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SUPREME COURT OF MARYLAND

Attorney Grievance Commission of Maryland v. George L. Farmer, AG No. 41, September Term 2021, filed July 10, 2023. Opinion by Gould, J.

https://www.mdcourts.gov/data/opinions/coa/2023/41a21ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

Mr. Farmer was a practicing attorney but never a member of the Maryland bar. In 2020, he was approached by a family friend who was working as a full-time caretaker for a 92-year-old widow suffering from dementia. The family friend was married to the widow's son. The widow had been represented by a Maryland attorney who had provided estate and trust services to the widow, her late husband, and son, for approximately three decades. That attorney had set up a trust for the widow and her family.

Mr. Farmer met with the friend, the widow's son, and the widow. He was told that the trust held about five million dollars. After the meeting, Mr. Farmer began representing his friend. He sent a letter to the widow's attorney, purportedly on behalf of the widow, instructing him to create a power of attorney in favor of the widow's attorney and Mr. Farmer's friend, and provide Mr. Farmer with copies of the trust documents and the widow's will. The attorney refused to comply because Mr. Farmer was not a Maryland attorney and the widow "didn't have the capacity to appoint him." Mr. Farmer then had the widow sign a retainer agreement with him and pay him a $8,500 retainer.

Mr. Farmer continued to demand that the attorney comply with the instructions, threatening an ethics complaint if he refused. Mr. Farmer had the widow sign an amendment to the trust, which removed her attorney as co-trustee and substituted an accountant who shared Mr. Farmer's New Jersey office. Mr. Farmer demanded that the trust's bank declare any actions by the attorney as ineffective and transfer the money to another account. The bank declined to follow these requests, prompting Mr. Farmer to file a complaint against it.

Concerned that others were trying to gain improper access to the widow's finances, her attorney filed an emergency petition, which resulted in four orders: (1) compelling an independent examination to determine the widow's capacity; (2) appointing the attorney as temporary guardian of the widow; (3) appointing a local attorney as temporary guardian of her property; and (4) appointing another local attorney as counsel for the widow. The widow was ultimately diagnosed as severely impaired and in need of a guardian of her person and property.

Mr. Farmer contended that he had no conflict of interest even though he purported to represent both his friend and the widow. He also contended that it was not a problem that he was not authorized to practice law in Maryland. He attempted to obtain local counsel to support a pro hac vice petition and represent the widow and his friend as local counsel. His request was ultimately refused because the widow had a court-appointed attorney and the friend lacked standing in the guardianship proceeding.

Mr. Farmer filed several motions, primarily to vacate the orders. He also applied for admission pro hac vice as widow's counsel, without a Maryland sponsor. Mr. Farmer alleged that the widow's long-standing attorney was engaged in significant misconduct and that he, together with the widow's court-appointed guardian, were harming her.

The friend filed a motion pro se, requesting that the court dismiss the petition, vacate its orders, and appoint her as the sole decision-maker for the widow's health care. The hearing judge found that Mr. Farmer either drafted or assisted in drafting the motion.

A hearing on the pending motions was held. The court denied Mr. Farmer's pro hac vice motion with prejudice and denied the motion to dismiss. The court found that the widow was represented by the court-appointed counsel, and, as a result, ruled that Mr. Farmer was prohibited from communicating with her.

After the hearing, Mr. Farmer presented the widow's guardian with an invoice in the amount of $158,589.18 for expenses and for "legal services" purportedly rendered on behalf of the widow between March 2020 and May 2020. The guardian refused to pay.

Mr. Farmer filed a complaint in federal court against the attorney and his firm, alleging tortious interference with contract, tortious interference with economic relationship, legal malpractice, and "willful and malicious acts," all based on his relationship and agreement with the widow. That complaint was dismissed with prejudice because Mr. Farmer was not licensed to practice law in Maryland and his retainer agreement with the was invalid and against public policy.

On December 1, 2021, pursuant to Maryland Rule 19-721, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Mr. Farmer. The Petition alleged that Mr. Farmer violated multiple provisions of the Maryland Attorneys' Rules of Professional Conduct. In accordance with Maryland Rules 19-722(a) and 19-727, on July 18, 2022, the hearing judge issued a written statement containing findings of fact and conclusions of law (the "findings"), concluding by clear and convincing evidence that Mr. Farmer violated MARPC 1.4 (Communication), 1.5 (Fees), 1.7 (Conflict of Interest—General Rule), 1.16(a)(1) (Declining or Terminating Representation), 3.1 (Meritorious Claims and Contentions), 5.5(a) (Unauthorized Practice of Law; Multi-Jurisdictional Practice of Law), and 8.4(a) (Misconduct). The hearing judge also found one mitigating factor and five aggravating factors.

Mr. Farmer filed exceptions to multiple findings pursuant to Maryland Rule 19-728(b). The Commission excepted to one finding. Oral argument was held before this Court on November 4, 2022.

Held:

The Supreme Court overruled Mr. Farmer's exceptions and the Commission's exception, adopted the hearing judge's findings, and determined that indefinite suspension was the appropriate sanction under the facts and circumstances of this case. The Supreme Court concluded that the hearing judge's conclusions are supported by clear and convincing evidence and therefore overruled Mr. Farmer's exceptions.

Many of Mr. Farmer's exceptions were summarily overruled. The Supreme Court found that the record contained substantial evidence that supported the hearing court's conclusions and that the inferences the hearing judge drew from such evidence were logical, sound, and well-reasoned.

The Supreme Court found that Mr. Farmer violated MARPC 1.4, 1.7, and 1.16(a)(1) when he represented both his friend and the widow, two clients with conflicting interests. The Supreme Court also found that he violated Rule 1.5 by collecting the $8,500.00 retainer fee and billing $158,589.18 for legal services. Because of the conflict of interest inherent in his representation, and because he was not authorized to practice law in Maryland, the Court found that Mr. Farmer could not lawfully perform the services for which he charged the widow. The Court further found that Mr. Farmer violated Rule 3.1 when he filed the frivolous lawsuit in federal court against the widow's attorney and his firm; that he violated Rule 5.5 when he engaged in the unauthorized practice of law by, at minimum, filing motions in the Maryland court; and that he violated Rule 8.4 because he violated six other MARPC rules.

Further, the Supreme Court found that Mr. Farmer took no remedial action to cure his misconduct: he did not return the $8,500 retainer fee, recant his accusations against the attorney or the bank, or help clarify for the widow that she was not represented by him.

The Supreme Court agreed with the hearing judge's finding of one potential mitigating factor: that Mr. Farmer made a good faith effort to be admitted pro hac vice and informed his clients that he was not licensed to practice law in Maryland. The Supreme Court also agreed with the hearing judge's finding of five aggravating factors: (1) prior attorney discipline; (2) a pattern of misconduct; (3) refusal to acknowledge the misconduct's wrongful nature; (4) the victim's vulnerability; and (5) substantial experience in the practice of law.

The Supreme Court further determined that Mr. Farmer's arguments that the Court lacked subject matter jurisdiction and personal jurisdiction were without merit. The Supreme Court also rejected Mr. Farmer's argument that he was entitled to the defense of unclean hands and found no merit in his allegations.

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The Supreme Court concluded that Mr. Farmer clearly did not grasp the nature and extent of his misconduct. Although he represented a vulnerable, elderly widow at the same time as he was representing the widow's caretaker, who was attempting to seize control over the widow's estate, he still maintained there was no conflict of interest. He insisted that he properly moved for admission pro hac vice in the guardianship case, even though Rule 19-217 plainly requires a sponsoring Maryland-licensed attorney to file the motion on his behalf. Mr. Farmer insisted he was not acting as a lawyer in representing the widow, even though he filed papers on her behalf in a Maryland court, drafted estate planning documents, issued demands to her long-standing counsel and bank, had her sign a retainer agreement on his law firm letterhead, and issued invoices for "Legal Services Rendered." When others failed to bend to his will, Mr. Farmer lashed out, sparing nobody. He filed an ethics complaint and federal lawsuit against the attorney. He filed a regulatory complaint against the bank. He accused Bar Counsel of waging a personal vendetta against him. He accused the hearing judge of bias, pointing to no evidence other than the fact that she credited the evidence against him. And at oral argument before the Supreme Court, he continued to insist that the attorney had misappropriated funds as trustee, but could not point to a single shred of evidence supporting his allegations.

Having considered the facts and circumstances and having applied the governing principles of law, the Supreme Court concluded that an indefinite suspension was the appropriate sanction for Mr. Farmer's misconduct.

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Attorney Grievance Commission of Maryland v. Natasha Veytsman Rossbach, AG No. 15, September Term 2022, filed August 31, 2023. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2023/15a22ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – INDEFINITE SUSPENSION

Facts:

On August 22, 2022, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Natasha Veytsman Rossbach in connection with two client matters. Petitioner alleged that Ms. Rossbach violated the following Maryland Attorney's Rules of Professional Conduct ("MARPC"): 19-301.1 (Competence), 19-301.3 (Diligence), 19-301.4(a) and (b) (Communication), 19-301.5(a) (Fees), 19-301.15(a) and (c) (Safekeeping Property), 19 301.16(d) (Declining or Terminating Representation), 19-308.1(a) and (b) (Bar Admission and Disciplinary Matters), and 19 308.4(a), (c), and (d) (Misconduct).

The Supreme Court of Maryland designated the Honorable Sherrie R. Bailey of the Circuit Court for Baltimore County to serve as the hearing judge. On October 26, 2022, the hearing judge issued an Order of Default against Ms. Rossbach for failing to respond to the charges filed against her. Ms. Rossbach filed a motion to vacate the default order, but did not provide any support for her motion as required under Maryland Rule 2 613(d). The hearing judge denied Ms. Rossbach's motion to vacate. At the evidentiary hearing, the hearing judge allowed Ms. Rossbach to present mitigating factors without objection from Petitioner. The hearing judge admitted Petitioner's requests for admissions of facts and genuineness of documents into evidence.

On January 23, 2023, the hearing judge issued findings of fact and conclusions of law, concluding that Ms. Rossbach committed the violations alleged in the Petition for Disciplinary or Remedial Action. Neither party filed exceptions. Ms. Rossbach and Petitioner waived oral argument.

Held: Indefinite suspension.

The Court agreed with the hearing judge that clear and convincing evidence demonstrated that Ms. Rossbach violated MARPC 19-301.1 (Competence), 19-301.3 (Diligence), 19 301.4(a) (Communication), 19 301.5(a) (Fees), 19 301.16(d) (Declining or Terminating Representation), 19-308.1(a) and (b) (Bar Admission and Disciplinary Matters), and 19 308.4(a), (c), and (d) (Misconduct). These violations were based on the following: (1) Ms. Rossbach failed to act with competence and diligence in two client matters; (2) failed to keep the clients reasonably

informed about the status of their matters and failed to respond to their requests for information; (3) failed to perform the services for which she was retained; (4) failed to refund any portion of one client's unearned fee and failed to refund the other client's unearned fee until approximately 18 months after the client terminated the representation; (5) failed to respond to Bar Counsel's requests for information; and (6) made knowingly false statements to Bar Counsel.

The Court did not find that clear and convincing evidence supported the hearing judge's conclusions that Ms. Rossbach violated Rule 19-301.4(b) (Communication) and Rule 19 301.15(a) and (c) (Safekeeping Property). The hearing judge concluded that Ms. Rossbach failed to deposit unearned fees in trust or obtain the clients' informed consent to a different arrangement. The Court concluded to the contrary because Bar Counsel did not introduce any evidence, nor did the hearing judge make any factual finding, that supported the conclusion that Ms. Rossbach failed to obtain the clients' informed consent to a different arrangement.

The Court agreed with the hearing judge that Ms. Rossbach failed to meet her burden to prove any mitigating factors other than a lack of prior discipline. The Court further agreed with the hearing judge's assessment of seven aggravating factors: (1) a dishonest or selfish motive, (2) a pattern of misconduct, (3) multiple offenses, (4) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, (5) refusal to acknowledge the wrongful nature of conduct, (6) substantial experience in the practice of law, and (7) indifference to making restitution.

The Court indefinitely suspended Ms. Rossbach from the practice of law in Maryland but declined to set a minimum time period that must run before Ms. Rossbach may apply for reinstatement.

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Attorney Grievance Commission of Maryland v. Marylin Pierre, Misc. Docket AG No. 42, September Term 2021, filed August 16, 2023. Opinion by Fader, C.J.

Battaglia, J., concurs.
Watts, J., concurs and dissents.

https://mdcourts.gov/data/opinions/coa/2023/42a21ag.pdf

ATTORNEY DISCIPLINE – SANCTION – REPRIMAND

Facts:

The Attorney Grievance Commission of Maryland filed a petition for disciplinary or remedial action against Marylin Pierre, arising primarily out of accusations made in a campaign email sent by the campaign manager for a slate of sitting judges who were running against Ms. Pierre for seats on the Circuit Court for Montgomery County. Then-Bar Counsel received the email and immediately opened an investigation, informed the sitting judges' campaign manager of the existence of the investigation, and sought additional information. Less than two months before the election, Bar Counsel sent a letter to Ms. Pierre summarizing many of the allegations levelled against her and requiring her to respond substantively in writing within two weeks. The Commission alleged that Ms. Pierre violated Maryland Attorneys' Rules of Professional Conduct ("MARPC") 8.1 (Bar Admission and Disciplinary Matters) (Rule 19-308.1), 8.2 (Judicial and Legal Officials) (Rule 19-308.2), and 8.4 (Misconduct) (Rule 19 308.4), as well as New York Disciplinary Rules ("NYDR") 1-101 (Maintaining Integrity and Competence of the Legal Profession) and 1-102 (Misconduct).

A hearing judge found by clear and convincing evidence that Ms. Pierre had violated each MARPC and NYDR alleged, but rejected several of the grounds on which Bar Counsel had relied. The hearing judge also found clear and convincing evidence of seven aggravating factors: having a dishonest or selfish motive, obstructing the attorney discipline proceeding, engaging in illegal conduct, engaging in a pattern of misconduct, committing multiple violations of the MARPC, making misrepresentations to Bar Counsel, and having substantial experience in the practice of law. The hearing judge also found by a preponderance of the evidence four mitigating factors: absence of a prior disciplinary record, generally good reputation and good character, sincere remorse, and unlikely repetition of misconduct. Bar Counsel did not file exceptions to any of the hearing judge's findings of fact or conclusions of law. Ms. Pierre excepted generally to all of the hearing judge's findings of fact and conclusions of law that were adverse to her.

Held: The Court issued a reprimand.

