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ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Ranji M. Garrett. Petitioner alleged violations of the Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, and 8.4.

The judge to whom the matter was assigned conducted a hearing after Respondent failed to answer the petition. Three complainants testified at the hearing, and Respondent's failure to answer discovery requests resulted in all requests for admissions of fact and genuineness of documents being deemed admitted and entered into evidence.

The hearing judge found that Respondent represented Mr. Jose Betancourt, Mr. Daryl R. Middlebrooks, Ms. Jennifer R. Blackburn, Mr. John Kennedy O'Day, Mr. Paul R. Chase, Dr. Anita Krishnan, Dr. Frederick G. Lippert, Mr. Samuel A. Reddix, Jr., and Mr. Patrick Storey at various periods between 2007 and 2009 in family and other civil matters. The hearing court found that in February and March 2009, Respondent ceased communication with his clients and opposing counsels. Respondent failed to attend scheduled hearings and provide effective services. Respondent failed to earn or refund the fees of seven clients. Furthermore, Respondent failed to maintain the fees in trust and converted the fees to his own use with respect to seven clients. Finally, Respondent abandoned the practice of law without notice to his clients.

The hearing judge concluded that Respondent violated MLRPC 1.1, 1.2(a), 1.3, 1.4, 1.5(a), 1.15(a) and (d), 1.16(d), 3.2, 8.1(b) and 8.4(a), (c), and (d) by failing to provide effective counsel, not communicating with his clients, failing to return unearned fees, and failing to maintain fees in trust. Additionally, Respondent violated the MLRPC by abandoning the practice of law without notice, converting his clients' fees to his own use and benefit, failing to appear at scheduled hearings, and failing to cooperate with Bar Counsel during the investigation of these matters.

Held:

Respondent violated MLRPC 1.1, 1.2(a), 1.3, 1.4, 1.5(a), 1.15(a) and (d), 1.16(d), 3.2, 8.1, and 8.4(a), (c), and (d), in the representation of nine separate clients. The appropriate sanction is disbarment.

Neither Petitioner nor Respondent filed exceptions to the hearing judge's findings of fact or conclusions of law. The Court concluded that disbarment is the only appropriate sanction for Respondent's 80-plus serious violations of the MLRPC. Respondent's misuse of fees, ineffective services, and abandonment of practice make disbarment the only appropriate sanction.

Attorney Grievance Commission v. Heung Sik Park, Misc. Docket AG No. 15, September Term 2009, filed June 25, 2012. Per Curiam.

http://mdcourts.gov/opinions/coa/2012/15a09ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Heung Sik Park. The petition alleged violations of Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.1, 1.3, 1.4, 1.16, 8.1, and 8.4 based on Respondent's representation of a client seeking immigration services.

Respondent failed to file an answer or response to the petition. Subsequently, the judge to whom the matter was assigned conducted a hearing in Respondent's absence. The hearing judge found by clear and convincing evidence that Respondent violated MLRPC 1.1, 1.3, 1.4, 1.16, 8.1, and 8.4.

The hearing judge found that Respondent was retained by Chae Hong Min and Kyung Min to file applications for permanent residence status, employment authorization, and other immigration benefits. The Mins received a notice from immigration authorities that the applications required more information and attempted to contact respondent in September 2007. The Mins were unable to reach Respondent until sometime in October 2007, when Respondent told the Mins they would receive the work permit in 30 days. Respondent received a request for information from immigration authorities on October 11, 2007, did not inform the Mins about the request, and did not respond to the request. After receiving another notice from immigration authorities, the Mins filed a Freedom of Information Act (FOIA) request to obtain the applications' Notice of Decision denying the applications. Subsequently, the Mins filed a complaint with Bar Counsel.

The hearing judge concluded the following: Respondent violated MLRPC 1.1 and 1.3 by filing incomplete applications and failing to respond timely to immigration authorities' requests. Respondent violated MLRPC 1.4 by failing to inform the Mins about the notices and decisions. Respondent violated 1.16 by abandoning the representation and failing to provide the Mins with his location. Respondent violated 8.1 by not answering letters from Bar Counsel and not meeting with Bar Counsel's investigator. Finally, Respondent violated 8.4 by failing to keep his clients informed, abandoning the practice of law without notice, and not refunding the unearned fee.

Held:

Respondent violated MLRPC 1.1, 1.3, 1.4, 1.16, 8.1(b), and 8.4(d), for which the appropriate sanction is disbarment.

Neither Petitioner nor Respondent filed exceptions to the hearing judge's findings and conclusions. The Court concluded that disbarment was the appropriate sanction because there was no mitigation, Respondent failed to pursue the client's interests, failed to communicate with the client, ignored the client's repeated requests for status updates, terminated the representation without notice by failing to provide effective services, failed to return unearned fees, and failed to cooperate with Bar Counsel's demands for information.

