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Table of Contents

THE APPELLATE COURT

Return to ToC

APPELLATE COURT OF MARYLAND

Albert M. Muldrow, Jr. v. State of Maryland, No. 1898, September Term 2021. Opinion by Getty, J.

https://www.courts.state.md.us/data/opinions/cosa/2023/1898s21.pdf

JURY – COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS – BIAS AND PREJUDICE

EVIDENCE – DETERMINATION AS TO BASIS OF EXPERT'S OPINION AND RELIABILITY IN GENERAL

Facts:

Baltimore County police officers responded to a wellness check at an apartment in Dundalk, Maryland in March 2019. Once there, officers found Martino Duffin dead and lying in a pool of blood from two gunshot wounds to his head. After reviewing surveillance footage, police identified Albert Muldrow as a suspect and took him in for questioning. Muldrow waived his *Miranda* rights and was questioned by the lead detective. He admitted to meeting Duffin through an online chat room and went to Duffin's apartment to have homosexual relations with him. He was ultimately charged with the murder of Duffin, among other counts.

During jury selection at the Circuit Court for Baltimore County, defense counsel proposed 62 questions for *voir dire* of the jury pool. Among these were questions to detect potential jurors' bias against homosexuality. The judge asked some, but not all, of the proposed questions, and declined to ask questions about same-sex relations. Ultimately, the jury found Muldrow guilty on eight out of nine counts, including first-degree murder.

Held: Reversed and remanded.

The Appellate Court of Maryland reversed, holding that when the evidence presented at trial may arouse bias against homosexuality, the trial court must ask questions during *voir dire* aimed at uncovering such bias. Details about the homosexual relationship between Muldrow and Duffin came up repeatedly at trial, and the State explicitly linked this encounter to Muldrow's motive

for murder. This evidence was anticipated at trial, and the *voir dire* questions should have taken this into account when determining which jurors can be impartial.

While the *voir dire* issue in this case is dispositive, the Appellate Court of Maryland also considered whether a *Daubert* hearing was necessary to determine the admissibility of the State's phenolphthalein test, as the issue is likely to rise again if the case is retried. Relying on *Rochkind v. Stevenson*, 471 Md. 1 (2020), and *Katz, Abosch, Windesheim, Gershman, & Freedman, P.A. v. Parkway Neuroscience & Spine Institute, LLC*, 485 Md. 335 (2023), the Court concluded that a *Daubert* hearing is required if there is a genuine argument that the phenolphthalein test was performed in a way that could render its conclusions unreliable.

Return to ToC

State of Maryland v. Garrett Lee Holsen, No. 1410, September Term 2022, filed December 20, 2023. Opinion by Nazarian, J.

https://www.mdcourts.gov/data/opinions/cosa/2023/1410s22.pdf

SEX CRIMES – INCONSISTENT VERDICTS – DISMISS THE REMAINING CHARGES

Facts:

Garrett Lee Holsen was charged with committing multiple sex crimes against a Naval Academy classmate. At trial in the Circuit Court for Anne Arundel County, the defense contended that the overlapping elements across the three charges—second-degree rape, third-degree sex offense, and second-degree assault—presented a risk that the jury would produce inconsistent verdicts. The defense asked the court to direct the jury to consider the charge of second-degree rape first and, if it found him not guilty, not to consider the other two charges. The State objected, but the trial court accepted the defense's proposal, prepared a verdict sheet to that effect, and instructed the jury to proceed accordingly. Mr. Holsen was acquitted of second-degree rape and the jury, as instructed, did not consider the remaining counts. The defense moved to dismiss the remaining charges, and the court granted the motion.

Held: Reversed in Part and Remanded.

The Appellate Court of Maryland reversed as to the third-degree sex offense and second-degree assault and remanded, holding that the trial court preempted the jury's ability to enter verdicts on each charge impermissibly and that the dismissal of the remaining charges did not amount to acquittals. For a trial court to unilaterally dismiss charges, it must ground its decision in a specific source of authority—typically, a court may intervene to protect the defendant from having their constitutional rights violated by the State (such as a speedy trial violation). But dismissing charges based solely on the fear of producing inconsistent verdicts is not a sufficient reason. Inconsistent verdicts may be remedied after the jury enters a verdict for each charge. The jury's important fact-finding purpose must be kept intact. Finally, when a trial court dismisses criminal charges without authority, this cannot amount to an acquittal. Without a valid acquittal, there can be no double jeopardy concerns.