The Court sustained many of Ms. Pierre's exceptions to the hearing judge's findings of fact but overruled those exceptions related to two false statements she made about the sitting judges and a misrepresentation on her New York Bar Application. The Court sustained Ms. Pierre's exceptions to the hearing judge's conclusions of law that she violated MARPC 8.1(a) and (b) and 8.4(b). However, the Court overruled her exceptions to the hearing judge's conclusions of law that she violated MARPC 8.2(a), 8.4(a), (c), and (d), and NYDR 1-101 and 1-102. The Court sustained the hearing judge's findings related to three aggravating factors: a dishonest or selfish motive; substantial experience in the practice of law; and illegal conduct. The Court also sustained the hearing judge's findings on all mitigating factors.

The Court acknowledged that the context in which the alleged MARPC violations arose—judicial campaign speech investigated in the lead-up to the election—presented two concerns: (1) First Amendment concerns, because the alleged violations arose from speech related to an election and that is critical of judges, two types of speech with significant constitutional protection; and (2) campaign interference concerns because the initiation of the investigation into an attorney challenging sitting judges at a sensitive point in the campaign gives rise to a risk that it will be perceived as an attempt to interfere in the election, which may undermine public confidence in the integrity of the attorney disciplinary process.

The Court concluded that Ms. Pierre violated MARPC 8.2(a) when she made the campaign statement on Twitter that "some sitting judges who are only English speakers send people to jail because they could not speak English," knowing it was false or with reckless disregard to its truth or falsity. Ms. Pierre also violated MARPC 8.4(c) and (d) for the same reason. However, the Court did not find a MARPC 8.2(a) violation for another campaign tweet because, unlike the first statement, the second statement, although false, did not impugn the qualifications or integrity of the sitting judges. The Court concluded that Ms. Pierre violated MARPC 8.4(a) because she violated MARPC 8.2(a).

The Court also found that clear and convincing evidence supports the conclusion that Ms. Pierre violated NYDR 1-101 and 1-102 when she provided incomplete and intentionally misleading information on her 1999 New York Bar Application.

The Court concluded that, although Ms. Pierre's conduct violated several of the MARPC and the NYDR and would have been subject to greater discipline in a different context, the overlay of the election and First Amendment concerns made a reprimand the appropriate sanction.

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In the Matter of the Petition of Kern Hosein, Misc. No. 24, September Term 2022, filed August 14, 2023. Per Curiam Opinion.

Fader, C.J., Booth, and Gould, JJ., concur.
Hotten., J, concurs.
Watts, Biran, and Eaves, JJ., dissent.

https://www.courts.state.md.us/data/opinions/coa/2023/24a22m.pdf

INTERPRETATION OF JUDICIAL ADMINISTRATIVE TOLLING ORDERS

Facts:

Mr. Kern Hosein was a Baltimore City Police Officer who sustained injuries during a motor vehicle accident while responding to an emergency call. Shortly thereafter, Mr. Hosein filed for Line-of-Duty Disability Retirement with the Fire and Police Employees' Retirement System for the City of Baltimore. After review, a hearing examiner denied Mr. Hosein's request and granted him Non-Line-of-Duty Disability Retirement. A copy of that decision was mailed to Mr. Hosein on December 22, 2021. On January 25, 2022, Mr. Hosein filed for a petition for judicial review of the hearing examiner's decision in the Circuit Court for Baltimore City.

The Fire and Police Employees' Retirement System moved to dismiss Mr. Hosein's case arguing that Mr. Hosein's filing was untimely because it was filed after the 30-day deadline prescribed by Maryland Rule and City Code. Mr. Hosein disagreed, arguing that the deadline was extended by 15 days because of administrative tolling orders issued by Chief Judge Barbera during the COVID-19 pandemic. The circuit court concluded that the extension applied only to deadlines that were tolled during the closure of the court clerks' offices, which lasted from March 16, 2020 through July 20, 2020. Accordingly, the court granted the motion to dismiss.

Mr. Hosein timely appealed. The Appellate Court of Maryland certified the following question to this Court: "Does the 15-day extension apply to all cases whose statute of limitations and deadlines related to initiation expired between March 16, 2020, and April 3, 2022?"

Held: Affirmed.

During the COVID-19 pandemic, Chief Judge Barbera issued a series of administrative orders concerning the tolling of statutes of limitations and other deadlines related to the initiation of matters. A total of 17 administrative orders on that subject were issued during the course of the Judiciary's COVID-19 emergency period, which lasted from March 16, 2020 through April 3, 2022. Pursuant to those orders, all such deadlines were tolled from March 16, 2020, when court clerks' offices were first closed to the public, through July 20, 2020, when the court clerks'

offices were reopened (the "tolling period"). Certain of the orders also referenced a 15 day extension of deadlines. The question before the Supreme Court was whether the 15-day extension applied only to deadlines that were suspended during the tolling period, *i.e.*, up until July 20, 2020, or, instead, applied to all deadlines that were pending during the COVID-19 emergency period, *i.e.*, through April 3, 2022. The specific order that was in effect at the time the hearing examiner denied Mr. Hosein's request for Line-of-Duty Disability Retirement was issued on August 6, 2021 and titled the Tenth Revised Administrative Order on the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters (the "Tenth Revised Administrative Order" or "Order").

In a per curiam opinion, the Court concluded that the 15-day extension applied only to deadlines that were suspended during the tolling period. Because the deadline for Mr. Hosein to note his appeal fell outside that period, the Court affirmed the judgment of the circuit court.

A plurality of the Court concluded that the Tenth Revised Administrative Order is unambiguous and that it did not provide a 15-day extension for deadlines that were not suspended during the tolling period. The plurality opinion first examined the relevant administrative orders. The initial administrative orders on the subject (issued between April 3 and May 4, 2020) tolled all statutes of limitations and other deadlines regarding the initiation of matters beginning on March 16, 2020, and provided that such deadlines would remain tolled for "the number of days that the courts are closed to the public due to the COVID-19 emergency by order of the Chief Judge of the Court of Appeals." The next three administrative orders (issued between May 22 and October 2, 2020) identified July 20, 2020—the date on which court clerks' offices would be reopened to the public—as the end date of the tolling period. Each of those orders further provided that with the reopening of the clerks' offices, "the filing deadlines to initiate matters are hereby extended by an additional 15 days[.]" Beginning with the administrative order issued on November 12, 2020, subsequent orders—including the Tenth Revised Administrative Order—removed the language establishing the 15-day extension and replaced it with language acknowledging "the filing deadlines to initiate matters having been extended by previous Order, by an additional 15 days."

The plurality concluded that: (1) the Tenth Revised Administrative Order did not establish a 15-day extension of any deadlines, but instead referenced the earlier orders that had established such an extension; and (2) the earlier orders expressly and unambiguously tied the 15-day extension only to deadlines that had been suspended during the tolling period. The plurality rejected Mr. Hosein's contention that aspects of subsequent administrative orders, including a definition of "matters" that was added only to orders issued after those that established the 15-day extension, introduced ambiguity into the scope of the extension. Because the deadline applicable to Mr. Hosein's appeal was not suspended during the tolling period, it was not subject to the 15-day extension.

In a separate concurring opinion, Justice Hotten agreed with the plurality that the 15-day extension only applied to filing deadlines that were tolled during the closure of the clerks' offices between March 16, 2020 and July 20, 2020. However, Justice Hotten concluded that the scope

of the 15-day extension under the Tenth Revised Administrative Order was ambiguous. The 15-day extension did not purport to implement the 15-day extension; rather, it implicitly served in an advisory capacity because it indicated that a previous order effectuated that extension. The reference to a previous order belies the fact that each successive administrative tolling order rescinded its predecessor. Therefore, the scope of the extension must be apparent from the plain language of the only administrative tolling order in effect during the relevant time, *i.e.*, the Tenth Revised Administrative Order. Otherwise, the extension is necessarily ambiguous.

Justice Hotten observed that the Tenth Revised Administrative Order did not explain whether the 15-day extension, as implemented by the previous order, remained in effect. None of the other operative provisions clarified the scope of the 15-day extension. Indeed, the *only* clue to the extension's true meaning lay in its reference to a rescinded order. Accordingly, the evaluation of rescinded orders falls within the domain of an ambiguity analysis, just as the evaluation of any other extrinsic indicia of intent.

To ascertain the meaning of the 15-day extension, Justice Hotten evaluated the following extrinsic indicia of intent: (1) the history of the 15-day extension, which indicated that the extension was connected to the closure of the clerks' offices; (2) the Maryland Judiciary's communications to the public regarding the narrow scope of the extension; (3) the Order's title's reference to emergency tolling, which the Order defined as the four-month closure; (4) the Order's preamble, which resembled the language contained in Title 16, Chapter 1000 of the Maryland Rules and advised the public of the Chief Justice's emergency powers and how those powers would be used; (5) dicta from this Court's decision in *Murphy v. Liberty Mutual Insurance Company*, 478 Md. 333, 274 A.3d 412 (2022), which was unhelpful in clarifying the scope of the 15-day extension; and (6) Maryland Rule 16-1003(a)(7), which governed the extension, and the Rules Committee's comments thereto suggesting that a party's "practical ability" to meet filing deadlines concern their physical "access to" the courts. Although these indicia do not individually establish the Chief Judge's intent, they cumulatively support a narrower extension.

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Eastland Food Corporation, et al. v. Edward Mekhaya, No. 37, September Term 2022, filed August 31, 2023. Opinion by Gould, J.

Fader, C.J., and Booth, J., concur.

https://www.mdcourts.gov/data/opinions/coa/2023/37a22.pdf

SUFFICIENCY OF PLEADINGS – STOCKHOLDER OPPRESSION – "REASONABLE EXPECTATION"

BREACH OF FIDUCIARY DUTY – STANDING TO BRING ACTION

UNJUST ENRICHMENT – STANDING TO BRING ACTION

Facts:

In 1999, Pricha Mekhayarajjananonth recruited his son, Edward Mekhaya, to work for Eastland Food Corporation ("Eastland"), a Maryland corporation that Pricha founded in the 1980s. Pricha told Edward that Edward would become an employee of Eastland, eventually become an owner, and, once an owner, would be compensated as an owner. Pricha explained that Eastland distributed its profits as annual bonuses instead of dividends. Based on Edward's conversations with his father, his recognition of the importance of family, his expectation of continued employment, his expectation of participation in Eastland's management, and Eastland's compensation structure, Edward resigned from his job to join Eastland in 2000.

In 2002, Edward was promoted to Vice-President of Operations and was elected to Eastland's board of directors. From 1996 through the end of 2008, Pricha and Edward's mother, Vipa Mekhaya, each owned 50 percent interests in Eastland. In 2008, Eastland reallocated its issued and outstanding stock and allocated stock to Edward and his brother, Oscar Mekhaya.

From 2000 to 2008, Edward's annual compensation increased dramatically from $53,564 in 2000 to $457,376 in 2008. Between 2008 and 2018, Edward's annual compensation was in the $400,000 to $600,000 range. This compensation included the bonus payments—which fluctuated year to year based on Eastland's profitability—that Edward received between 2010 and 2018 in lieu of dividends.

In November 2015, Pricha ceased being a shareholder of Eastland and agreed to redistribute his shares. In August 2017, Pricha, who until then had served as Eastland's President and as a member of its board of directors, was removed from both positions because, among other reasons, he had moved to Thailand and was not expected to return to resume his duties. The following month, over Edward's objection, Oscar was elected President of Eastland. At the next stockholders' meeting, without cause or reason, Edward was not re-elected to the board of directors. After that meeting, the board of directors consisted of three members: Oscar, Vipa,

and an individual named Tisnai Thaitam. Edward's efforts to re-join the board were rejected by the stockholders at subsequent annual stockholder meetings.

Three days after that meeting, Edward was terminated from his position with Eastland. After that, despite the company's continued profitability, Eastland refused to pay Edward any share of the profits, regardless of form. Instead, according to Edward's allegations, Vipa, who did no substantial work for Eastland, and Oscar, whose poor management skills caused high employee turnover and low morale, took excessive compensation and diverted corporate funds for their personal use.

Edward filed suit alleging oppression of a minority shareholder against Oscar, Vipa, Tisnai and Eastland (Count I), breach of fiduciary duty against Oscar, Vipa, and Tisnai (Count II), and unjust enrichment against Oscar and Vipa (Count III). Each count rested on common facts. Specifically, Edward alleged that since he was terminated from Eastland: (1) Oscar and Vipa received distributions of Eastland's profits through excessive compensation; (2) Oscar and Vipa diverted corporate funds for personal use; and (3) Eastland refused to pay any share of the profits to Edward through compensation or dividends.

Petitioners Eastland, Oscar, Vipa, and Tisnai jointly moved to dismiss Edward's complaint. Petitioners' motion and Edward's opposition debated whether Edward alleged sufficient facts to: (1) sustain a stockholder oppression claim given the at-will nature of his employment with Eastland; (2) overcome the business judgment rule codified under Md. Code Ann. Corps. & Ass'ns ("CA") § 2-405.1 (1975, 2014 Repl. Vol.); and (3) sustain a direct cause of action against Oscar, Vipa, and Tisnai. The court granted the motion to dismiss in its entirety, with prejudice. Edward timely moved to alter or amend the judgment. The circuit court denied Edward's motion. Edward timely appealed to the Appellate Court of Maryland.

The Appellate Court of Maryland reversed the judgment of the circuit court and held that Edward alleged sufficient facts to support all three causes of action in his initial complaint. *Mekhaya v. Eastland Food Corp*., 256 Md. App. 497 (2022). Petitioners petitioned for writ of certiorari, which was granted. *Eastland Food Corp. v. Mekhaya*, 483 Md. 264 (2023).

Held:

Edward alleged that petitioners engaged in "illegal, fraudulent and oppressive" conduct, entitling him to various forms of equitable relief short of Eastland's dissolution. In doing so, he invoked CA § 3-413, which establishes the statutory basis for involuntary dissolution. Crediting Edward's allegations and the reasonable inferences drawn therefrom; the Supreme Court concluded that Edward's proposed amended complaint stated a cause of action for stockholder oppression.

Edward alleged sufficient facts to support the reasonableness of his expectation, that, by virtue of his status as a stockholder, he would have continued employment and managerial involvement in

Eastland. The Court held that it was reasonable for the founders of a family-owned business to structure their business and estate plan to pass along the business—both management and ownership—to the next generation in the family. The Court also held that it was reasonable for a son who leaves a profession at his father's request to expect continued employment by the family-owned business, particularly when the period of employment predating the issuance of shares could be seen as the father's test of his son's commitment and dedication to the company. Based on the well-pleaded facts of the proposed amended complaint, Edward alleged a reasonable expectation that continued employment and managerial input as a director would accompany his stock ownership.