Attorney Grievance Commission v. James Charles August Moeller, Misc. Docket AG No. 49, September Term 2007, filed June 22, 2012. Per Curiam.

http://mdcourts.gov/opinions/coa/2012/49a07ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

Petitioner, Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent James C.A. Moeller. Petitioner alleged violations of the Maryland Lawyers' Rules of Professional Conduct (MLRPC) based on Respondent's overdrawn trust account.

Respondent did not timely file an answer, and an Order of Default was entered. The judge to whom the matter was assigned heard the matter and found, by clear and convincing evidence, that Respondent had violated MLRPC 1.1, 1.15(a), 8.1(b), and 8.4(d).

The hearing judge found that Petitioner received notice from Bank of America that Respondent's client trust account was overdrawn by $271.54 because of a $1,900.00 check payable to Baltimore County, Maryland. Petitioner sent three unanswered letters to Respondent requesting an explanation for the overdraft. After several attempts at contacting Respondent by telephone and in person, Petitioner's investigator met with Respondent. Respondent acknowledged receiving something from Petitioner, but informed that he did not respond due to health problems. Respondent explained that the overdraft was the result of a higher than estimated recordation tax for a deed. Respondent also said that he no longer has clients or practices law. The hearing judge also found that Respondent withdrew funds from the trust account for his own use five times, totaling $167.47, and had an AOL service charge during the period in question.

The hearing judge concluded that Respondent violated MLRPC 1.1 by not collecting enough money to pay the recordation tax, indicating a lack of thoroughness. Respondent violated MLRPC 1.15 by withdrawing money for his own use and failing to maintain a sufficient balance in the trust account. Respondent violated MLRPC 8.1(b) by knowingly failing to answer Petitioner's inquiries. Finally, Respondent violated MLRPC 8.4(d) by failing to maintain sufficient funds in the trust account and failing to respond to Petitioner.

Held:

Respondent violated MLRPC 1.1, 1.15(a), 8.1(b), and 8.4(d), for which the appropriate sanction is indefinite suspension.

Neither Petitioner nor Respondent filed exceptions to the hearing judge's findings of fact and conclusions of law. The Court concluded that indefinite suspension is an appropriate sanction for failing to collect enough money to pay the recordation tax, failing to keep client and third person property separate from his own property, and failing to respond to Bar Counsel's inquiries, where there was no allegation of dishonesty or fraud.

Vincent T. Greco, Jr. v. State of Maryland, No. 86, September Term 2011, filed June 26, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2012/86a11.pdf

POSTCONVICTION RELIEF – RE-LITIGATION OF ALLEGATION OF ERROR – NEW CONSTITUTIONAL STANDARD

ILLEGAL SENTENCE

Facts:

Petitioner Vincent T. Greco, Jr. was convicted by a jury in the Circuit Court for Baltimore County in 1982 of first degree premeditated murder, first degree felony murder, and first degree rape. He was sentenced to serve consecutive life sentences for premeditated murder and first degree rape, with a concurrent life sentence for felony murder. Petitioner's defense at trial was that he had acted in imperfect self-defense by misperceiving the threat the victim had posed and overreacting in response. He called an expert witness, Dr. Rothstein, to testify in support of this theory of imperfect self-defense. The trial court limited Dr. Rothstein's testimony, based on its understanding that some of the proposed testimony would support the impermissible defense of diminished capacity. The trial court thus excluded "testimony . . . to support the fact that the defendant honestly but unreasonably believed that he was in danger of injury or that the killing was the only way to prevent it."

Petitioner appealed his conviction to the Court of Special Appeals, which affirmed the judgments of conviction on the basis that Petitioner had sought to introduce evidence to support the impermissible defense of diminished capacity. The intermediate appellate court, however, vacated the sentences for premeditated and felony murder because a defendant could not be sentenced twice for murdering a single individual. On remand, the Circuit Court resentenced Petitioner to consecutive life sentences for premeditated murder and rape with no separate sentence for felony murder. Petitioner thereafter filed several motions to reconsider the sentences and, ultimately, in 1998, the trial court reduced the consecutive life sentences for premeditated murder and rape to consecutive life sentences with all but fifty years suspended with no term of probation to follow the unsuspended portion.

In 1996, Petitioner filed a petition for postconviction relief, which Petitioner amended to allege that the trial court's exclusion of portions of Dr. Rothstein's testimony impeded his ability to establish imperfect self-defense. The postconviction court heard the matter and subsequently granted postconviction relief of a new trial, later specifying that the relief was limited to the premeditated murder charge alone. The postconviction court reasoned that the Court of Appeals's decisions in *Hoey v. State*, 311 Md. 473, 536 A.2d 622 (1988), and *Simmons v. State*, 313 Md. 33, 542 A.2d 1258 (1988), together overruled *Johnson v. State*, 292 Md. 405, 439 A.2d 542 (1982), which the trial court had relied upon in barring some of Dr. Rothstein's testimony.

