejudice if the plaintiff files a deficient or untimely CQE.

Dr. Melissa Jordan received dental care from Dr. Ali Elyassi and his dental practice. Dr. Elyassi is a board certified oral and maxillofacial surgeon, and he was practicing within that specialty when he treated Dr. Jordan. Dr. Elyassi attempted to replace two of Dr. Jordan's dental implants, but the procedure failed. Dr. Jordan then claimed that she was left with a postoperative infection and a need for further surgery.

After filing an arbitration claim under the HCMCA, Dr. Jordan waived arbitration and filed suit in the Circuit Court for Prince George's County. She also filed a CQE signed by Dr. Michael Kossak. Dr. Kossak was not board certified, but he taught periodontics for about two years in the 1970s as an assistant university professor, before implants and bone grafts had been developed. Dr. Elyassi moved to strike Dr. Kossak's CQE and dismiss Dr. Jordan's action. He conceded that periodontics was a related field, but he argued that the HCMCA required Dr. Kossak's teaching experience to occur within five years of the alleged malpractice. The Circuit Court granted Dr. Elyassi's motion and dismissed Dr. Jordan's action with prejudice, reasoning that the "taught medicine" exception was ambiguous and should be interpreted as containing a five-year limit. The Circuit Court further reasoned that a dismissal without prejudice would make no difference because the applicable statute of limitations had run.

Dr. Jordan timely appealed to the Appellate Court.

Held: Reversed

First, the Appellate Court held that the "taught medicine" exception is not ambiguous and should be interpreted as written. Thus, because CJ § 3–2A–02(c)(2)(ii)(2)(B) does not contain a five-year limit, Dr. Kossak's teaching experience in the 1970s qualified for the "taught medicine" exception and exempted Dr. Kossak from the board certification requirement.

In so holding, the Appellate Court first looked to the statutory language. The Appellate Court reasoned that the plain meaning of "taught medicine" is not time-bound, and the existence of a five-year limit elsewhere in the statute suggested that the General Assembly knew how to impose such a limit and did not intend to do so here.

The Appellate Court looked to legislative history to confirm its interpretation, explaining that the purpose of the HCMCA is to weed out non-meritorious medical malpractice claims but not to create roadblocks to meritorious claims. The Appellate Court also noted that the provisions at issue were enacted over the Governor's veto and objection that expert witness requirements had been "watered down." The Appellate Court further reasoned that CQE requirements must be interpreted carefully to ensure that they are no broader than the General Assembly intended, because they impose threshold barriers to suit and could pose constitutional problems if interpreted too broadly.

Second, the Appellate Court held that Dr. Elyassi failed to preserve his argument that Dr. Kossak's teaching experience occurred too long ago to qualify as having "taught medicine" within the specialty of oral and maxillofacial surgery or a related field.

Third, in the alternative, the Appellate Court held that the Circuit Court erred in dismissing Dr. Jordan's action with prejudice. The Appellate Court reasoned that the plain language of CJ § 3–2A–04(b)(1) did not afford the Circuit Court any discretion to dismiss an action with prejudice for the failure to file a valid and timely CQE.

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ATTORNEY DISCIPLINE

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By an Opinion and Order of the Supreme Court of Maryland dated February 1, 2023, the following attorney has been disbarred:

KEITH ANTHONY PARRIS

*

By an Order of the Supreme Court of Maryland dated January 23, 2023, the following attorney has been temporarily suspended, effective February 18, 2023:

CHARLES EDWARD SMITH

*

By an Order of the Supreme Court of Maryland dated February 23, 2023, the following attorney has been disbarred by consent:

ROBERT STEVEN POPE

*

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JUDICIAL APPOINTMENTS

*

On January 6, 2023, the Governor announced the appointment of **Llamilet Gutierrez** to the District Court for Prince George's County. Judge Gutierrez was sworn in on February 8, 2023, and fills the vacancy created by the retirement of the Hon. Gregory C. Powell.

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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