Return to ToC

Julie Wolf, et al. v. Planning Board of Prince George's County, No. 2099, September Term 2022, filed December 21, 2023. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/cosa/2023/2099s22.pdf

LAND USE – ZONING AND SUBDIVISION APPROVAL – APPROVAL ORDER

LAND USE – ZONING AND SUBDIVISION APPROVAL – EFFECT OF APPEAL

LAND USE – CONSISTENCY BETWEEN PRIOR ZONING AND SUBDIVISION APPROVALS

LAND USE – ZONING COMPLIANCE IN SUBDIVISION APPLICATIONS

Facts:

Werrlein WSSC, LLC ("Werrlein") submitted an application to the Prince George's County Planning Board proposing a residential development in Hyattsville, Maryland. The subject property, called Suffrage Point (formerly Magruder Pointe), consists of an upper and lower parcel. Werrlein submitted a Conceptual Site Plan that requested a change to the zoning of the area to allow for its proposed residential density and housing types. The City of Hyattsville and a group of residents opposed the approval and successfully obtained a remand from the Appellate Court of Maryland in 2022 that required the Prince George's County Council, sitting as District Council, to correct the dwelling unit density it had approved for the project. After the Council corrected the density and again approved Werrlein's plan, a group of residents filed for judicial review of that approval, which remains pending.

In the interim, Werrlein proceeded to the next phase of the development process and submitted an application for a Preliminary Plan of Subdivision ("PPS") for the lower parcel of the project. The Planning Board of Prince George's County approved that plan subject to a set of conditions, including that a density calculation needed to be finalized in the next stage of approvals. A group of residents filed for judicial review, arguing that the PPS could not be approved until judicial review of the underlying Conceptual Site Plan was complete and that the PPS was inconsistent with that plan. Further, the residents asserted that the approved PPS contained a density calculation that did not comply with the county zoning ordinance. The circuit court disagreed and affirmed the Board's approval.

Held: Affirmed.

The Appellate Court of Maryland affirmed, holding that, without a stay, pending judicial review of an underlying approval does not prohibit a developer from moving to the next stage in the development process. Section 22-407(a)(4) of the Land Use Article of the Maryland Code

(2012) provides that a petition for judicial review "does not stay enforcement of the final decision of the district council, but the district council may stay enforcement of its final decision or the reviewing court may order a stay on terms it considers proper." The Prince George's County Code provides for a specific order of approvals for development proposals, but its plain language does not require that an underlying approval must be final and all appeals completed before the next approval can be granted. A developer may therefore choose to proceed with the understanding that an underlying approval may be vacated by a court and require the developer to backtrack through the process.

Under the Prince George's County Code, a development approval does not need to conform with a prior approval unless the County Code specifically requires such conformity. Development is an ever-changing process, and strict conformity requirements inhibit the flexibility to allow developers to adapt to issues as they arise.

Finally, because the zoning and planning processes are separate and each have their own distinct considerations, thorough review of zoning compliance is not required for a planning approval, nor is thorough review of planning compliance required for a zoning approval.

Werrlein was not required to wait until the residents' appeal of the Conceptual Site Plan was complete to seek approval of its PPS. Any inconsistencies between the approved Conceptual Site Plan and the PPS did not prohibit the Planning Board from approving the PPS because conformity between the two applications is not required by the plain language of the County Code. Because the Conceptual Site Plan is a zoning approval and the PPS is a planning approval, the Board did not need to review thoroughly the PPS's compliance with zoning requirements.

Return to ToC

SVAP II Pasadena Crossroads LLC v. Fitness International LLC, No. 1982, Sept. Term 2022, filed December 21, 2023. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2023/1982s22.pdf

COMMERCIAL LEASE – COVID-19 PANDEMIC – EXECUTIVE ORDERS LIMITING BUSINESS OPERATIONS – LEGAL IMPOSSIBILITY – FRUSTRATION OF PURPOSE - BREACH OF LEASE – TENANTS' FAILURE TO PERFORM – LANDLORD'S FAILURE TO PERFORM – STANDING – SALE OF COMMERCIAL PROPERTY

Facts:

In 2009, landlord, SVAP II Pasadena Crossroads LLC ("Landlord") and tenant, Fitness International LLC d/b/a L.A. Fitness ("LAF"), entered into a lease for approximately 40,000 feet of commercial space (the "Premises") which LAF intended to utilize as a fitness center. The Premises were located at the Pasadena Crossroads Shopping Center (the "Property"), which was owned by Landlord. Pursuant to the Lease, LAF was required to pay rent, which was calculated based on a variable formula, as well as additional expenses. The lease contained a force majeure provision addressing LAF's obligation to pay rent in the event of a force majeure event.