The postconviction court reasoned further that *Hoey* and *Simmons* had created a new constitutional standard that was intended to apply retroactively, thereby affording Petitioner relief under § 7-106(c) of the Uniform Postconviction Procedure Act (UPPA), codified at Maryland Code (2001, 2008 Repl. Vol.), §§ 7-101 through 7-301 of the Criminal Procedure Article (CP).

The State applied for leave to appeal the postconviction court's order. The Court of Special Appeals granted the State leave to appeal and ultimately reversed the postconviction court's grant of relief. The intermediate court reasoned that the rule of law set forth in *Hoey* and *Simmons* had been recognized before those cases were decided. Moreover, not all of the components of that rule of law were constitutionally imposed. Because the rule had to be both new and constitutionally imposed to afford a basis for postconviction relief, Petitioner was not entitled to a new trial.

Petitioner filed a petition for writ of certiorari and the State filed a conditional cross-petition. The Court of Appeals granted both the petition and cross-petition and considered two primary issues: (1) Whether Petitioner is entitled to postconviction relief on the conviction for premeditated murder because the Court's decisions in *Hoey* and *Simmons* established a new, constitutionally imposed rule that was intended to apply retroactively; and (2) whether Petitioner's sentences of life imprisonment with all but fifty years suspended, with no term of probation, were illegal sentences for premeditated murder and first degree rape.

Held: Affirmed.

Case remanded to the Circuit Court for Baltimore County. The Court of Appeals held that the legal standard set forth in *Hoey* and *Simmons* was not new because it did not squarely overturn a prior standard announced in *Johnson*, which had rejected the defense of diminished capacity. *Hoey* and *Simmons* merely clarified, in passing, a point of dicta in *Johnson*. Moreover, the *Hoey* and *Simmons* standard would not entitle Petitioner to present any more evidence than he had originally entered at trial; therefore, he was unable to establish that the trial judge's ruling had an adverse effect upon the validity of the murder conviction.

The Court of Appeals further held that Petitioner's concurrent sentences of life imprisonment, suspend all but fifty years, with no period of probation, for premeditated murder and first degree rape converted by operation of law into term-of-years sentences of fifty years. Because the minimum sentence permitted by statute for first degree premeditated murder is life imprisonment, a fifty-year term-of-years sentence was illegal. Although generally a trial court may not impose a more severe sentence on remand after an appeal, the trial court may impose a more severe sentence in order to correct an illegal sentence. Otherwise, a court would be permitted to impose illegal sentences *ad infinitum*. Therefore, the trial court, on remand, could impose a life sentence with all but fifty years suspended, with a period of probation to follow.

Turning to the first degree rape conviction, the Court rejected Petitioner's assertion that the trial court was required to determine Petitioner's life expectancy to determine a sentence that would be less than his natural life because the statute at the time of Petitioner's conviction provided for a maximum of "the period of his natural life." The Court also noted that no defendant can actually serve a sentence longer than the balance of his natural life. Therefore, the Court held that a fifty-year term-of-years sentence for first-degree rape was not illegal.

COURT OF SPECIAL APPEALS

Alan Sanford Remson v. Karen Krausen f/k/a Karen Remson, No. 2187, September Term 2010, filed June 28, 2012. Opinion by Hotten. J.

http://mdcourts.gov/opinions/cosa/2012/2187s10.pdf

HEADNOTE – CIVIL PROCEDURE – APPEALS – APPELLATE JURISDICTION – STATE COURT REVIEW

Facts:

Karen Krausen, appellee, filed a complaint for a limited divorce against appellant, Alan Sandford Remson, in the Circuit Court for Montgomery County. Not long after, appellee filed an emergency motion for injunctive relief. A consent order enjoining appellant from contacting appellee was subsequently signed. About thirteen days later, appellee filed a motion for contempt, asserting that appellant had contacted her at work. At the conclusion of the contempt hearing, the circuit court found appellant in contempt, and sentenced him to thirty days of incarceration. The sentence was suspended, predicated on future compliance and payment of $2500 in attorney's fees.

After a few months of compliance, appellant submitted a motion to set aside the contempt order. Then, through new counsel, appellant submitted a motion to withdraw the motion to set aside. Days later, the motion to set aside was granted. The circuit court then granted the motion to withdraw, thereby reinstating the contempt order. Thereafter, through new counsel, appellant submitted a motion to vacate the order granting the withdrawal. The motion was denied and appellant requested an in banc panel determine whether the circuit court abused its discretion in granting the motion to withdraw.