Edward likewise pleaded sufficient facts to support a reasonable expectation that he would receive his share of the distributable profits in accordance with his ownership percentage. Before Edward joined the company, his father explained to him the company's practice of paying out the company's profits in the form of bonuses rather than dividends. His father explained that this practice would continue when Edward became an owner, and it did. Edward detailed his total compensation from 2000 until his termination in 2018, including specific amounts of the amount of compensation attributable to profit bonuses once he became a stockholder. Until he left the company in August 2017, Pricha ran Eastland as its President and unilaterally determined the amount of the profit bonuses. After Pricha severed his ties in 2017, the stockholders considered at the 2018 annual stockholders' meeting whether to move away from Pricha's practice of distributing profits through bonuses and instead adopt a practice of distributing profits through dividends. The Court held that, under Maryland law, Eastland's board of directors was supposed to decide how and in what amounts profits should be distributed. The Court further held that Edward's allegations, if proven, would support the inference that from the stockholders' perspective, the board of directors was deciding how distributable profits would be paid and how much of the distributable profits would be paid, not whether the distributable profits would be paid at all.

According to Edward, however, after he was terminated, Eastland stopped its practice of distributing profits through bonuses and refused to distribute profits through dividends. Instead, Vipa and Oscar drew excessive compensation and diverted corporate funds for personal use to reduce the company's profits. As a result of these actions, Edward was denied all economic benefits attendant to his stock ownership. These allegations sufficed to state a viable cause of action for minority stockholder oppression.

In Count II, Edward alleged that as directors of Eastland owed fiduciary duties to Eastland and its stockholders. He also alleged that Oscar and Vipa, as majority stockholders, owed him fiduciary duties as well. Edward alleged that the directors permitted Oscar and Vipa to loot the company by taking corporate funds for personal use and exclude him from sharing in the company's profits while allowing Oscar and Vipa to take profits through excessive compensation. At the pleading stage, such allegations suffice to overcome CA § 2-405.1's presumption that directors complied with the standard of care set forth therein. However, Edward does not have the right to assert a direct claim against the directors for alleged excessive payments (compensation or otherwise) made to Vipa and Oscar. The cases addressing the fiduciary duties owed by majority stockholders to minority stockholders do not hold that such

duties give rise to direct actions by the latter against the former for compensatory damages. Under the circumstances alleged by Edward here, recourse for the majority stockholder's breach of fiduciary duties would lie in his oppression count. Further, to the extent Edward alleged that the board of directors authorized Eastland to distribute profits to Oscar and Vipa, and Edward did not receive his rightful share, his claim for compensatory damages would be against Eastland as the party statutorily responsible for making that payment, not a breach of fiduciary duty against the directors. To the extent Oscar and Vipa misused corporate funds, either by taking excessive compensation, taking distributions in excess of their rightful share, or by pocketing corporate funds for personal use, the injury was sustained by the corporation, not Edward personally. Edward, as a minority stockholder, did not suffer an injury distinct from Eastland's, and therefore did not have standing to pursue a direct action against Oscar and Vipa.

Edward's claim for unjust enrichment against Oscar and Vipa was predicated on the same facts that supported his breach of fiduciary duty claim. The benefits of excessive compensation and funds for personal use came at the corporation's expense, not Edward's directly. Edward could therefore not bring this claim in his individual capacity.

The Supreme Court of Maryland held that a proposed amended complaint stated a cause of action for stockholder oppression because the plaintiff alleged sufficient facts to support the reasonableness of his expectation that, by virtue of his status as a stockholder, he would have had continued employment and managerial involvement in his company and would have continued to receive his proportional share of the distributable profits.

The Supreme Court of Maryland held that a proposed amended complaint did not state a cause of action for breach of fiduciary duty. The Court determined that the plaintiff could not bring a direct claim for compensatory damages as opposed to a derivative claim because his alleged injury due to breach of fiduciary duty was not separate and distinct from any injury suffered by the corporation.

The Supreme Court of Maryland held that a proposed amended complaint did not state a cause of action for unjust enrichment. The Court determined that the plaintiff could not bring a direct claim for compensatory damages as opposed to a derivative claim because the alleged excessive compensation and use of company funds for personal purposes came at the corporation's expense, not at his expense.

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Jacob Bennett v. Harford County, Maryland, No. 38, September Term 2022, filed August 30, 2023. Opinion by Fader, C.J.

Gould, J., dissents.

https://mdcourts.gov/data/opinions/coa/2023/38a22.pdf

STATUTORY INTERPRETATION – ELIGIBILITY TO BE A HARFORD COUNTY COUNCIL MEMBER

PUBLIC EMPLOYMENT – INCOMPATIBLE POSITIONS

Facts:

Jacob Bennett, the appellant, and Harford County, Maryland (the "County"), the appellee, dispute whether Mr. Bennett is barred from serving as a member of the Harford County Council (the "Council") by Harford County Charter § 207 or by the common law doctrine of incompatible positions because of his employment as a public school teacher by the Harford County Board of Education (the "Board"). Charter § 207 dictates, in relevant part, that, while serving on the Council, a "member shall not hold any . . . employment in the government of the State of Maryland, Harford County, or any municipality within Harford County[.]" The doctrine of incompatible positions prohibits an individual from holding two offices that conflict with each other by means of one exercising certain powers over the other.

Mr. Bennett was elected as a member of the Council in the November 2022 general election. He planned to continue working as a teacher employed by the Board while serving as a Council member. Shortly after the election, the County filed this action challenging Mr. Bennett's ability to hold both positions. The Circuit Court for Harford County entered a declaratory judgment and order in which it held that both Charter § 207 and the doctrine of incompatible positions preclude Mr. Bennett from serving as a Council member while being employed by the Board. The Court granted Mr. Bennett's petition for a writ of certiorari and, following oral argument, issued a per curiam order reversing the circuit court. The Court issued this opinion to explain its reasoning.

Held: Reversed and Remanded.

The Court first considered whether Charter § 207 barred Mr. Bennett from serving as a Council member while employed by the Board, due to employment with either the State or the County. To answer that question, the Court first addressed whether a local board of education is necessarily of State, county, or independent character for purposes of the application of § 207. After reviewing statutes and caselaw, the Court concluded that county boards have a mix of State, local, and independent characteristics that, depending on context, could result in a

determination that they are of a State, local, or independent character for a particular purpose. Which character prevails depends on the role or function of the county board in context.

Here, the relevant context is that Charter § 207 bases an individual's qualification to serve as a Council member on the individual's status as an employee of certain government entities, untethered from any role or function of those entities. In that context, there is no applicable role or function of a county board to be analyzed to determine its character. As a result, the Court turned to its familiar canons of statutory interpretation to determine whether the framers of the Charter intended § 207 to render employees of the Board ineligible to serve on the Council. Although the plain language, context of the Charter, and indicia of legislative intent were sufficient to rule out the possibility that the framers would have viewed employees of the board as County employees for purposes of § 207, those sources did not answer whether those individuals might be viewed as State employees. The Court resolved that ambiguity by applying a canon of construction establishing a presumption in favor of eligibility. The Court therefore held that Mr. Bennett was not precluded by § 207 from serving as a Council member while employed by the Board.

The Court next considered whether the common law doctrine of incompatible positions barred Mr. Bennett from simultaneously serving on the Council and as an employee of the Board. Incompatibility is determined by the relation and character of the offices, and if there is a prospective or present conflict of interest. Here, the Court determined that the offices were not incompatible because neither was subject to the supervision of the other; neither had the authority to set the salary of, appoint, or remove the other; and the Board's limited roles in connection with the Board's budget and the appointment of Board members was too attenuated from the job of a county schoolteacher to run afoul of the doctrine of incompatible positions.

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John Matthew Woodlin v. State of Maryland, No. 22, September Term 2022, filed July 26, 2023. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2023/22a22.pdf

CRIMINAL LAW – MARYLAND REPEAT SEXUAL PREDATOR PREVENTION ACT OF 2018 – STATUTORY INTERPRETATION

CRIMINAL LAW – MARYLAND REPEAT SEXUAL PREDATOR PREVENTION ACT OF 2018 – PROPENSITY EVIDENCE

APPELLATE PROCEDURE – WAIVER

Facts:

Petitioner, John Matthew Woodlin, was tried and convicted in the Circuit Court for Wicomico County for child sexual abuse and other related sexual offenses against his ten-year old grandson. Before trial, the State timely moved pursuant to § 10-923 of the Courts and Judicial Proceedings Article ("CJP") to introduce evidence of Petitioner's 2010 conviction (by way of a guilty plea) for sexual assault against a different individual, which the circuit court granted. CJP § 10-923 allows the State to move to introduce in a criminal trial for certain sexual offenses evidence of a defendant's "other sexually assaultive behavior" that occurred either before or after the crime currently charged. In order for evidence of such other sexually assaultive behavior to be admissible, the State must prove at a mandatory hearing four criteria: (1) the evidence is offered either to (i) prove a lack of consent or (ii) rebut an express or implied allegation that a minor victim fabricated a sexual offense, (2) the defendant had the opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior, (3) the sexually assaultive behavior was proven by clear and convincing evidence at the required hearing, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. CJP § 10-923(e).

On appeal to the Appellate Court of Maryland, Petitioner argued that the circuit court abused its discretion in admitting evidence of his 2010 conviction. The court bifurcated and rephrased Petitioner's question to ask: whether (1) his 2010 conviction was sufficiently similar to the charged offense so as to allow its admission and (2) the evidence used to prove the 2010 conviction was too salacious to be admitted. *Woodlin v. State*, 254 Md. App. 691, 702 (2022). While the Appellate Court noted that the similarities between the currently charged crime and the other sexually assaultive behavior is a relevant question to determine admissibility, it did not definitively answer whether consideration of any such similarities or dissimilarities is *required* under CJP § 10-923(e)(4). *Id*. at 704–05. The court nevertheless held that the circuit court did not abuse its discretion in determining that evidence of Petitioner's 2010 conviction was not substantially outweighed by the danger of unfair prejudice. *Id*. at 705–06. While the court held that Petitioner waived any argument concerning whether the circuit court had a *sua sponte* duty

to limit any of the "salacious" details of the admissible evidence, it likewise would have held—assuming waiver was not an issue—that the circuit court did not abuse its discretion. *Id.* at 708–13.

Petitioner sought a writ of certiorari, which the Supreme Court of Maryland granted on October 21, 2022. *Woodlin v. State*, 482 Md. 31 (2022).

Held: Affirmed

The Supreme Court of Maryland held that, under CJP § 10-923(e)(4), circuit courts are not required to consider any particular factor when determining whether the probative value of evidence of a defendant's other sexually assaultive behavior is substantially outweighed by the danger for unfair prejudice. When engaging in this balancing test, the Court provided an illustrative—but not exhaustive—list of factors that circuit courts may consider: (1) similarity or dissimilarity of the acts, (2) temporal proximity and intervening circumstances, (3) frequency of the sexually assaultive behavior, (4) whether evidence of the other sexually assaultive behavior overshadows the crime charged, and (5) the jury's knowledge—or not—that the defendant previously was punished for the other sexually assaultive behavior.

The Court made clear that, even though the State may satisfy the required criteria under CJP § 10-923(e)(1)–(4), subsection (e) still vests circuit courts with the discretion to admit or exclude the evidence. In other words, evidence of a defendant's other sexually assaultive behavior is not automatically admissible if the State satisfies the criteria contained in CJP § 10-923(e)(1)–(4). In conducting this second act of discretion, *i.e.*, in determining whether to admit or exclude the evidence after determining that the State has satisfied the criteria in (e)(1)–(4), a circuit court may consider the State's need to for the evidence in dispute and the manner in which the State seeks to prove the other sexually assaultive behavior.

Recognizing that Petitioner only argued that the facts surrounding his 2010 conviction were too dissimilar from the crime charged to warrant admissibility, the Court focused its analysis on that part of the circuit court's ruling. The Court noted that the circuit court recognized an underlying issue of a lack of consent in both the 2010 conviction and the crime currently charged. The circuit court, after examining both instances, gave little weight to the factual difference that one victim was an adult and the other one a minor. In the circuit court's view, the two instances were similar enough to warrant admission and outweigh the potential for unfair prejudice. Because the circuit court's determination was a reasonable one given the two competing interpretations of the evidence, the Court could not say that the circuit court's determination was well removed from any center mark imaginable.

The Supreme Court likewise agreed with the Appellate Court that Petitioner had not preserved for appellate review any argument that the circuit court had a *sua sponte* duty to limit the details of the evidence the State used. The Court observed that Petitioner knew as early as his October 2020 pre-trial conference the exact scope of the evidence that the State would introduce at trial.

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Petitioner's failure to ask the circuit court—at any point—to limit the scope of that evidence amounted to a waiver.

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William Samuel Blake v. State of Maryland, Misc. No. 2, September Term 2022, filed August 29, 2023. Opinion by Booth, J.

https://mdcourts.gov/data/opinions/coa/2023/2a22m.pdf

CRIMINAL LAW – INEFFECTIVE ASSISTANCE OF COUNSEL – STATE'S OBLIGATION TO PROVIDE IMPEACHMENT EVIDENCE

Facts:

On July 12, 2012, William S. Blake was arrested by Baltimore City Police Officer Fabien Laronde for distribution of heroin. Mr. Blake was searched incident to his arrest and a bag containing 3.5 grams of heroin was found in his underwear. Mr. Blake was indicted for distribution of heroin and related lesser charges by a Baltimore City grand jury.

Before trial, Mr. Blake, by counsel, filed a motion to suppress the heroin found on his person. He contended that the recovery of the drugs was the result of an illegal strip search. A hearing was held at which Officer Laronde was the only witness. During cross-examination, Mr. Blake's trial counsel attempted to create doubt concerning the reasonableness of the search in light of the place and manner of the search, but trial counsel did not challenge Officer Laronde's account of the search. The court denied Mr. Blake's motion to suppress.

On October 17, 2013, Mr. Blake entered a plea of not guilty upon an agreed statement of facts—gleaned from Officer Laronde's testimony—to one count of distribution of heroin, with the understanding that he would be found guilty by the court. The circuit court sentenced Mr. Blake to eight years' incarceration.