In March 2020, as COVID-19 began to spread throughout the United States, Governor Larry Hogan declared a "State of Emergency and Existence of Catastrophic Health Emergency" in the State of Maryland. On March 16, 2020, Governor Hogan issued an executive order requiring all fitness centers to close to the general public. On March 17, 2020, LAF wrote to Landlord asserting that the executive order "both frustrated the purpose of the Lease by robbing [LAF] of [its] essential benefit of the bargain under the Lease" and "constituted a force majeure event and has made performance under the Lease both impossible and impracticable . . . allowing us to fully abate rent[.]" LAF was permitted to reopen its fitness facility on June 19, 2020, albeit with certain restrictions, including a limit on occupancy.

On April 13, 2020, LAF was served with a ten-day notice of default demanding payment of past due rent, but LAF did not remit payment, nor did LAF pay rent for April, May, or June 2020. LAF resumed payment of rent in July 2020. On May 26, 2020, Landlord filed a claim in the Circuit Court for Anne Arundel County seeking unpaid rent and attorney's fees; LAF filed a response as well as a counterclaim.

On October 22, 2021, Landlord sold the property on which the Premises were located to Paramount Realty NJ LLC ("Paramount") pursuant to a Purchase and Sale Agreement ("PSA"). The PSA included various provisions regarding the ongoing litigation with LAF, as well as provisions addressing the collection of rent for rent due to the seller prior to the date of sale.

A bench trial was held in the Circuit Court for Anne Arundel County on August 3, 2022, after which both parties submitted post-trial memoranda. In addition to substantive arguments

regarding LAF's nonpayment of rent, LAF asserted that Landlord lacked standing to pursue the action as a result of the sale of the Property. On January 4, 2023, the circuit court issued an order entering judgment in favor of LAF and against Landlord with respect to both Landlord's claim and LAF's counterclaim. Landlord noted a timely appeal.

Held: Reversed.

The first issue the Appellate Court of Maryland addressed on appeal was whether Landlord had standing to pursue the breach of contract action. LAF asserted that when Landlord sold the Property, it gave up any rights to pursue unpaid rent arising from the Lease, and, therefore, lacked standing to pursue this claim. First, the Court observed that under Maryland law, "[w]hen there is a transfer of title, unpaid accrued rent, unless otherwise provided for, belongs to the person who was the landlord at the time of accrual." *Antietam-Sharpsburg Museum, Inc. v. William H. Marsh, Inc*., 252 Md. 265, 267 (1969). The Court then looked to the terms of the PSA. The Court emphasized that, when engaging in contract interpretation, courts "attempt to construe contracts as a whole, to interpret their separate provisions harmoniously, so that, if possible, all of them may be given effect." *Walker v. Dep't of Human Res*., 379 Md. 407, 421 (2004). After considering the PSA as a whole, the Court rejected LAF's contention that Landlord lacked standing to pursue the litigation.

The Court then turned to the Landlord's breach of contract claim. The Court determined that Landlord established a *prima facie* claim for breach of contract at trial when it presented evidence demonstrating that: (1) Landlord and LAF were parties to the Lease; (2) the Lease obligated LAF to pay rent each month; and (3) LAF failed to pay rent to Landlord from March 2020 through June 2020. The Court considered the extracontractual affirmative defenses of frustration of purpose and legal impossibility raised by LAF. The Court discussed its recent opinion in *Critzos v. Marquis*, 256 Md. App. 684 (2023), the only reported Maryland case to date addressing the issue of whether the COVID-19-related closure orders excuse a tenant's obligation to pay rent. The Court also considered case law from other jurisdictions, which largely held in favor of commercial landlords in similar disputes arising from COVID-19-related shutdowns. Ultimately, the Court held that the evidence presented to the circuit court was insufficient to establish the affirmative defenses of frustration of purpose or legal impossibility because the lease did not restrict LAF's use of the Premises to a particular purpose, LAF was forced to close its in-person operations for approximately three months, which was a relatively short time compared to the overall lease term, and, after the relevant executive orders were modified and ultimately lifted, LAF was entitled to resume its regular operations at the Premises.