After the in banc panel concluded that the circuit court did not abuse its discretion, appellant filed a motion to alter or amend, or in the alternative, motion to strike the contempt order pursuant to Md. Rule 2-535(b). In that motion, appellant requested a reconsideration of the in banc panel's decision and the dissolution of the circuit court's order. The in banc panel denied the motion without explanation. Appellant noted an appeal and we issued a show cause order requesting that appellant explain "why this appeal should not be dismissed as an impermissible appeal from the decision of an in banc panel of the circuit court."

Held: Appeal dismissed.

Article IV, § 22 constitutionally proscribes an appeal from a decision of an in banc panel against the party that brought the review. Appellant argued that the appeal should not be dismissed because the issues on appeal were distinct from those addressed by the in banc panel. Specifically, appellant averred that the panel considered whether the circuit court abused its discretion in granting a motion to withdraw, whereas the pending appeal concerned whether the circuit court abused its discretion in denying a motion to vacate, and whether it erred in denying the motion to dissolve the injunction.

Article IV, § 22 provides that "upon the decision, or determination of any point, or question" by a circuit court, "it shall be competent to the party, against whom the ruling or decision is made, upon motion, to have the point, or question reserved for the consideration" by an in banc panel of three circuit court judges. Stated another way, an in banc panel's jurisdiction is predicated on a decision of a circuit court being reserved for review. Implicit in this requirement is that an issue must be presented to the circuit court before an in banc panel can conduct a review.

Absent an explanation regarding the denial of the motion to alter or amend, or in the alternative, motion to strike the contempt order pursuant to Md. Rule 2-535(b), we cannot ascertain whether the in banc panel exceeded its jurisdiction in denying the motion. Nevertheless, the appeal was dismissed because there was no final judgment on appellant's request to dissolve the injunction and vacate the contempt order pursuant to Md. Rule 2-535(b).

Christina D. Thomas, et. al. v. Rowhouses, Inc., No. 2102, September Term 2010, filed June 28, 2012. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2012/2102s10.pdf

CORPORATIONS – CHARTER FORFEITURE – CIVIL PROCEDURE – SERVICE OF PROCESS

Facts:

In October 2006, Christina Thomas brought suit against Rowhouses, Inc. and the Estate of Eric Patten in the Circuit Court for Baltimore City for damages due to lead paint poisoning. By the time suit was filed, Eric Patten, the only corporate director listed in the corporation's articles of incorporation and the firm's resident agent, had died and Rowhouses had forfeited its corporate charter.

Rowhouses was then served through the State Department of Assessments and Taxation (SDAT) in November of 2009 and on May 18, 2010, Eric Patten's personal representative accepted service on behalf of the Estate. Rowhouses moved to dismiss for insufficiency of service of process and the Estate moved to quash summons and vacate service. Both motions were granted. The circuit judge concluded that Md. Code (1975, 2007 Repl. Vol.), Corporations and Associations Article (CA) §3-515 "does not permit service of process upon the personal representative of the estate of a deceased director. The statute only permits service upon a surviving director. In addition, regarding service on [SDAT,] because a forfeited corporation is not a legal entity, Maryland Rule 2-124 (o) does not apply." Thomas appealed both rulings.

Held: Reversed and remanded as to Rowhouses. Affirmed as to the Estate.

The Court of Special Appeals concluded that even though it is said that forfeiture of a corporate charter for failure to file a property tax return makes a corporation a legal non-entity, CA §3-515 is a "corporate survivor" statute that makes it clear that the corporation continues to exist for some limited purposes, including winding-up the entity's affairs and being sued to satisfy its debts and liabilities. Further, the text and purpose of CA §3-515 must be read together with Md. Rule 2-124(o) which authorizes substituted service upon SDAT in certain situations, such as when the corporate entity has no resident agent or the resident agent is deceased. Thus, substituted service on the SDAT under Md. Rule 2-124(o) is sufficient when a corporation has forfeited its charter, has no resident agent, and the only corporate director listed in the articles of incorporation is deceased.

As to the Estate, the Court concluded that because individual liability differs from corporate liability, when a corporation is in the winding-up mode authorized by CA §3-515 and no director

/ trustee is alive, neither State law nor the Maryland Rules permit service on the estate of a deceased director / trustee.

Y. Y. v. State of Maryland, No. 3025, September Term 2009, filed June 27, 2012. Opinion by Kehoe, J.

Deborah Eyler, J. concurs.

http://mdcourts.gov/opinions/cosa/2012/3025s09.pdf

CRIMINAL LAW – ENFORCEMENT OF PLEA AGREEMENTS
Pursuant to *Rios v. State*, 186 Md. App. 354, 366-367 (2009), "the standard to be applied to plea negotiations is one of fair play and equity under the facts and circumstances of the case, which, although entailing certain contract concepts, is to be distinguished from . . . the strict application of the common law principles of contracts." However, a criminal defendant seeking to enforce a plea agreement must still prove that he performed his obligations under the agreement before he can enforce the agreement against the State.