Mr. Blake filed a petition for post-conviction relief alleging that (1) Mr. Blake's trial counsel rendered ineffective assistance of counsel for failing to demand pretrial disclosure of Officer Laronde's disciplinary files, and (2) Mr. Blake was denied due process of law because the State withheld favorable material impeachment information related to Officer Laronde in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). A post-conviction hearing was held in September 2020. At the hearing, Mr. Blake entered into evidence Internal Affairs Division ("IAD") files and other documents containing in total ten allegations of misconduct involving Officer Laronde prior to the day he was called as a witness at Mr. Blake's suppression hearing. Mr. Blake argued that the allegations in the files were relevant to Officer Laronde's credibility and his alleged propensity for conducting strip searches and planting narcotics to justify arrests. In addition to entering evidence of the misconduct allegations, Mr. Blake's trial counsel testified that he had previously heard allegations about Officer Laronde's inappropriate strip searching of civilians, that the State had not disclosed any information related to nine of the allegations against Officer Laronde, and that, had he had this information, he would have attempted to use the information at the suppression hearing and may have decided to go to trial with that information. Mr. Blake did not testify that he would have rejected the State's plea offer and gone to trial had he known about the

allegations against Officer Laronde, nor did he claim that Officer Laronde's testimony was false. Additionally, Mr. Blake did not claim that the facts contained in the agreed statement of facts were inaccurate.

The post-conviction court ruled (1) that Mr. Blake's trial counsel had not rendered ineffective assistance by failing to move to compel disclosure of information related to allegations against Officer Laronde, and (2) that Mr. Blake had no right to impeachment information prior to his entry of a plea agreement because *Brady* obligations are a trial-related right, and Mr. Blake waived trial-related-rights by entering what was, in effect, a guilty plea.

Thereafter, Mr. Blake noted a timely appeal. After the parties submitted briefs, the Appellate Court filed a certification pursuant to Maryland Rule 8-304, requesting that this court answer the following certified questions:

> 1. Did the post-conviction court err by ruling that trial counsel had not rendered ineffective assistance by failing to move to compel the Internal Affairs Division files and other potential impeachment evidence regarding a State's witness prior to a pre-trial suppression hearing?
>
> 2. In the alternative, did the post-conviction court err by ruling that the State had not violated its *Brady* obligations by failing to disclose impeachment evidence regarding a State's witness?

This Court issued a writ of *certiorari* to the Appellate Court, and, pursuant to Rule 8 304(c)(3), accepted the entire action.

Held: Affirmed.

The Supreme Court of Maryland answered no to questions 1 and 2. In answering question 1, the Court held that Mr. Blake failed to prove that his trial counsel rendered ineffective assistance by failing to move to compel production of Officer Fabien Laronde's IAD files. Undertaking the analysis required under *Strickland v. Washington*, 466 U.S. 668 (1984), the Court concluded that Mr. Blake failed to satisfy his burden of demonstrating that his trial counsel's failure to move to compel production of Officer Laronde's IAD files fell below an objective standard of reasonableness and that his performance was therefore deficient. Moreover, even if Mr. Blake had established that his trial counsel's performance was deficient, he failed to demonstrate that the failure to move to compel the disclosure of these files prejudiced him. In other words, assuming trial counsel erred in failing to move to compel the disclosure of the IAD files, Mr. Blake failed to show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different.

Concerning question 2, given that the same legal standard applies to a *Strickland* prejudice analysis and the materiality standard to establish a *Brady* violation, the court assumed, without

deciding, that the State was required to disclose impeachment evidence prior to the suppression hearing. On that basis, the court determined that Mr. Blake failed to satisfy the *Brady* materiality standard for the same reasons that he failed to establish prejudice under *Strickland*.

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Lateekqua Jackson v. State of Maryland, No. 34, September Term 2022; *State of Maryland v. Garrick L. Powell*, Jr., No. 35, September Term 2022, filed August 14, 2023. Opinion by Booth, J.

https://mdcourts.gov/data/opinions/coa/2023/34a22.pdf

CRIMINAL PROCEDURE – HICKS RULE – SEEKING OR EXPRESSLY CONSENTING TO DELAY

Facts:

Under a Maryland statute and corresponding court rule, which are collectively known as the "Hicks rule," a criminal trial in a circuit court must commence within 180 days of the first appearance of the defendant or defense counsel in that court—a deadline known as the "Hicks date." Md. Code Criminal Procedure Article ("CP") § 6-103; Maryland Rule 4-271. A continuance of the trial beyond the Hicks date may be granted only for "good cause." Where a violation of the Hicks rule occurs, the defendant's charges must be dismissed with prejudice, unless the defendant or defense counsel sought or expressly consented to a trial date beyond the Hicks date.

The two cases that are the subject of this opinion originated in the Circuit Court for Anne Arundel County when the criminal trials of defendants Garrick L. Powell, Jr. and Lateekqua Jackson were initially scheduled beyond their October 25, 2021 Hicks date without a finding of "good cause." Mr. Powell's and Ms. Jackson's cases turn on the events that occurred at three court appearances: (1) Mr. Powell's status conference, (2) Ms. Jackson's status conference, and (3) Ms. Jackson's afternoon court appearance.

At Mr. Powell's status conference, Mr. Powell's counsel confirmed that the parties were looking for a trial date in October, and when the prosecutor proposed several Hicks-compliant October dates, Mr. Powell's counsel rejected them. The prosecutor proposed October 26, the court set the trial date without comment from Mr. Powell's counsel.

Ms. Jackson was not present at her status conference, but Ms. Jackson's counsel appeared in her absence. Ms. Jackson's counsel had knowledge that there was a motion pending to consolidate Ms. Jackson's and Mr. Powell's trial. Defense counsel was also aware that that the State expressed a desire to schedule Mr. Jackson's trial on the same day as Mr. Powell's—October 26. At the hearing, defense counsel advocated for scheduling Ms. Jackson's trial despite the court's doubts about scheduling trial while Ms. Jackson had outstanding bench warrants issued for Ms. Jackson's failure to appear at two court proceedings. At defense counsel's encouragement, the court proceeded to schedule Ms. Jackson's trial for October 26.

Later that day, Ms. Jackson appeared before the same scheduling judge. The judge recalled the bench warrants and explained to Ms. Jackson the importance of appearing at her trial. The clerk

and judge repeated the date of Ms. Jackson's trial that had been set in her absence, to which Ms. Jackson responded "Twenty sixth, okay."

After the defendants moved to dismiss their respective indictments because of the Hicks rule violations, the circuit court granted the defendants' motions and dismissed the charges against them. On appeal, the Appellate Court of Maryland affirmed the circuit court's judgment in Mr. Powell's case, concluding that Mr. Powell's attorney did not expressly consent to a trial date beyond the Hicks date. The Appellate Court reversed the judgment in Ms. Jackson's case, concluding that Ms. Jackson expressly consented to a trial date beyond the Hicks date. The State petitioned for a writ of *certiorari* in Mr. Powell's case, and Ms. Jackson petitioned for a writ of *certiorari* in her case.

Held:

Judgment reversed with respect to Mr. Powell's case. Judgment affirmed with respect to Ms. Jackson's case, but for other reasons.

The Supreme Court of Maryland discussed the 40 years of jurisprudence that shaped the current Hicks rule. The Court clarified the basic principles and parameters for analyzing whether a defendant or defense counsel seeks or expressly consents to a trial date beyond the Hicks date, thereby precluding the sanction of dismissal where a Hicks rule violation occurs. First, in considering whether dismissal is required for a violation of the Hicks rule, the court must keep in mind the competing societal interests behind the rule and the exception. Second, there is not always overlap between seeking or expressly consenting to a trial date beyond the Hicks date; the court should consider whether the words spoken or conduct in question satisfy either component of the exception. Third, a determination of whether the defendant or defense counsel seeks or expressly consents to a trial date beyond the Hicks date is contextual and fact-driven. Fourth, the seeking analysis applies when setting an initial trial date as well as postponing a trial date. Fifth, the defendant or defense counsel must be a party to the violation, and seeking behavior requires some affirmative conduct bearing on scheduling.

With respect to Mr. Powell's case, the Supreme Court of Maryland concluded that Mr. Powell's counsel's conduct was tantamount to seeking a trial date beyond the Hicks date. Although Mr. Powell's counsel did not make a statement signifying his express consent to the trial date, by rejecting earlier dates that would have complied with the Hicks rule, Mr. Powell's counsel engaged in conduct that resulted directly in the selection of a trial after the Hicks date. Accordingly, dismissal of Mr. Powell's charges for a violation of the Hicks rule was not proper.

With respect to Ms. Jackson's appeal, the Supreme Court concluded that Ms. Jackson did not expressly consent to a trial date beyond the October 25, 2021, Hicks date. The conduct at issue took place after bench warrants had been issued for Ms. Jackson's failure to appear at prior court proceedings—including failure to appear at the scheduling hearing where her trial date had been set for October 26. When Ms. Jackson appeared at a later proceeding, the hearing judge recalled

the bench warrants and explained to Ms. Jackson the importance of appearing at her trial. Based on the context of Ms. Jackson's statement, the Supreme Court concluded that Ms. Jackson's affirmative "okay" was an acknowledgement of the date, not an express consent to the trial date. Therefore, the Supreme Court concluded that Ms. Jackson did not expressly consent to a trial date beyond the Hicks date based on her statement to the circuit court judge.

The Supreme Court then considered whether Ms. Jackson's counsel sought a trial date beyond the Hicks date at Ms. Jackson's scheduling conference. The Supreme Court concluded that defense counsel knew or should have known that her conduct encouraging the court to schedule Ms. Jackson's trial would result in the trial being scheduled for October 26. Therefore, the Court determined that Ms. Jackson's counsel sought a trial date beyond the Hicks date. Accordingly, dismissal of Ms. Jackson's charges for a violation of the Hicks rule was not proper.

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Maryland Department of the Environment v. Assateague Coastal Trust, No. 11, September Term 2022, filed August 9, 2023. Opinion by Booth, J.

Watts, J. dissents.

https://mdcourts.gov/data/opinions/coa/2023/11a22.pdf

ENVIRONMENTAL LAW – ADMINISTRATIVE LAW – CLEAN WATER ACT – MARYLAND WATER POLLUTION CONTROL LAWS

Facts:

The federal Clean Water Act, 33 U.S.C. § 1251, *et seq*. and Maryland's water pollution control law, Title 9, Subtitle 3 of the Environment Article of the Maryland Code, prohibit discharges of pollution into waterways, but an Animal Feeding Operation ("AFO") may obtain a general discharge permit authorizing such discharges. The current iteration of this general discharge permit for AFOs was finalized by the Maryland Department of the Environment ("the Department") pursuant to certain statutory requirements under federal and state law, which require that the Department review and issue or reissue water pollution control permits every five years.

In 2019, the Department reissued with revisions the general discharge permit for AFOs ("the 2019 General Permit"). The 2019 General Permit built on previous iterations of the general discharge permit. As such, it contains provisions that are substantially the same as previous iterations of the AFO general discharge permit, as well as some key additions.

Like previous permit iterations, the 2019 General Permit prohibits all discharges of pollutants to surface and ground waters from AFO production areas with limited exceptions. Importantly, to obtain coverage under the permit, an AFO owner or operator is required to submit a notice of intent and a "Required Plan," developed by a licensed plan writer, which must meet statutory requirements and standards. These plans are based upon the specific site conditions for a particular operation. As set forth in the federal and state regulatory framework, Required Plans must include site-specific pollution controls known as "technology based effluent limitations" in the form of best management practices. Required Plans must be submitted and approved in order to obtain coverage under the general permit. If the Department approves a plan, its terms are incorporated as terms and conditions of that AFO's permit coverage.

Other relevant conditions in the 2019 General Permit that were included in previous iterations of the permit are: a requirement that the permittee comply at all times with the General Permit, the approved Required Plans, the Clean Water Act, and the Maryland water pollution control law; a right of entry at all times by the Department and other designated parties to inspect, monitor, and sample covered AFOs; and a requirement that permit conditions be consistent with existing Total

Maximum Daily Loads for impaired water bodies through the use of best management practices and controls.

Among the changes made from the prior iteration of the AFO general discharge permit was the new requirement concerning "outdoor air quality for poultry operations . . . [r]equir[ing] the appropriate NRCS Practice Standards if air quality is a resource concern." Specifically, the 2019 General Permit states that nutrient management plans prepared for a particular facility must address any "resource concerns" about the particular AFO's air quality. A "resource concern" is a term of art, defined as "an expected degradation of the soil, water, air, plant, or animal resource base to the extent that the sustainability or intended use of the resource is impaired." NRCS Planning Procedures Handbook, Title 180 § 600.2(120). The 2019 General Permit states: "For poultry: If outdoor air quality is determined to be a resource concern, use appropriate NRCS Practice Standards to address the concern."

During the public comment period on the proposed permit, the Department received competing comments related to the Department's new permit provisions addressing air emissions. Assateague argued that the new language in the draft permit did not adequately address ammonia pollution from AFOs. Other commenters took the opposite position, contending that the Department had no authority to regulate odors or air quality through a water pollution discharge permit. The Department responded to the comments, stating that MDE was acting within its authority to include in the 2019 General Permit provisions that require AFO owners or operators to implement best management practices to address air quality resource concerns based on site-specific conditions, that the best management practices in the 2019 General Permit were sufficient to minimize ammonia emissions from AFOs, and, therefore, no revisions to the 2019 General Permit were necessary.

After the Department published its Notice of Final Determination to reissue with revisions the 2019 General Permit, Assateague filed a petition in the Circuit Court for Montgomery County seeking judicial review. After the circuit court vacated the permit and remanded the matter to the Department with instructions to incorporate certain water quality standards into the permit, the Department filed an appeal to the Appellate Court of Maryland. While the case was pending in that court, Assateague filed a petition for writ of *certiorari*. The Supreme Court of Maryland granted the petition to consider the following questions:

> Whether MDE's Final Determination to issue the 2019 General Permit was reasonable and complied with water quality standards established under the Clean Water Act and the State's water pollution control law.
>
> Whether the Department's permit conditions in the 2019 General Permit that address AFO ammonia emissions were reasonable and complied with the water quality standards established under the State's water pollution control law.

Held: Reversed.

The Supreme Court of Maryland reversed the judgment of the Circuit Court for Montgomery County. First, the Supreme Court held that the Department's general discharge permit framework is reasonable and is consistent with federal and state law. In reaching this decision, the Court considered the general discharge permit framework, which addresses water quality standards by requiring technology based effluent limitations in the form of best management practices that are prepared for a particular facility based upon site-specific conditions. In addition, the Department retains discretion to impose additional water quality controls where they are necessary to protect and maintain water quality standards of a particular waterway.