The Court further determined that the lease apportioned the risk of such an event to LAF via the *force majeure* clause. The Court held, therefore, that the uncontroverted evidence established that LAF breached the Lease by failing to pay rent as required during the months of April through June of 2020, and no reasonable fact-finder could conclude otherwise.

The Appellate Court of Maryland considered Landlord's assertion that the circuit court erred by entering judgment in LAF's favor with regard to the counterclaim. LAF asserted that Landlord breached the provision of the lease that gave LAF the right to use the Premises "for the operation of a health club and fitness facility" and provided that "operation of business from the Premises for [LAF's] Primary Uses . . . does not and will not violate any agreements respecting exclusive use rights or restrictions on use within the Project or any portion thereof." The Court determined that there was insufficient evidence presented at trial to establish the claim when the executive orders issued during the early days of the COVID-19 pandemic were the cause of the temporary closure of LAF's business – not any action taken by Landlord. The Court further held that LAF presented insufficient evidence to establish a breach based upon its "peaceful and quiet possession and enjoyment of the" Premises being adversely affected. The Court determined that this provision of the lease was inapplicable because it addresses Landlord's "good and insurable title to the Project and the Premises," and no evidence was offered to establish that Landlord did not have good title to the Premises. Finally, the Court addressed Landlord's assertion that the circuit court erred by abating rent for LAF based upon the terms of the lease. Consistent with its holding in other cases, *see, e.g., GPL Enter., LLC v. Certain Underwriters at Lloyd's,* 254 Md. App. 638, *cert. denied*, 482 Md. 538 (2023), Court rejected LAF's assertion that the COVID-19 pandemic was a "casualty" allowing for abatement of rent.

Return to ToC

ATTORNEY DISCIPLINE

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This is to certify that the name of

SHERON ANDREA BARTON

has been replaced on the register of attorneys permitted to practice law in this state as of December 15, 2023.

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This is to certify that the name of

STEVEN GENE BERRY

has been replaced on the register of attorneys permitted to practice law in this state as of December 15, 2023.

*

This is to certify that the name of

MIGUEL ALAN HULL

has been replaced on the register of attorneys permitted to practice law in this state as of December 15, 2023.

*

By an Order of the Supreme Court of Maryland dated December 22, 2023, the following attorney has been indefinitely suspended by consent:

NEMA SAYADIAN

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Return to ToC

JUDICIAL APPOINTMENTS

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On November 17, 2023, the Governor announced the appointment of **Magistrate Ginina Alexandra Jackson-Stevenson** to the Circuit Court for Anne Arundel County. Judge Jackson-Stevenson was sworn in on December 6, 2023, and fills the vacancy created by the retirement of the Hon. Glenn L. Klavans.

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On November 17, 2023, the Governor announced the appointment of **Jennifer Michelle Alexander** to the District Court for Anne Arundel County. Judge Alexander was sworn in on December 15, 2023, and fills the vacancy created by the retirement of the Hon. John P. McKenna, Jr.

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On December 28, 2023, the Governor announced the appointment of **Magistrate Lara C. Weathersbee** to the Circuit court for Howard County. Judge Weathersbee was sworn in on December 22, 2023, following her appointment notification from the Governor on December 21, 2023. Judge Weathersbee fills the vacancy created by the retirement of the Hon. Timothy J. McCrone.