CRIMINAL LAW – ENFORCEMENT OF PLEA AGREEMENTS – REMEDIES – *QUANTUM MERUIT*
Quantum meruit is an aspect of the remedy of restitution. Restitution is a legal and equitable remedy to address unjust enrichment. The remedy is either monetary damages or return of title to property. *Alternatives Unlimited, Inc. v. School Comm'rs*, 155 Md. App. 415, 450-507 (2004)

CRIMINAL LAW – ENFORCEMENT OF PLEA AGREEMENTS – REMEDIES – *QUANTUM MERUIT* – APPLICATION OF *QUANTUM MERUIT*
Quantum meruit is not available to a criminal defendant who has not completed performance of his obligations under the plea agreement. Where the State agrees to make a recommendation as to a defendant's sentence, and the recommendation is conditioned on the defendant's performance of specific obligations as a confidential informant, the State does not have to make such a recommendation until either the defendant has performed his obligations as a confidential informant, or his lack of performance is otherwise excused. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981) ("It is a condition of each party's remaining duties to render performances [under a contract] that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

CRIMINAL LAW – ENFORCEMENT OF PLEA AGREEMENTS – TIME FOR PERFORMANCE
When the parties to a plea agreement do not specify a date by which the agreement must be performed, the court will impose a reasonable time. *See Anne Arundel County v. Crofton Corp.*, 286 Md. 666, 673 (1980) ("In the absence of an express time for performance, a reasonable time will be implied."); *see also Kiley v. First Nat'l Bank*, 102 Md. App. 317, 335 (1994) ("[P]romises ordinarily are not interpreted to require perpetual performance.") (citations omitted)).

CRIMINAL LAW – ENFORCEMENT OF PLEA AGREEMENTS – REMEDIES – SPECIFIC PERFORMANCE

The circuit court did not err in refusing to order the members of the Prince George's County Narcotics Enforcement Division to continue to work with Y. to fulfill his obligations as a confidential informant under the plea agreement because Y. breached the agreement by failing to perform his obligations within a reasonable time.

Facts:

Appellant entered into a verbal plea agreement with the State's Attorney for Prince George's County to plead guilty to a pending charge of possession of cocaine with intent to distribute under the condition that, if appellant cooperated with the Narcotics Enforcement Division of the Prince George's County Police Department as a confidential informant, he would be sentenced to 18 months with all but one day suspended, but if he failed to do so, he would be sentenced within the sentencing guidelines, which were five to ten years. Accordingly, appellant entered a guilty plea, which was accepted by the circuit court. The transcript of the proceeding contains no reference to the terms of the plea agreement. However, the terms of the agreement were explained to the presiding judge off the record.

Several days later, appellant, his counsel, and an Assistant State's Attorney for Prince George's County signed a letter setting out the specific agreement including that he would act as a confidential informant and would give information, conduct a control buy, or arrange an introduction that leads to the arrest of suppliers in possession of enough controlled dangerous substance for an indictment for possession with intent to distribute.

Appellant's sentencing proceeding was continued numerous times to give appellant an opportunity to satisfy his obligations under the plea agreement. Eventually, appellant filed a motion to enforce the plea agreement, contending that the State had ceased performing its obligations under the agreement, therefore making it impossible for appellant to satisfy his. After an evidentiary hearing, the court denied appellant's motion. Finding that appellant had failed to complete his obligations under the agreement, the court determined that appellant's requests for relief were inappropriate because "[i]n order to benefit from the contract, you have to do everything the contract says if you want the full benefit." The court further stated that specific performance was not appropriate because the circuit court did not have the constitutional authority "to order the State to continue to have their agents work with the Defendant" and because to "order, specific performance, I have to find that the contract had been completed, and it hasn't been." The court also denied appellant's request for *quantum meruit* relief. Appellant noted an interlocutory appeal to the court's ruling prior to sentencing.

Held: Affirmed.

The circuit court's order denying appellant's motion to enforce the plea agreement was appealable under the collateral order doctrine. *See Rios v. State*, 186 Md. App. 354, 364-66

(2009) ("The enforceability of alleged plea agreements is a proper basis for interlocutory appeals because of the strong public policy that favors the plea negotiation process.").

The circuit court correctly concluded that the plea agreement entered into on May 12, 2009 was a legally enforceable agreement–even though appellant had earlier entered his guilty plea in court, pursuant to an off-the-record plea agreement–because the parties entered into the earlier agreement with the intent to be bound by the terms later agreed to, and signed, on May 12.