Second, the Supreme Court held that there is substantial evidence in the record to reflect that the Department not only acknowledges its authority to regulate ammonia emissions and air deposition through the 2019 General Permit, but that it, in fact, has exercised this authority by requiring best management practices to address ammonia emissions where they are determined to be a resource concern. The Supreme Court determined that the Department's decision to evaluate each AFO individually and to require appropriately tailored best management practices to control these emissions where they present a real risk of discharge, is reasonable and falls within the discretion afforded to the Department by the Legislature under Maryland's water pollution control law.

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Thomas L. Lloyd v. Anna Cristina Niceta, No. 33, September Term 2022, filed August 30, 2023. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2023/33a22.pdf

FAMILY LAW – POSTNUPTIAL AGREEMENTS – LIQUIDATED DAMAGES CLAUSES

FAMILY LAW – POSTNUPTIAL AGREEMENTS – PUBLIC POLICY – ADULTERY

FAMILY LAW – POSTNUPTIAL AGREEMENTS – ALLOCATION OF MARITAL ASSETS UPON DIVORCE BASED ON ADULTERY

Facts:

In 2006, Thomas L. Lloyd ("Petitioner") and Anna Cristina Niceta ("Respondent") were married in the District of Columbia. On June 2, 2014, Respondent discovered that Petitioner was involved in an extramarital affair. In an effort to reconcile, the parties retained counsel and began negotiating the terms of a postnuptial agreement ("Agreement") over several months. On September 18, 2015, the parties entered into the Agreement, which included a lump sum provision that, as applied in this case, required Petitioner to transfer to his wife $7 million up to the value of his 50% share of specified marital assets if the parties divorced after he engaged in adultery. Thereafter, Petitioner engaged in another extramarital affair.

On October 23, 2019, Respondent filed a Complaint for Absolute Divorce in the Circuit Court for Montgomery County on the grounds of adultery. She requested that the circuit court incorporate the Agreement into the divorce decree and enforce the lump sum provision. Petitioner argued that the lump sum provision constituted an unenforceable penalty because it was an excessive liquidated damages clause. The circuit court upheld the lump sum provision as an enforceable penalty. The circuit court relied on *McGeehan v. McGeehan*, 455 Md. 268, 167 A.3d 579 (2017), for the proposition that adultery penalties are permissible in postnuptial agreements. The circuit court reasoned that other jurisdictions that have rejected adultery penalties have held that those provisions undermine no-fault divorce laws in those states. In the circuit court's view, those decisions were unpersuasive because Maryland permits fault-based divorce.

The Appellate Court of Maryland affirmed the circuit court's ruling regarding the lump sum provision and remanded for further proceedings regarding child support. The Appellate Court held that *McGeehan* stood for the proposition that penalty provisions are permissible in postnuptial agreements because such agreements are designed to discourage and penalize conduct that would undermine a marriage, such as adultery. The Appellate Court reasoned that the Agreement did not require Petitioner to remain married to Respondent. The Appellate Court noted that Petitioner's conduct triggered the penalty. The Appellate Court observed that adultery

penalties may create stability during a marriage because the parties would understand the consequences of certain behaviors.

Held: Affirmed.

The Court held that spouses may transfer marital assets to each other upon divorce based on whether one of the spouses engages in adultery, thereby being primarily responsible for the breakdown of the marriage. The Court clarified that its description of penalty provisions in *McGeehan* referred to those that operate to the detriment of a party, rather than punishing a party for breach of contract under liquidated damages principles.

The Court held that liquidated damages principles do not apply to postnuptial agreements. In non-marital contracts, liquidated damages operate as "a sum that will compensate the nonbreacher . . . in lieu of the compensatory contract damage[s] to which the nonbreacher would otherwise be entitled[.]" *Barrie Sch. v. Patch*, 401 Md. 497, 513, 933 A.2d 382, 392 (2007) (cleaned up). In divorce proceedings, parties are not entitled to compensatory damages; rather, the primary monetary sums available are alimony, child support, and a division of marital assets, including a potential monetary award. *See* Md. Code Ann., Family Law ("Fam. Law") §§ 1-201(b)(2), (4), (9), 8-205(a)(1). None of those monetary sums serve as compensatory damages for which liquidated damages may substitute. Additionally, liquidated damages cannot serve as a substitute for non-monetary relief, such as annulment, divorce, custody, or visitation. *See* Fam. Law § 1-201(b)(3)–(6).

The Court interpreted the lump sum provision as a distribution of marital assets that was contingent upon infidelity as the cause of the breakdown of the marriage. Under Maryland law, spouses "may make a valid and enforceable . . . agreement that relates to . . . property rights[.]" Fam. Law § 8-101(a). Fam. Law § 8-205(b)(4) empowers family courts to consider "the circumstances that contributed to the estrangement of the parties[,]" including adultery, when fashioning "a monetary award . . . as an adjustment of the equities and rights of the parties concerning marital property[.]" Fam. Law § 8-205(a)(1); *Ohm v. Ohm*, 49 Md. App. 392, 410, 431 A.2d 1371, 1381 (1981). Here, the lump sum provision constitutes a "valid and enforceable . . . agreement" regarding the parties' "property rights[]" upon the dissolution of their marriage. Fam. Law § 8-101(a). The provision was premised on "the circumstances that contributed to the estrangement of the parties[.]" Fam. Law § 8-205(b)(4). Marital agreements allow spouses to transfer marital assets to each other for any reason. *See Laudig v. Laudig*, 425 Pa. Super. 228, 236, 624 A.2d 651, 655 (1993). If spouses may transfer marital assets for any reason, then they may place conditions upon those distributions, provided those conditions comport with public policy.

The Court held that the public policy in Maryland currently supports spouses negotiating in good faith to condition a transfer of marital assets upon the dissolution of a marriage when a spouse commits adultery. The jurisdictions that have rejected adultery penalties or transfers of marital assets based on adultery have done so because those provisions violate no-fault divorce laws.

See, e.g., Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494, 496 (2002) (rejecting an adultery penalty because it contravenes California's public policy of no-fault divorce); *In re Marriage of Cooper*, 769 N.W.2d 582, 587 (Iowa 2009) (rejecting allocation of marital assets based on adultery in Iowa); *Crofford v. Adachi*, 150 Haw. 518, 526, 506 P.3d 182, 190 (2022) (rejecting allocation of marital assets based on adultery in Hawai'i). Those decisions are not persuasive regarding the public policy in Maryland because this State: (1) currently permits divorce based on fault, including adultery; and (2) requires courts to consider "the circumstances that contributed to the estrangement of the parties[,]" such as adultery, when issuing a monetary award following divorce. Fam. Law §§ 7-103(a)(1), 8-205(b)(4); *Ohm*, 49 Md. App. at 410, 431 A.2d at 1381.

The Court held that the lump sum provision was valid and enforceable. The provision required Petitioner to transfer to his wife $7 million up to the value of his 50% share of specified marital assets if the parties divorced after he engaged in adultery. Fam. Law § 7-103(a)(1) permits spouses to file for divorce on the grounds of adultery, which supports provisions that distribute assets based on that conduct. The lump sum provision did not restrict Petitioner's ability to foster platonic relationships. Respondent's mere suspicions were insufficient to trigger the provision because she was required to establish "by a preponderance of the evidence" that Petitioner had engaged in adultery. Petitioner alone controlled whether the provision would trigger. The lump sum provision did not require the parties to remain married. The provision identified Petitioner's 50% share in specified marital assets as the source for the $7 million, which limited the transfer to the cumulative value of those assets.

Baltimore Police Department, et al. v. Open Justice Baltimore, No. 20, September Term 2022, filed August 31, 2023. Opinion by Biran, J.

https://mdcourts.gov/data/opinions/coa/2023/20a22.pdf

STATUTORY INTERPRETATION – MARYLAND PUBLIC INFORMATION ACT – WAIVER OF FEES

APPELLATE REVIEW – DENIAL OF FEE WAIVER UNDER THE MPIA

MPIA – DENIAL OF FEE WAIVER – ARBITRARY AND CAPRICIOUS REVIEW

APPELLATE REVIEW – ARBITRARY AND CAPRICIOUS AGENCY ACTION – REMEDY

Facts:

In late 2019 and early 2020, Open Justice Baltimore (OJB), an organization interested in investigating police misconduct, submitted several similarly worded and broadly worded requests under the Maryland Public Information Act (MPIA), Maryland Code Ann., General Provisions (GP) § 4-201, et seq., to the Baltimore Police Department (BPD). In one of the requests, as subsequently broadened per the mutual understanding of OJB and BPD, OJB sought files relating to all internal investigations of officers' Level 1, Level 2, and Level 3 uses of force that were closed between July 1, 2018 to December 19, 2019.

BPD quoted a cost of over $245,000 to produce 2,337 files responsive to OJB's request. Under GP § 4-206(e)(2)(ii), OJB requested that BPD waive the entire fee, stating the waiver would be in the public interest because it would increase transparency and community trust in light of the public controversy surrounding officer misconduct in the BPD, and because OJB could not afford the fee.

BPD denied OJB's fee waiver request in full. OJB had already initiated a lawsuit against BPD based on BPD's noncompliance with certain statutory deadlines related to their request. After BPD provided notice of the fee waiver denial, OJB argued that BPD's fee waiver denial was arbitrary and capricious.

The Circuit Court for Baltimore City found BPD's denial was not arbitrary and capricious because of the voluminous nature of the request and the cost and burden on the agency. The Appellate Court of Maryland reversed the Circuit Court's holding as to the fee waiver denial, reasoning that BPD did not meaningfully consider the benefit to the public of disclosure of the requested records in light of the public controversy surrounding BPD's history of police misconduct.

The Supreme Court of Maryland granted certiorari to consider the following questions (as rephrased by the Court):

1. What are the parameters of the discretion that the MPIA vests in an official custodian in reviewing a fee waiver request under GP § 4-206(e)?

2. Did the Appellate Court properly hold that BPD's denial of OJB's request to waive fees for the production of closed Level 1, Level 2, and Level 3 use of force investigation files was arbitrary and capricious?

3. If BPD erroneously denied OJB's fee waiver request, what is the proper remedy?

Held: Affirmed in part and remanded.

The Supreme Court of Maryland held that section 4-206(e) of the General Provisions Article provides records custodians broad discretion in deciding whether to waive a fee associated with fulfilling a records request; however, the discretion is not boundless. The structure of GP § 4-206(e) indicates there are two scenarios in which agencies are authorized to waive a fee: (1) when the applicant asks for a waiver, is indigent and files an affidavit of indigency; and (2) when the applicant asks for a waiver and the custodian determines the waiver would be in the public interest after consideration of the applicant's ability to pay and "other relevant factors."

When a custodian is assessing the public interest under GP § 4-206(e)(2)(ii), the custodian must consider whether waiving the fee in whole or in part would be in the public interest. The Supreme Court of Maryland held that the General Assembly intended for the custodian to have discretion in determining what factors (besides the applicant's ability to pay and whether the public would benefit from disclosure of the requested records) are relevant with respect to a particular fee waiver request. The Court did not set out an exhaustive list of factors for custodians to consider. However, the Court acknowledged that custodians may consider the cost and burden on the agency in producing the records as additional relevant factors. The Court held that, after considering all relevant factors, the custodian has discretion under the MPIA to determine whether a waiver of the fee, in whole or in part, would be in the public interest. If a custodian determines that it would be in the public interest to waive all or part of the fees to produce the requested records, the custodian does not have discretion at that point to deny the partial or full waiver.

The Court affirmed the Appellate Court's application of the arbitrary and capricious standard of review for a custodian's fee waiver denial. This was due in part to the fact that OJB's appeal was only cognizable via an administrative mandamus action, as there is no statutory grant of appellate jurisdiction in the MPIA for reviews of fee waiver denials. An administrative mandamus action permits judicial review of discretionary agency actions where no statute otherwise provides a pathway for judicial review and where there is an allegation of arbitrary and capricious agency decision making. As OJB had alleged in its pleadings in the circuit court that BPD's fee waiver denial was arbitrary and capricious, and as there was no statutory pathway for

appellate review of this agency decision, review of the denial was properly conducted under the arbitrary and capricious standard.

Applying the arbitrary and capricious standard of review to BPD's denial of the fee waiver, the Court held that BPD misapplied some relevant factors and failed to consider other relevant factors. Specifically, BPD failed to consider whether the records would shed light on the public controversy surrounding BPD's use of force, and whether a complete denial of a fee waiver would exacerbate the public controversy. The Court held that BPD's complete fee waiver denial was arbitrary and capricious to the extent it relied on: (1) the belief that the request was so vague or general that BPD could not assess the public benefit of a waiver, as the public benefit was plainly apparent; (2) the belief that the requested records were redundant of information already publicly available; (3) the claim that OJB could afford the fee when OJB had indicated a willingness to pay reasonable copying costs before receiving the cost estimate; and (4) the mere conclusory assertion that the records would require such significant redactions that they would not be understandable to the general public. The Court emphasized that the MPIA depends on custodians and record requestors collaborating and that neither party demonstrated the type of collaboration that was needed in this case to successfully resolve a complicated request for records that implicated important and competing interests.

The Court held that the appropriate remedy for a procedural defect in the custodian's exercise of discretion, absent bad faith, is a remand to the agency for reconsideration. As the failure to consider certain relevant factors constituted a procedural defect and as the circuit court found that BPD had acted in good faith, the Supreme Court of Maryland held that a remand to permit BPD to reconsider the requested fee waiver was the appropriate remedy.

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Bridget Romeka v. RadAmerica II, LLC, et al., No. 16, September Term 2022, filed August 30, 2023. Opinion by Gould, J.

https://www.mdcourts.gov/data/opinions/coa/2023/16a22.pdf

HEALTH CARE WORKER WHISTLEBLOWER PROTECTION ACT – CAUSATION

HEALTH CARE WORKER WHISTLEBLOWER PROTECTION ACT – SUMMARY JUDGMENT

Facts:

This case arose from the termination of employment of petitioner Bridget Romeka by respondents RadAmerica II, LLC ("Employer"). Ms. Romeka alleged that her termination violated the Maryland Health Care Worker Whistleblower Protection Act (the "HCWWPA" or the "Act"), Md. Code Ann., Health Occ. §§ 1-501 through 1-506 (1981, 2021 Repl. Vol.), a statutory scheme that protects employees in healthcare settings against adverse employment consequences of raising health and safety concerns in the workplace.