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Return to ToC

UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

	Case No.	*Decided*
A		
Adkins, Martaveous Melvin v. State	0435 **	December 22, 2023
Ahmad, Arif Syed v. Ali	0591	December 8, 2023
Amick, Michael Earl v. State	0035	December 5, 2023
Aparicio, Ricardo v. State	1322 *	December 7, 2023
B		
Bingham-Lane, Aaron T. v. State	1959 *	December 1, 2023
Brasher, Lance T. v. Brasher	0588 *	December 7, 2023
Browning, Valerie Codd v. Browning	0653	December 4, 2023
Byrd, Evan Scott v. State	1852 *	December 6, 2023
C		
Caples, Jeffrey v. State	1826 *	December 27, 2023
Christy, Jordan Isaiah v. State	1799 *	December 12, 2023
Curiale, Mario v. Scampton	0324 *	December 8, 2023
Custer, Jeffrey Lee, Sr. v. State	0024	December 1, 2023
D		
Dagher, Jouhad v. Moreno	2181 *	December 1, 2023
Dalton, Matthew S. v. State	2064 *	December 1, 2023
Daniel, Willie J., Jr. v. Curseen	0372	December 21, 2023
Darvish, Janet L. v. DiPietro	1789 *	December 12, 2023
Davis, Rodderick Lacy v. State	1727 *	December 1, 2023
Derr, Larry v. Jakoby	0214	December 1, 2023
Durity, Steven v. Prince George's Cty. Police Dept.	2130 *	December 12, 2023
Dyer, Scott E. v. State	0076 *	December 12, 2023
F		
Felton, Vann Augustus v. State	0247	December 1, 2023
Funkhouser, Matthew Shane v. State	0367	December 27, 2023

September Term 2023
* September Term 2022
** September Term 2021

Return to ToC

G

Gioioso, Tina Michelle v. Kohan	1456 *	December 28, 2023
Gordneer-Ben, Robyn D. v. Ben	0498	December 1, 2023
Guzman-Fuentes, Jose G. v. State	2101 *	December 22, 2023

H

Hand, Timothy A., Sr. v. State	1910 *	December 8, 2023
Hawkins, Avery Jordan v. State	2253 *	December 14, 2023
Hollins, Isiah A. v. State	2023 *	December 14, 2023
Hopkins, Randall Eric v. State	2106 *	December 1, 2023
Hopson, Carrick Arthur v. State	0809	December 1, 2023
Horne, Jennifer S. v. Horne	0483 *	December 8, 2023

I

Iglesias, Exau Guevara v. Castro de Guevara	0603	December 18, 2023
In re. G.W.	0454	December 4, 2023
In re: G.W.	2022 *	December 4, 2023
In re: K.E.	1442 *	December 14, 2023
In re: K.H.	0810	December 18, 2023
In re: R.N.	0562	December 14, 2023
Irby, Bobby v. State	1836 *	December 27, 2023

J

Jackson, Robert v. State	1506 *	December 7, 2023
Johnson, Aaron Lawrence v. State	0950 *	December 15, 2023
Johnson, Deon Lennard v. State	0511 *	December 22, 2023

K

KAJ Enterprises v. Miles	0600 **	December 12, 2023

L

Lambert, Gregory Daniel v. State	0324	December 1, 2023
Leister, Cody v. Leister	2230 *	December 11, 2023

M

McLendon, Quadari Isaiah v. State	0712 *	December 22, 2023
Middleton, Richard Eugene, Jr. v. State	1616 *	December 18, 2023
Mustafa, Kamal v. Omaha Property Manager	0014	December 1, 2023

N

Nurse, Stephen A. v. State	0916 *	December 7, 2023

September Term 2023
* September Term 2022
** September Term 2021

Return to ToC

P		
Parks, Terry Lee, Jr. v. State	0907 *	December 22, 2023
R		
Rojo, Hector v. State	1241 *	December 1, 2023
Rountree, Anthony Michael v. State	0869	December 1, 2023
S		
Sabnis, Ashwini Vinod v. Mohanty	0788	December 27, 2023
Sarpong, Sampson v. Nationwide Mutual Fire Ins.	1811 *	December 21, 2023
Scarboro, Dominick v. State	1646 *	December 7, 2023
Schatz, Jeffrey Michael v. State	1455 *	December 5, 2023
Seivers, Aaron Victor v. State	1914 *	December 1, 2023
Smith, Nicholas Greg v. State	0921 *	December 4, 2023
Spencer, Thurman, Jr. v. State	1835 *	December 12, 2023
State v. Edwards, Richard A.	0163	December 28, 2023
Stoltz, Gary v. Stoltz	0468	December 21, 2023
T		
Tyler, Daquan L. v. Dept. of Pub. Saf. & Corr. Servs.	1797 *	December 4, 2023
V		
Villatoro, Carlos Walter v. State	0132	December 1, 2023
Y		
Y.B. v. T.B.	1650 *	December 1, 2023

September Term 2023
* September Term 2022
** September Term 2021