The circuit court also did not err in dismissing appellant's motion to enforce the plea agreement after finding that appellant had a reasonable time to perform his obligations (seven months) but still failed to perform his obligations under the agreement. The court made credibility-based findings as to appellant's performance and these findings were not clearly erroneous. The court did not err in applying the law to the facts as it found them and in concluding that appellant failed to perform the agreement. Specific performance is inapplicable because appellant, not the State, breached the agreement. Appellant had no right to restitutional remedies, such as *quantum meruit*, because no unjust enrichment occurred when the police officers used the information appellant provided for its intended purpose.

Shelton Burris a/k/a Tyrone Burris v. State of Maryland, No. 1970, September Term 2010, filed June 28, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/1970s10.pdf

CRIMINAL LAW AND PROCEDURE – ADMISSIBILITY OF EVIDENCE – GANG-RELATED EVIDENCE – EXPERT TESTIMONY – VOIR DIRE – PLAIN ERROR – PRESERVATION FOR REVIEW – RELEVANCE – UNFAIR PREJUDICE – GROUNDS FOR OBJECTION

Facts:

A jury sitting in the Circuit Court for Baltimore City convicted Shelton Burris, also known as Tyrone Burris, appellant, of one count of first-degree murder and one count of use of a handgun in the commission of a crime of violence. The circuit court sentenced appellant to life imprisonment for first-degree murder and nineteen years' imprisonment consecutive for use of a handgun in the commission of a crime of violence, the first five years to be served without parole.

During trial, the circuit court admitted gang-related evidence, including expert testimony, that appellant was a member of the Black Guerrilla Family gang ("BGF"). At trial, three witnesses testified inconsistent with statements they made to detectives, incriminating appellant, following the shooting. Audio recordings of the witnesses' interviews with detectives were introduced as substantive evidence by the State. Two of the three witnesses identified appellant as a member of the BGF in their statements to detectives and indicated that appellant committed the offense at the direction of another BGF member. A fourth witness initially testified that he could not remember overhearing any conversations related to the shooting, but later testified that he heard appellant admit to killing someone. Over appellant's objection, Sergeant Dennis Workley of the Baltimore City Police Department testified as an expert witness for the State in the field of gangs, gang membership, gang insignia, gang ranking, and gang identification. Sergeant Workley gave testimony on the following topics: (1) the history and structure of the BGF, (2) the Division of Corrections's classification of appellant as a member of the BGF and appellant's membership in the gang, and (3) appellant's tattoos.

During *voir dire*, the circuit court asked the venire panel whether any member would require "trace" or "scientific" evidence in order to accept a proposition presented by one of the parties. One juror stood in response. Appellant's counsel did not object to the asking of the *voir dire* question or during the questioning of the individual juror who responded affirmatively to the question. At the end of *voir dire*, appellant's counsel exercised a peremptory challenge and struck the juror and the juror was not impaneled as a member of the jury. At the conclusion of the jury selection process, appellant accepted the impaneled jury, without objection.

During trial, the circuit court admitted into evidence a recording of a jailhouse telephone call in which appellant, calling from the Baltimore City Detention Center prior to trial, attempted to contact one of the witnesses who was to testify on behalf of the State. The State contended that appellant sought to intimidate the witness.

On appeal, appellant contended that the circuit court abused its discretion by admitting gang-related evidence, including pretrial statements by two witnesses, as well as Sergeant Workley's expert testimony concerning the BGF, arguing that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Appellant argued that the circuit court abused its discretion by asking a "CSI-type" question during *voir dire*. Appellant asserted that the circuit court erred by admitting into evidence the audiotape of the telephone call he made from the Baltimore City Detention Center to an unidentified woman inquiring into the whereabouts of the witness.

Held: Affirmed.

A trial court does not abuse its discretion by admitting fact evidence identifying a defendant as a member of a gang where the evidence demonstrates that the defendant was acting at the behest of a gang boss and that the crime was gang-related. Under those circumstances, the pretrial statement constitutes highly probative fact evidence establishing a motive for the offense.

A gang expert's testimony is admissible where the expert testimony directly explains the motive for a defendant's participation in the offense.

Expert testimony about the history, hierarchy, and common practices of a street gang is admissible to explain a witness's in-court recantation where: (1) the evidence establishes that a witness has previously given information to law enforcement officers incriminating the defendant and the witness recants the information at trial, (2) the reason for the recantation is related to the defendant's membership in, or affiliation with, a gang, and (3) the probative value of the expert testimony is not substantially outweighed by the danger of unfair prejudice to the defendant.