The circuit court granted Employer's motion for summary judgment, finding that the undisputed facts established that Employer terminated Ms. Romeka on legitimate, non-pretextual grounds. The Appellate Court of Maryland affirmed. *Romeka v. RadAmerica II, LLC*, 254 Md. App. 414 (2022).

Held:

The Supreme Court of Maryland held that to prevail under the Health Care Worker Whistleblower Protection Act, a plaintiff (1) must prove that but for the protected disclosure, the employer would not have taken the adverse personnel action, and (2) may establish but-for causation through the analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The Supreme Court of Maryland held that, in a claim of retaliatory firing under the Health Care Worker Whistleblower Protection Act, where a defendant establishes, through a motion for summary judgment filed pursuant to Maryland Rule 2-501 and supported by an affidavit or facts in the record, that there is no genuine dispute as to any material fact that a plaintiff was fired for reasons unrelated to an alleged protected disclosure and plaintiff fails to respond with an affidavit or written statement under oath or to identify any information in the record that establishes a genuine dispute of material fact as to whether defendant's stated reasons for the termination were pretextual, summary judgment is properly granted in defendant's favor.

Under the HCWWPA, a plaintiff must prove that, but for the protected disclosure, the employer would not have taken the adverse personnel action. Consistent with *Department of Natural Resources v. Heller*, 391 Md. 148 (2006), a plaintiff may establish but-for causation through the *McDonnell Douglas* framework.

The Circuit Court properly granted summary judgment to Employer because (1) the defendant established through undisputed evidence that the plaintiff was fired for reasons unrelated to the alleged protected disclosure and (2) plaintiff failed to come forward with evidence that defendant's stated reasons for the termination were pretextual.

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John Doe v. Catholic Relief Services, Misc. No. 28, September Term 2022, filed August 14, 2023. Opinion by Biran, J.

Watts, Hotten, and Eaves, JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2023/28a22m.pdf

STATUTORY INTERPRETATION – MARYLAND FAIR EMPLOYMENT PRACTICES ACT, MD. CODE ANN., STATE GOV'T § 20-606 – DISCRIMINATION – MEANING OF DISCRIMINATION BASED ON "SEX"

STATUTORY INTERPRETATION – MARYLAND EQUAL PAY FOR EQUAL WORK ACT, MD. CODE ANN., LAB. & EMPL. § 3-304 – DISCRIMINATION – MEANING OF DISCRIMINATION BASED ON "SEX"

STATUTORY INTERPRETATION – MARYLAND FAIR EMPLOYMENT PRACTICES ACT, MD. CODE ANN., STATE GOV'T § 20-604(2) – DISCRIMINATION – EMPLOYMENT – RELIGIOUS ENTITY EXEMPTION

Legal Background:

In 2001, the General Assembly amended the Maryland Fair Employment Practices Act ("MFEPA") to prohibit employers from discriminating on the basis of sexual orientation. The General Assembly did so based on its understanding that MFEPA did not previously ban discrimination based on sexual orientation, despite the fact that it prohibited discrimination based on "sex." At the same time that it amended MFEPA to prohibit sexual orientation discrimination by most employers, the General Assembly made an exception for religious entities, allowing such entities to discriminate on the basis of sexual orientation with respect to employees who "perform work connected with the activities of the religious entity."

The Maryland Equal Pay for Equal Work Act ("MEPEWA") originally only prohibited wage disparities based on sex. In 2016, the General Assembly amended MEPEWA to also prohibit wage disparities based on gender identity. Testifying in favor of the proposed amendment to add gender identity as a protected category in MEPEWA, the National Women's Law Center suggested that the proposed legislation "could be further strengthened by adding protections from discrimination on the basis of sexual orientation." The General Assembly did not do so.

Facts:

John Doe works as a data analyst for Catholic Relief Services ("CRS"). Mr. Doe is a gay, cis-gender man who is married to another man. After beginning his employment with CRS in June 2016, Mr. Doe enrolled his spouse through CRS's benefits enrollment system. CRS accepted the enrollment. Several months later, CRS informed Mr. Doe that CRS had mistakenly approved the enrollment of his same-sex spouse and that CRS did not provide spousal health benefits to employees in same-sex relationships. CRS personnel and Mr. Doe subsequently conferred about a potential coverage alternative, but the parties were unable to reach an agreement. CRS terminated Mr. Doe's spouse's health benefits, effective October 1, 2017. CRS did so because it considers the provision of such benefits to be contrary to its Catholic values.

Mr. Doe filed suit against CRS in the United States District Court for the District of Maryland. He brought claims under both federal law (Title VII of the Civil Rights Act of 1964 and the federal Equal Pay Act) and Maryland law (MFEPA and MEPEWA).

The parties filed cross-motions for summary judgment. The federal district court ruled that CRS violated Title VII and the federal Equal Pay Act by revoking Mr. Doe's spousal benefits. Regarding Mr. Doe's claims under Maryland law, the district court certified three questions to the Supreme Court of Maryland, which the Supreme Court reordered and rephrased as follows:

> 1. Whether the prohibition against sex discrimination in MFEPA, SG § 20-606, prohibits discrimination on the basis of sexual orientation.
>
> 2. Whether the prohibition against sex discrimination in MEPEWA, LE § 3-304, prohibits discrimination on the basis of sexual orientation.
>
> 3. What is the meaning of the phrase "to perform work connected with the activities of the religious entity," as used in MFEPA's religious entity exemption, SG § 20 604(2)?

Held:

Certified question 1: The Supreme Court answered the first certified question in the negative.

MFEPA prohibits employers from discriminating against an employee based on, among other things, the employee's "sex, … sexual orientation, [or] gender identity." Md. Code Ann., State Gov't ("SG") § 20-606(a)(1)(i) (2021 Repl. Vol., 2022 Supp.). Thus, Maryland law unambiguously prohibits employers from discriminating against employees on the basis of their sexual orientation. Mr. Doe argued that, despite the specific listing of sexual orientation as a protected category in MFEPA, the statute's ban on sex discrimination also prohibits discrimination based on sexual orientation. The Supreme Court disagreed with Mr. Doe's interpretation of MFEPA.

Dictionary definitions of "sex" and "sexual orientation" at the time MFEPA was originally passed in 1965 and dictionaries today treat the two terms as discrete concepts. In addition, legislative history reflects that the General Assembly added a specific reference to sexual orientation in MFEPA in 2001 because it believed MFEPA did not yet prohibit discrimination on the basis of sexual orientation. Further, at the same time the General Assembly added sexual orientation as a protected category under MFEPA, it also amended MFEPA's religious entity exemption to add sexual orientation – but not sex – as a permissible basis for at least some discrimination by religious organizations. It is clear that policymakers at the time viewed sexual orientation as its own discrete class, and determined that it was appropriate to amend the religious entity exemption to add sexual orientation, in order to achieve a balance between the rights of individuals to be free of sexual orientation discrimination and the rights of religious organizations to further their religious beliefs. The Supreme Court reasoned that accepting Mr. Doe's reading of MFEPA would ignore the purposeful balancing that the General Assembly incorporated in MFEPA when it amended the statute in 2001.

Mr. Doe primarily relied on the recent case of Bostock v. Clayton County, 140 S. Ct. 1731 (2020), in which the United States Supreme Court held that sex discrimination under Title VII includes discrimination based on sexual orientation (and gender identity) because "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision[.]" 140 S. Ct. at 1737.

The Supreme Court of Maryland reasoned that, contrary to Bostock, the General Assembly that amended MFEPA in 2001 to add sexual orientation as a protected class did not believe that sexual orientation discrimination was prohibited as a result of the ban on sex discrimination. The Supreme Court stated: "That the [United States] Supreme Court now has told us that sexual orientation discrimination has been prohibited under Title VII all along does not mean that we can or should ignore the General Assembly's clear understanding at the time it added sexual orientation as a protected category" to MFEPA.

Certified question 2: The Supreme Court of Maryland answered the second certified question in the negative.

MEPEWA explicitly prohibits wage disparities between employees of different sexes or gender identities, but it makes no mention of wage disparities based on sexual orientation. See Md. Code Ann., Lab. & Empl. § 3-304 (2016 Repl. Vol.). The Supreme Court of Maryland reasoned that the lack of any reference prohibiting pay disparities between those of different sexual orientations indicates the General Assembly did not intend MEPEWA to prohibit such disparities. Legislative history confirms this plain reading of the statutory language. The General Assembly amended MEPEWA in 2016 to add "gender identity" as a protected class. Despite testimony from the National Women's Law Center advocating that the General Assembly also add a ban on pay disparities based on sexual orientation to MEPEWA, the General Assembly did

not do so. In light of this legislative history, and consistent with its analysis concerning MFEPA in answering the first certified question, the Supreme Court of Maryland declined to interpret MEPEWA's ban on wage disparities based on "sex" as encompassing a ban on wage disparities based on sexual orientation. The Supreme Court stated: "With the 2016 amendment to MEPEWA, the statute's plain terms now also prohibit pay disparities based on gender identity. Adding sexual orientation as a protected category in MEPEWA will require similar legislative action. It would be improper for us to make that policy determination in lieu of the General Assembly." (Footnote omitted).

Certified question 3: The Supreme Court of Maryland held that MFEPA's religious entity exemption applies with respect to claims by employees who perform duties that directly further the core mission(s) of the religious entity.

As discussed above, MFEPA generally prohibits employers from discriminating on the basis of, among other things, sex, sexual orientation, and gender identity. However, under MFEPA's religious entity exemption, MFEPA's protections do not apply to claims against a religious entity employer (such as CRS) "with respect to the employment of individuals of a particular religion, sexual orientation, or gender identity to perform work connected with the activities of the religious entity." SG § 20-604(2). The Supreme Court rejected CRS's argument that this exemption allows religious entities to discriminate against all of their employees on the basis of sexual orientation (as well as religion and gender identity). The Supreme Court also rejected Mr. Doe's interpretation of the exemption, which would allow religious entities to discriminate based on religion, sexual orientation, and gender identity only with respect to ministers and other employees who spread the faith. The Supreme Court held that the relevant statutory language – "work connected with the activities of the religious entity" – is properly interpreted to cover those employees who perform duties that directly further the core mission(s) of the religious entity, whether those core missions are religious, secular, or both. The Supreme Court stated:

> We believe that our interpretation of SG § 20-604(2)'s language properly gives effect to the General Assembly's intent to balance the protections afforded to religious entities under the exemption with the statute's remedial purpose to eliminate discrimination in the workplace. However, we recognize that, under our interpretation of the exemption, some employees of a religious entity may bring claims against their employer for all forms of discrimination that are actionable under MFEPA, while other employees may sue the entity for all forms of discrimination except for discrimination based on religion, sexual orientation, or gender identity. We leave it to Maryland's legislators to decide whether to retain or eliminate the difference in MFEPA's coverage among employees of the same religious entities.

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Prince George's County Council, et al. v. Concerned Citizens of Prince George's County, et al., No. 23, September Term 2022, filed August 22, 2023. Opinion by Gould, J.

Fader, C.J., Watts, and Booth, JJ., dissent

https://www.mdcourts.gov/data/opinions/coa/2023/23a22.pdf

LAND USE – ZONING – STANDARD OF REVIEW

LAND USE – ZONING – UNIFORMITY

Facts:

The Freeway airport is a privately owned general aviation airport on a 129 acre property at 3900 Church Road in Bowie. The airport lies in an area that was once rural and is now largely suburban. Over the past forty years or so, a few dozen small planes have crashed during takeoff or landing. Some of those planes have crashed into nearby residences or the highway that runs next to the airport, sometimes fatally. Since at least the 1990s, the county has identified the airport as a public safety risk.

The airport has experienced financial difficulties in recent years. As a result, its owners have said they will increase operations or, alternatively, redevelop the site for non-airport use. The county's zoning ordinance has historically limited development of housing at the airport to low density, single-family detached housing. To incentivize redevelopment of the airport, the County Council, over the protests of some constituents, amended the text of the zoning ordinance to allow the airport to develop higher-density housing, including townhouses.

In November 2019, the Prince George's County Council, sitting as the District Council (the "Council"), enacted Council Bill 17-2019 ("CB-17" or "Council Bill 17"), a text amendment to the Prince George's County Code, to encourage the decommissioning of the Freeway airport by allowing higher-density housing. Under the county zoning ordinance then in effect ("PGCC § 27-"), the airport was zoned as Residential Agricultural ("R-A"). The R-A Zone prohibited single family attached residences ("townhouses") and imposed a maximum development density of 0.5 dwelling units per acre. PGCC §§ 27-441(b), 27 442(h).

Council Bill 17, however, exempts qualifying R-A Zone properties, namely the Freeway airport, from those limitations, allowing townhouses and a development density of up to 4.5 dwelling units per acre. PGCC § 27-441(b) n.136. Specifically, CB-17 allows for higher-density housing if located on an assemblage of adjacent properties that: (1) is 100 150 acres or was formerly used as an airport; (2) is entirely within one mile of a municipal boundary; (3) is entirely within 2,500 feet of land used for the generation, transmission, or distribution of electricity; and (4) has frontage on a freeway. Id.

Concerned Citizens, a citizens' group, challenged the legality of the ordinance in the Circuit Court for Anne Arundel County, claiming that it violated Maryland's uniformity requirement, which requires zoning laws to "be uniform for each class or kind of development throughout a district or zone." Md. Code Ann., Land Use § 22 201(b)(2)(i) (2012, 2022 Supp.). They argued that the ordinance, though facially neutral, violates uniformity because it is tailored so narrowly as to afford favorable development opportunities, in effect, to only the Freeway airport property. On May 7, 2021, the circuit court affirmed the Council's decision without explanation.

On appeal, the Appellate Court of Maryland held that CB 17 violated Maryland's uniformity requirement. *In re Concerned Citizens of PG Cnty. Dist. 4*, 255 Md. App. 106 (2022). The Court reasoned that CB 17 was "tailor made for Freeway Airport" and that the record did not show "any public purpose for creation of this special high density area within an R A zone[.]" *Id.* at 124. In effect, the Court deemed CB 17 a "mere favor" to Freeway Airport. *Id*. at 125-27.

Freeway Airport and the Council each petitioned to the Supreme Court of Maryland for writ of certiorari, asking the Court to reverse the Appellate Court and affirm the validity of CB 17. The Council subsequently filed a notice of dismissal, thereby withdrawing as a party and leaving Freeway Airport as the sole petitioner.

Held:

Courts review the Council's action in zoning matters as an administrative agency action. For Prince George's County, Section 22 407 of the Land Use Article provides the standards of judicial review for the Council's "final decision[s]" in zoning matters. Both legislative and quasi judicial acts by the Council constitute reviewable "decisions."

Section 22 407(e) identifies when courts may reverse or modify a zoning decision by the Council. The decision must be: "(i) unconstitutional; (ii) in excess of the statutory authority or jurisdiction of the district council; (iii) made on unlawful procedure; (iv) affected by other error of law; (v) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or (vi) arbitrary or capricious."

Maryland courts review amendments to the text of a zoning ordinance as legislative actions. *Md. Overpak Corp. v. Mayor of Balt.*, 395 Md. 16, 35 (2006); *MBC Realty, LLC v. Mayor of Balt*., 192 Md. App. 218, 234 (2010). In Prince George's County, amendments to the zoning ordinance are considered "final decision[s]" of the Prince George's County Council, sitting as the District Council, and are reviewed by courts only for legality. *See* Md. Code Ann., Land Use § 22 407(a)(1), (e) (2012, 2022 Supp.); *Town of Upper Marlboro v. Prince George's Cnty. Council*, 480 Md. 167, 180 81, 191 (2022); *Cnty. Council of Prince George's Cnty. v. Chaney Enters. Ltd. P'ship*, 454 Md. 514, 528 31 (2017).

Courts review legislative actions only for legality, which implicates only provisions (i) to (iv) of the list above. Here, the Council's enactment of CB 17 was in the nature of a legislative action.

Legislative action enjoys a strong presumption of validity; courts do not substitute their policy judgments for the legislature's and assume as the action's basis any reasonably conceived state of facts that would sustain it. The challenger to the law or regulation must establish, by clear and affirmative evidence, the invalidity of the action.

Maryland's uniformity statutes reassure property owners that they will not be subject to arbitrary or invidious discrimination, or government favoritism or coercion. Regulations that draw classifications between properties within a zone are, as a general matter, permissible. Such regulations do not violate uniformity when reasonable and based upon public policy, and when similarly situated properties are treated the same.

The requirement that there be a valid public purpose promotes uniformity by protecting against mere favoritism toward particular parties. Here, CB 17 furthers a public purpose by incentivizing the redevelopment of land currently used for a nonconforming and dangerous airport. Eliminating the risk of plane crashes, particularly in a residential area, without question furthers an interest in public safety, and Concerned Citizens did not argue otherwise. Additionally, the elimination or mitigation of nonconforming uses is, as a general matter, a valid public purpose. That is because nonconforming uses are, by definition, incompatible with the zone in which they are located and thus reduce uniformity. Here, the Freeway airport has been a legal nonconforming use since 1968, when the mostly rural area was first zoned as R A.

Concerned Citizens, having failed to argue that decommissioning the Freeway airport, or any other similar airport, has no public purpose, presented evidence of public opposition to CB-17. The court's duty, however, is not to weigh public opinion or debate public policy, but to determine only whether legislation reasonably serves a public purpose.

Facial neutrality of a zoning ordinance, though relevant, is not, on its own, a sure defense to a uniformity challenge.

Concerned Citizens argued that CB 17 is invalid because it is site specific. A regulation's "site specific" intent or effect, however, does not alone sustain a uniformity violation. That a regulation affects only one or a few properties, though relevant, is not dispositive. This proposition holds not only when regulations inadvertently affect only one or a few properties, but even when a zoning authority deliberately targets a particular property or properties. That a legislature may contemplate a specific property does not prove the absence of a public purpose, or arbitrary or invidious discrimination.

A regulation that discriminates between similarly situated properties is invalid. Just because properties are within the same zone, however, does not make them similarly situated; zoning categories are not determinative. Properties are similarly situated when there is no reasonable basis to treat them differently; regulations thus violate uniformity when they discriminate between properties unreasonably.

Here, CB 17 discriminates between properties, but Concerned Citizens did not show that CB 17 discriminates between *similarly situated* properties. Concerned Citizens did not identify any

actual, or even hypothetical, properties similarly situated to the Freeway airport that the qualifying criteria of CB 17 excluded from higher density development opportunities. Concerned Citizens did not argue that any of the qualifying criteria of CB 17 are unreasonable. The qualifying criteria of CB-17 are reasonable and based upon the public policy to be served. Nearby highways, population centers, and transmission lines are the safety hazards at the Freeway airport. That these features are not uniquely hazardous at Freeway Airport, but other airports too, bolsters that finding.

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Comptroller of Maryland v. Comcast of California/Maryland/Pennsylvania/ Virginia/West Virginia, LLC, et al., No. 32, September Term 2022, filed July 12, 2023. Opinion by Fader, C.J.

https://www.mdcourts.gov/data/opinions/coa/2023/32a22.pdf

EXHAUSTION OF ADMINISTRATIVE REMEDIES – TAX-GENERAL ARTICLE §§ 13-501–13-532 – DECLARATORY JUDGMENTS – COURTS & JUDICIAL PROCEEDINGS ARTICLE § 3-409

Facts:

This appeal arose from a challenge to Maryland's Digital Advertising Gross Revenues Tax Act, codified at Title 7.5 of the Tax-General Article. Title 7.5 imposes a tax on annual gross revenues of more than $1 million derived from digital advertising services in the State by certain businesses with at least $100 million in global annual gross revenues. Md. Code Ann., Tax-Gen. §§ 7.5-103; 7.5-201(a) (2022 Repl.).

The challengers, appellees here, are subsidiaries of Comcast Corporation and Verizon Communications Inc. (collectively, the "Companies"). In the Circuit Court for Anne Arundel County, the Companies obtained a declaratory judgment that the digital advertising tax was unconstitutional and illegal under federal law. The Comptroller argued that the Companies did not exhaust the comprehensive administrative remedies provided in the Tax-General Article for resolution of tax disputes. The Supreme Court granted certiorari before decision in the Appellate Court of Maryland.

Held: Vacated and Remanded.

The Court first summarized the remedial administrative scheme for resolving tax disputes and concluded that the extensive and comprehensive administrative remedies available under the Tax-General Article constitute persuasive evidence that the General Assembly intended to require exhaustion of those remedies before seeking relief in the circuit court.

The Court also considered § 13-505 of the Tax-General Article, which provides: "A court may not issue an injunction, writ of mandamus, or other process against the State or any officer or employee of the State to enjoin or prevent the assessment or collection of a tax under this article." The Court rejected the Companies' contention that § 13-505 precludes only coercive remedies, because in addition to injunctions and writs of mandamus, the provision precludes "other process" that would "enjoin or prevent the assessment or collection of a tax." The circuit court's declaratory judgment declaring the digital advertising gross revenues tax illegal and unconstitutional was plainly sought by the Companies to prevent the assessment or collection of

the tax. Had it been affirmed, it would have accomplished that purpose. Additionally, even if the broad language of § 13 505 could be interpreted so as not to preclude the Companies' declaratory judgment action, Courts and Judicial Proceedings § 3-409(b) expressly prohibits it. That provision states: "If a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed in lieu of a proceeding under this [declaratory judgment] subtitle." The combined effect of (1) the general prohibition against judicial remedies that would prevent the assessment or collection of taxes in § 13-505 of the Tax-General Article and (2) the specific prohibition against the use of a declaratory judgment action as an end-run around special statutory administrative remedies in Courts and Judicial Proceedings § 3-409(b), thus make clear that the General Assembly intended the special statutory administrative remedies for resolution of tax disputes to be exclusive.

The Court next considered whether the constitutional exception to the exhaustion of administrative remedies applies. That exception permits a judicial determination without exhaustion of administrative remedies when the challenge is to the authority of the legislative body to adopt the legislation. However, the constitutional exception is extremely narrow and subject to specific limitations. The dispositive limitation here is that "where the legislature has expressly provided or intended that the administrative and judicial review remedy be the exclusive remedy," the constitutional exception "is inapplicable, and a declaratory judgment or equitable action challenging the validity of an enactment as a whole will not lie." *Prince George's County v. Ray's Used Cars*, 398 Md. 632, 653 (2007) (internal quotation marks omitted). Here, because the Court determined that the applicable special statutory administrative remedies are exclusive with respect to the Companies' challenge to the digital advertising gross revenues tax, the Court held that the constitutional exception does not apply. The Companies' failure to exhaust remedies deprived the circuit court of jurisdiction to entertain this declaratory judgment action. The Court therefore vacated the circuit court's orders and remanded the case to that court with directions to dismiss the action.

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Katz, Abosch, Windesheim, Gershman & Freedman, P.A., et al. v. Parkway Neuroscience and Spine Institute, LLC, No. 30, September Term 2022, filed August 30, 2023. Opinion by Biran, J.
Booth, J., concurs.
Gould, J., concurs in part and dissents in part.
Watts, J., dissents.

https://mdcourts.gov/data/opinions/coa/2023/30a22.pdf

EXPERT WITNESSES – ADMISSIBILITY OF EXPERT TESTIMONY – MARYLAND RULE 5-702 – LIMITED REMAND

Facts:

Parkway Neuroscience and Spine Institute, LLC ("PNSI") is a medical and surgical practice that in 2013 retained accounting firm Katz, Abosch, Windesheim, Gershman & Freedman, P.A. ("KatzAbosch"). Within a few years of retaining KatzAbosch, PNSI began to disintegrate, and PNSI terminated KatzAbosch's services in 2015. In 2018, PNSI sued KatzAbosch in the Circuit Court for Howard County to recover damages for lost profits based on KatzAbosch's alleged malpractice.

To establish those damages, PNSI designated certified public accountant Meghan Cardell as an expert witness. She used the widely accepted "before-and-after" method to calculate PNSI's lost profits, choosing 2015 as a "baseline" period against which she would compare the actual profits in subsequent years through 2019; she added up the differences to arrive at an estimate of what profits PNSI missed out on due to KatzAbosch's alleged harmful conduct. A few weeks before the June 2021 *Daubert-Rochkind* hearing, Ms. Cardell issued updated calculations reflecting some "normalizing adjustments" she had made; although PNSI's accounting records had not changed since her initial analysis, Ms. Cardell reviewed PNSI's financial information again and this time noticed some payments that had been categorized in the wrong years. She reallocated those payments to the years she believed to be correct and updated her calculations.

Those two issues – Ms. Cardell's choice of 2015 as the "before" in her "before-and-after" analysis and her June 2021 normalizing updates – rose to the top of the trial court's mind in the *Daubert-Rochkind* hearing. First, the trial court noted speculative and insufficiently substantiated judgment calls that Ms. Cardell had made in arriving at the 2015 benchmark. Among other things, the trial court wondered why Ms. Cardell had chosen 2015 (a profitable year) rather than an average that included the several unprofitable years prior to the alleged harm event. Second, the trial court commented several times about Ms. Cardell's June 2021 normalizing adjustments, which negatively affected its opinion of Ms. Cardell's reliability. Essentially, the court did not understand why it had taken Ms. Cardell so long to notice the errors. The court discussed these adjustments when considering the *Daubert* factors relating to a methodology's error rate and to

whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Based on its application of the *Daubert-Rochkind* factors, the trial court excluded Ms. Cardell's testimony, leading to summary judgment in favor of KatzAbosch because PNSI could not prove damages. PNSI appealed, and the Appellate Court of Maryland held that the circuit court had abused its discretion in finding Ms. Cardell's methodology unreliable. *Parkway Neuroscience and Spine Institute, LLC v. Katz, Abosch, Windesheim, Gershman & Freedman, P.A., et al.*, 255 Md. App. 596, 623-37 (2022). KatzAbosch then petitioned the Supreme Court of Maryland for a writ of *certiorari*, which it granted on January 20, 2023. *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience and Spine Institute, LLC*, 482 Md. 534 (2023).

Held:

Vacated and remanded for further proceedings under Maryland Rule 8-604(d)(1).

The reliability of an expert witness's methodology is a core focus of a trial court under Maryland Rule 5-702. Without reliable methods (in addition to an adequate supply of data), an expert's opinion lacks sufficient factual basis to support it and is instead mere speculation or conjecture.

Although the Supreme Court of Maryland in this case discerned no error in most of the trial court's application of the *Daubert-Rochkind* factors, it did conclude that the trial court had erred in finding the expert's methodology less reliable because of her June 2021 normalizing updates. The trial court had discussed those updates in the context of two *Daubert-Rochkind* factors, the known or potential rate of error and whether the expert's field of expertise is known to reach reliable results for the projected type of expert opinion. But the expert's last-minute updates went at most to the care with which she had applied her methodology, and the trial court had said it did not question her level of care. The trial court's comments on the updates suggested that it played a significant part in the court's overall analysis and had made the expert's reliability "suspect" in the court's eyes. On this basis, the Supreme Court remanded the case to the trial court for further proceedings without improper consideration of the June 2021 normalizing updates.

As to the choice of 2015 as the "before-and-after" method baseline, the Supreme Court held that the trial court had not erred in considering the benchmark year choice as affecting the expert's methodology's overall reliability. The Court rejected overly rigid distinctions between data and methodology. While the soundness of an expert's data is left for the jury, sometimes, an expert's choices related to data may be so central to a straightforward methodology that those choices implicate the reliability of the methodology itself. Trial courts must not transmute all questions of a data's provenance or veracity into questions of methodology, but they also must not wear "methodology blinders" and deny the existence of some limited overlap between data and methodology. Trial courts have flexibility in discerning the sometimes blurry line between data and methodology, and appellate courts grant deference to a trial court's determination whether an

expert testimony dispute implicates the soundness of data (going to weight, for the jury) or the reliability of methodology (going to admissibility, for the judge as gatekeeper).

The Supreme Court vacated the judgment of the Appellate Court and retained jurisdiction over the case. The Court will issue an Order in the case after a limited remand for the trial court to decide whether to admit or exclude Ms. Cardell's testimony without improper consideration of the June 2021 normalizing adjustments.

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APPELLATE COURT OF MARYLAND

Lamont Smith v. State of Maryland, No. 573, September Term 2022, filed July 26, 2023. Opinion by Leahy, J.

https://www.courts.state.md.us/data/opinions/cosa/2023/0011s22.pdf

PRESERVATION – CONFRONTATION CLAUSE AND MARYLAND RULE 5-804(B)(3)

EVIDENCE – MARYLAND RULE 5-804(B)(3) – STATEMENT AGAINST INTEREST – CORROBORATING CIRCUMSTANCES – TRUSTWORTHINESS

EVIDENCE – MARYLAND RULE 5-804(B)(3) – STATEMENT AGAINST INTEREST – PARSING

Facts:

Appellant, Mr. Smith, was charged with numerous drug offenses in a 42-count indictment after large quantities of CDS were discovered in a house in which Appellant was present, along with Tony Blake and another co-defendant, Mr. Woods. At Appellant's trial before a jury in the Circuit Court for Wicomico County, the State, over Appellant's objection, played a recording of an interview with Mr. Blake (the "Blake Interview"). Mr. Blake gave a detailed statement to the officers, which portrayed Appellant as the former head of a narcotics distribution enterprise who had recently fallen back from the enterprise. Mr. Blake passed away before Appellant's trial and the Blake Interview was admitted into evidence, and played before the jury, under the statement against interest exception to the rule against hearsay set forth in Maryland Rule 5-804(b)(3).