Proof that a witness's recantation is related to a defendant's involvement with a gang, *i.e.* is "gang-related," opens the door for expert testimony regarding gang information. Where witnesses who, prior to trial, either identified the defendant as the shooter or stated that the defendant admitted to being the shooter, all recanted the statements at trial or gave conflicting testimony, and at least two had direct knowledge of the defendant's gang affiliation and expressed fear, the State adequately demonstrates that the witnesses knew the defendant is in a gang and that it was for this reason they recanted at trial, thereby opening the door for expert testimony regarding gang information.

The probative value of gang expert testimony that the Division of Corrections listed the defendant as a member of a gang is not substantially outweighed by the danger of unfair

prejudice where the expert testimony is an isolated remark limited to stating that the defendant is classified as a gang member and where the expert did not disclose details about the defendant's past criminal record.

Gang expert testimony concerning the nature of a defendant's gang-related tattoos is highly probative in confirming that a defendant identified himself as a gang member, a fact that is not conceded by the defendant at trial, and not substantially outweighed by the danger of unfair prejudice.

Gang expert testimony concerning the history and structure of a street gang is properly permitted as the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice where the testimony is highly probative in explaining a witness's recantation and in corroborating earlier testimony in which the witnesses described the defendant as a hit man.

Where a defendant fails to object to a "CSI-type" *voir dire* question and affirmatively accepts the impaneled jury, the defendant does not preserve an issue for appellate review as to the question.

Where a *voir dire* question is a content-neutral inquiry into the standard by which jurors would assess the evidence, plain error review is not appropriate as: (1) there is no error or deviation from a legal rule that had not been intentionally relinquished or abandoned and (2) there is no contention that the error was clear or obvious.

Where specific grounds are offered for an objection, the party objecting will be held to those grounds and ordinarily forfeits the right to appellate review of any grounds not specified that are later raised on appeal.

The admission of a recorded jailhouse call into evidence was not an abuse of discretion where the call was relevant and made the State's theory more probable than it would have been without the recording and where the probative value of the telephone call was not substantially outweighed by the danger of unfair prejudice.

Russell T. Bass v. State of Maryland, No. 2971, September Term 2010, filed June 28, 2012. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2012/2971s10.pdf

CRIMINAL LAW – DEFENDANT'S ENTITLEMENT TO JURY INSTRUCTION ON LESSER INCLUDED OFFENSE

Burglary in the Fourth Degree, Md. Code Ann., Crim. Law § 6-205(a) (2002), (prohibiting (a) breaking and entering the dwelling of another; (c) Being in or on dwelling of another with the intent to commit theft).
Burglary in the Third Degree, Md. Code Ann., Crim. Law § 6-204(a) (2002) (prohibiting breaking and entering the dwelling of another with the intent to commit a crime).
Burglary in the First Degree, Md. Code Ann., Crim. Law § 6-202(a) (2002)(prohibiting breaking and entering the dwelling of another with the intent to commit theft or a crime of violence); *Hook v. State*, 315 Md. 25, 43-44 (1989); *Bowers v. State*, 349 Md. 710, 718-19 (1998).

Facts:

Appellant was charged, *inter alia*, with first-degree burglary. After the trial judge granted his motion for judgment of acquittal on an assault charge, appellant requested that the jury be instructed on fourth-degree burglary at the close of the evidence. The State objected, arguing "that a fourth degree burglary is a lesser of a first degree burglary. I would say a third degree burglary is the lesser. The fourth degree burglary doesn't require any element. It's really just a trespassing in a home or a store house." According to the State, third-degree burglary was "the direct lesser of first degree," and fourth-degree burglary was not because it "doesn't refer to intent at all. You can have no intent. Once you get there, you could just take a nap." The circuit court refused to instruct the jury as to fourth-degree burglary, ruling that, ". . . if the jury finds that a crime was committed, it would be clearly third degree, certainly not fourth degree. Because I don't think fourth degree is . . . generated."

Held:

The inquiry in assessing whether a defendant is entitled to a lesser included offense jury instruction is a two-step process. The threshold determination is whether one offense qualifies as a lesser included offense of a greater offense. . . . Once the threshold determination is made, the court must turn to the facts of the particular case. In assessing whether a defendant is entitled to have the jury instructed on a lesser included offense, *the court must assess whether there exists, in light of the evidence presented at trial, a rational basis upon which the jury could have concluded that the defendant was guilty of the lesser offense, but not guilty of the greater offense.* (Emphasis added).