Appellant was acquitted or found not guilty of 30 counts, including all of the Drug Kingpin charges, but he was convicted of 12 counts for possession and conspiracy to possess heroin, fentanyl, cocaine, and alprazolam. The court merged Appellant's eight conspiracy convictions into four and sentenced Appellant to an aggregate of four years in prison. Appellant then noted a timely appeal to the Appellate Court of Maryland and contended that admission of the Blake Interview violated both the Confrontation Clause of the Sixth Amendment to the United States Constitution and Maryland Rule 5-804(b)(3).

Held: Reversed and remanded for a new trial.

The Appellate Court first held that Appellant's Confrontation Clause argument was not preserved for review pursuant to Maryland Rule 8-131(a). The record established that, although

defense counsel referenced his inability to cross-examine Mr. Blake on several occasions during the course of his arguments against admission of the Blake Interview, in context, those statements were clearly contained within counsel's arguments against admissibility under Maryland Rule 5-804(b)(3) due to their supposed lack of trustworthiness. Though the Confrontation Clause and Rule 5-804(b)(3) are interrelated, "it is well-settled that the two grounds are not synonymous or coextensive; thus objecting on one ground does not preserve the other ground." *Collins v. State*, 164 Md. App. 582, 605-06 (2005).

Next, the Appellate Court addressed Appellant's argument that, under Rule 5-804(b)(3), the Blake Interview should have been excluded in its entirety due to its lack of trustworthiness. Maryland Rule 5-804(b)(3) instructs that a statement "tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The Appellate Court held that the trial court's finding that there were sufficient corroborating circumstances establishing the trustworthiness of the Blake Interview was not clearly erroneous. Although some of the intrinsic circumstances of the interview—namely, Mr. Blake's status as a potential co-defendant, failing health, and difficulty in expressing a fully consistent narrative—weighed against a finding of trustworthiness, the State produced ample corroborating evidence at trial to overcome those deficiencies. It is clear, from the content of the interview and from the external circumstances, that Mr. Blake had intimate knowledge of and involvement in the drug distribution enterprise. Furthermore, Mr. Blake's statements regarding his role in the enterprise, and the role of Appellant, were corroborated by other evidence produced at trial.

The Appellate Court reversed, however, due to the trial court's failure to parse the Blake Interview and admit only those portions of the interview in which Mr. Blake inculpated himself. In determining the admissibility of a narrative statement proffered as a statement against interest, the court should first consider "content of the statement in light of all known and relevant circumstances surrounding the making of the statement and all relevant information concerning the declarant," and "determine whether the statement was in fact against the declarant's penal interest and whether a reasonable person in the situation of the declarant would have perceived that it was against his penal interest at the time it was made." *State v. Standifur*, 310 Md. 3, 17 (1987). Then, after determining that a statement as a whole is averse to the declarant's penal interest, the court must parse through the statement and "'and determine the separate admissibility of each single declaration or remark'" in the larger narrative. *State v. Matusky*, 343 Md. 467, 492 (1996) (quoting *State v. Mason*, 460 S.E.2d 36, 45 (W. Va. 1995)) (cleaned up). The Appellate Court held that the trial court erred by admitting the entire version of the Blake Interview offered by the State under the statement against penal interest exception to the hearsay rule set forth in Maryland Rule 5-804(b)(3) without parsing the narrative and redacting those portions not genuinely self-inculpatory as to Mr. Blake. Although statements contained in an interview naming a co-conspirator and describing the mechanics of a conspiracy can qualify as statements against penal interest when they sufficiently inculpate the declarant, that does not discharge the court's fundamental duty to parse all of the statements in the interview. Here, although some statements could be deemed equally inculpatory of both Mr. Blake and Appellant, other statements could not be considered genuinely inculpatory of Mr. Blake because they merely served to shift blame for the present workings of the enterprise.

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The Appellate Court therefore held that admission of the entire Blake Interview presented by the State into evidence under Maryland Rule 5- 804(b)(3) was in error. On remand, the Court instructed that, should the State decide to re-prosecute the case, the trial court would be required to parse through the overall narrative and redact those portions which are not genuinely self-inculpatory as to Mr. Blake.

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Hussain Ali Zadeh v. State of Maryland, No. 11, September Term 2022, filed June 29, 2023. Opinion by Leahy, J.

https://www.courts.state.md.us/data/opinions/cosa/2023/0011s22.pdf

CRIMINAL PROCEDURE – MOTIONS TO SUPPRESS – MARYLAND RULE 4-252 – TIMELINESS

CRIMINAL PROCEDURE – EXCLUSIONARY RULE – FOURTH AMENDMENT VIOLATION – GOOD FAITH EXCEPTION

CRIMINAL PROCEDURE – VOLUNTARINESS OF DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT – COMMON LAW VOLUNTARINESS – JURY INSTRUCTION

Facts:

Hussain Ali Zadeh was convicted, for the second time, of second-degree murder for the homicide of Cecil Brown. In his first trial, Zadeh and Larlane Pannell-Brown, Cecil Brown's wife and Zadeh's lover, were tried together as co-defendants before a jury in the Circuit Court for Montgomery County, Maryland. Both were convicted of second-degree murder but acquitted of first-degree murder and conspiracy to commit murder. On appeal, we reversed Zadeh's conviction for second-degree murder, holding, among other things, that Zadeh was unfairly prejudiced when he was tried together with Pannell-Brown. On remand, Zadeh moved to suppress cell-site location information that placed him at the scene of Brown's murder. The evidence had been obtained through a court order issued pursuant to the Maryland Stored Communications Act, and Zadeh moved to suppress based on new law articulated in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Zadeh's motion was denied on the grounds that it was filed outside the 30-day deadline specified in Maryland Rule 4-252(b) and there was no good cause to excuse the lack of timeliness. Before the suppression court, the State also argued that, on the merits, Zadeh's motion to suppress should be denied because the good faith exception to the exclusionary rule applied.

At Zadeh's second trial before a jury in the Circuit Court for Montgomery County, and over Zadeh's objection, the State played a recording of a lengthy discussion between Zadeh and two police officers who went to Zadeh's place of employment to execute a search warrant for Zadeh's DNA and cell phone. During that interview, Zadeh made several inculpatory statements. Zadeh's prior motion to suppress these statements was denied before trial. At trial, Zadeh requested that the jury be instructed with a pattern instruction regarding the voluntariness of a defendant's statements to law enforcement. Zadeh's request was denied, and his objection was noted on the record. Zadeh was then convicted by the jury of second-degree murder and sentenced to 30 years' imprisonment with credit for time served. Zadeh noted a timely appeal to the Appellate Court of Maryland.

Held: Reversed and remanded for a new trial.

The Appellate Court first held that Zadeh's motion to suppress the CSLI information should not have been denied due to lack of timeliness. Maryland Rule 4-252 governs the filing of mandatory motions, including motions to suppress evidence obtained from an illegal search or seizure, in criminal cases. Subsection (b) of the Rule provides that such mandatory motions "shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c)[.]" The Appellate Court held that, given the purpose of Rule 4-252(b) and the inconsistent impact on parties that would follow application of the 30-day clock on remand for a new trial, the 30-day clock for filing mandatory motions does not reset on remand for a new trial following the reversal or vacatur of a conviction. That does not mean, of course, that motions to suppress may be filed at any time or that Rule 4-252 generally does not apply on remand. Instead, on remand, a trial court can impose a reasonable deadline in a new scheduling order. Otherwise, the court, in its discretion, may take into consideration all of the circumstances, including the date on which trial is scheduled, good cause for any delay, and prejudice to the State. The Court concluded that Zadeh's motion was timely because it was filed nearly three months before the scheduled trial date (and 10 months before the trial actually began on September 28, 2021), and the trial judge did not articulate any prejudice that would inure to the State by considering the motion. The trial court's mistake, therefore, was in reapplying Rule 4-252(b)'s 30-day deadline to the appearance of Zadeh's new counsel filed more than five years after the litigation began.

Although the circuit court did not reach the merits of Zadeh's motion to suppress, the Appellate Court addressed them as they were preserved by the parties' extensive briefing and argument before the trial court. Applying *Carpenter*, the Court concluded that the court order through which law enforcement obtained Zadeh's CSLI data (the "August 7 Order") did not constitute a proper warrant and therefore violated the Fourth Amendment. Nonetheless, the Court also held, applying both *Illinois v. Krull*, 480 U.S. 340 (1987), and *United States v. Leon*, 468 U.S. 897 (1984), that the officer, Det. Wolff, acted in good faith in obtaining Zadeh's historical CSLI. First, under *Krull*, the Court held that an officer in Det. Wolff's position at the time he applied for the August 7 Order (prior to *Carpenter*) could have reasonably relied on the validity of the Maryland Stored Communications Act, which has never been declared unconstitutional. Second, in the Court's analysis under *Leon*, the Court held that, although the order was void *ab initio* because it was signed by a district court judge—rather than a circuit court judge as required by the statute—a reasonable officer would not have known that the order was so facially deficient as to preclude any reasonable reliance upon it. The ambiguity in the statute as to the meaning of "court of competent jurisdiction" was sufficiently confusing among the bench and bar that the Maryland Attorney General had to issue an opinion explaining that "a court of competent jurisdiction under . . . the stored communications statute means a circuit court." *See* 101 Md. Op. Att'y Gen. 61 (Md. A.G. Aug. 30, 2016). Accordingly, Det. Wolff reasonably relied upon the district court's ultimately mistaken determination that it possessed the authority to issue the order. The Court thus held that suppression of the CSLI data was not warranted and affirmed the circuit court's decision to deny Zadeh's motion to suppress.

The Appellate Court reversed, however, and remanded for a new trial due to the circuit court's failure to instruct the jury regarding the voluntariness of Zadeh's statements to law enforcement. Considering the very low bar imposed by the "some evidence" standard, and the principle that it is within the province of the jury to determine whether a defendant's statement to law enforcement was voluntarily given, irrespective of the court's preliminary decision, the Court concluded that the trial court abused its discretion by failing to give the requested pattern jury instruction, or, as in *Covel v. State*, ___Md. App. ___ (2023), No. 1094, Sept. Term 2021, slip. op. at 6, a modified voluntariness instruction. Zadeh's request to give a voluntariness instruction should have been granted because "some evidence" was presented at trial sufficient to generate the instruction when viewed under the totality of the circumstances. However, the trial court focused only on the absence of evidence of force, promises, threats, inducements, or offer of reward. The Appellate Court concluded the circuit court improperly removed the question of voluntariness from the jury's consideration despite "some evidence" from which a jury could infer that Zadeh's statements were not voluntarily given.

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John Paul Sexton v. State of Maryland, No. 1324, September Term 2022, filed July 27, 2023. Opinion by Albright, J.

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

APPEALS – APPEALABILITY OF ORDERS GENERALLY

CRIMINAL PROCEDURE – JUVENILE RESTORATION ACT

Facts:

Under Section 8-110 of the Criminal Procedure Article ("CP"), which was enacted as part of the Juvenile Restoration Act ("JUVRA"), certain juvenile offenders can move to reduce their remaining sentences, and a court may grant such a motion if it finds that the juvenile is not a danger to the public and that the interests of justice will be better served by reducing the sentence. In ruling on a motion under CP § 8-110, the court must also consider the eleven factors in CP § 8-110(d), including the nature of the offense, rehabilitation efforts by the juvenile, the juvenile's family and community circumstances at the time of the offense, and any other factor the court deems relevant.

After Mr. Sexton moved to reduce his sentence, the circuit court held a hearing and addressed the factors in CP § 8-110(d). Though finding that Mr. Sexton had "demonstrated maturity and rehabilitation" while incarcerated, the court denied Mr. Sexton's motion, explaining that Mr. Sexton's sentence was parole eligible. Thus, the court concluded, whether Mr. Sexton should be released was a decision for the parole board.

Mr. Sexton timely appealed to the Appellate Court.

Held: Vacated and Remanded

First, the Appellate Court addressed whether Mr. Sexton was entitled to appeal the denial of his motion to reduce his sentence, an issue of first impression. The Appellate Court did not resolve whether denials of such motions are generally appealable, but it reasoned that the denial here was appealable because it fit within a recognized exception for rulings that do not result from the exercise of discretion, but rather from an incorrect legal determination that the court lacked authority to grant a motion.

Second, the Appellate Court held that the circuit court applied the wrong legal standard in concluding that the issue of Mr. Sexton's release was a matter for the parole board, not the circuit court. As such, the circuit court abused its discretion by denying Mr. Sexton's motion without deciding its merits pursuant to CP § 8-110. In so holding, the Appellate Court looked to JUVRA's legislative history and Eighth Amendment jurisprudence to reason that the statute was

"intended to provide [a] meaningful opportunity for release[.]" The Appellate Court further reasoned that this opportunity is separate from the parole process, and although the circuit court may consider materials concerning the Maryland Parole Commission, JUVRA does not allow the circuit court to defer to the parole board in lieu of exercising its own discretion. As such, the Appellate Court vacated the circuit court's decision and remanded the case for a new hearing under CP § 8-110.

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ATTORNEY DISCIPLINE

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By an Order of the Supreme Court of Maryland dated August 25, 2023, the following attorney has been placed on disability inactive status by consent:

IRA CHARLES COOKE

*

By an Order of the Supreme Court of Maryland dated August 31, 2023, the name of

JOSEPH ROBERT LAUMANN

has been replaced on the register of attorneys permitted to practice law in this State.

*

By an Order of the Supreme Court of Maryland dated August 31, 2023, the name of

MARGOT ELIZABETH ROBERTS

has been replaced on the register of attorneys permitted to practice law in this State.

*

By an Opinion and Order of the Supreme Court of Maryland dated August 31, 2023, the following attorney has been indefinitely suspended:

NATASHA VEYTSMAN ROSSBACH

*

By an Opinion and Order of the Supreme Court of Maryland dated August 31, 2023, the following attorney has been indefinitely suspended:

ASHER NEWTON WEINBERG

*

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