Bashawn Montgomery Ray v. State of Maryland, No. 1444, September Term 2011, filed July 2, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/1444s11.pdf

CRIMINAL LAW & PROCEDURE – REASONABLE ARTICULABLE SUSPICION – TRAFFIC STOPS – TERRY STOPS – MOVING VIOLATIONS – VEHICLES' EQUIPMENT – TRANSPORTATION ARTICLE – PROBABLE CAUSE – PRESERVATION – PRESERVATION OF ISSUE THAT DEFENDANT DID NOT RAISE – PRESERVATION OF ISSUE THAT STATE RAISED – FOURTH AMENDMENT – EXCLUSIONARY RULE – FRUIT OF POISONOUS TREE – EXCLUSIONARY RULE'S SCOPE – COMMON ENTERPRISE AMONG VEHICLE'S OCCUPANTS – CONTRABAND – CONTRABAND IN VEHICLE – WAIVER OF RIGHT TO JURY TRIAL – PRESERVATION OF ANY ISSUE AS TO WAIVER OF RIGHT TO JURY TRIAL – FORFEITURE – FORFEITURE OF RIGHT TO APPELLATE REVIEW OF ANY ISSUE AS TO WAIVER OF RIGHT TO JURY TRIAL – PLAIN ERROR REVIEW – KNOWINGLY – KNOWING WAIVER – ON-THE-RECORD DETERMINATION OF KNOWLEDGE OF A JURY TRIAL – HARMLESS ERROR

Facts:

Based on a not guilty agreed statement of facts, the Circuit Court for Montgomery County convicted Bashawn Montgomery Ray, appellant, of conspiracy to commit theft of property with a value of at least $1,000 and making a false statement when under arrest. The circuit court sentenced appellant to ten years' imprisonment concurrent with pre-existing sentences, with all but four years suspended, for conspiracy to commit theft; six months' imprisonment concurrent for making a false statement when under arrest; and four years' supervised probation.

At a hearing on a motion to suppress, the State offered evidence that a law enforcement officer observed a black Ford Expedition that had headlamps that were emitting a blue color. Aware of a statute that mandated white headlamps, the officer initiated a traffic stop of the Expedition and asked its driver to exit the Expedition. The driver complied.

After the driver exited the Expedition, another officer approached the Expedition and spoke with its passengers, including appellant, who was sitting in the backseat. The officer asked where the passengers were coming from and where they were going. After every question that the officer asked, the Expedition's passengers would all look at each other and then one of them would respond with an answer. The officer asked the Expedition's passengers to exit the vehicle.

Appellant and the other passenger in the backseat immediately exited the vehicle, but the frontseat's passenger started moving and reaching around, which made the officer nervous. The officer asked the frontseat's passenger once again to exit the Expedition. The frontseat's passenger did not get out of the Expedition. The officer walked around to the Expedition's passenger side and, for the third time, asked the frontseat's passenger to exit the vehicle. The

frontseat's passenger said that it was cold out and that she needed to grab her jacket. The frontseat's passenger grabbed her jacket from the floor that was directly behind her seat before starting to exit the Expedition. The officer asked the frontseat's passenger if there were any weapons in her jacket, and the frontseat's passenger replied "no." The officer asked the frontseat's passenger if he could search the jacket to make sure, and the frontseat's passenger replied "yes." The officer found a large wallet, which he removed from the jacket. The officer asked the frontseat's passenger if it was her wallet, and she replied "yes." The officer asked if the frontseat's passenger's identification was in the wallet, and she replied "no." The officer asked if he could search the wallet to make sure, and the frontseat's passenger replied affirmatively. The officer saw inside the wallet a stack of credit cards that appeared to be fake. He started pulling them out and, one by one, and he would say the name on the credit card and ask the frontseat's passenger, "who's this person?" Every time that the officer showed a credit card to the frontseat's passenger, she said that she did not know who the person was whose name was on the credit card.

The not guilty agreed statement of facts established that the credit cards were counterfeited; that appellant had used the counterfeited credit cards to make purchases; and that, while under arrest, appellant gave a fake name to law enforcement officers.

On appeal, appellant contended that the circuit court erred in: (I.A) finding that law enforcement had reasonable articulable suspicion to initiate a traffic stop of the vehicle in which appellant was a passenger; (I.B.) finding that law enforcement officers had probable cause to arrest appellant; (II) determining that appellant knowingly waived the right to a jury trial, and in failing to announce its determination on the record pursuant to Maryland Rule 4-246(b).

Held: Affirmed.

An appellate court's review of a trial court's denial of a motion to suppress is based on the record that was created at the suppression hearing, and is a mixed question of law and fact. An appellate court reviews the trial court's findings of fact only for clear error, giving due weight to the inferences fairly drawn by the trial court and viewing the evidence and inferences reasonably drawn therefrom in a light most favorable to the party prevailing on the motion. Legal conclusions are not afforded deference and are reviewed *de novo*. The appellate court reviews *de novo* the conclusions of the trial court as to whether reasonable, articulable suspicion justified a traffic stop, as this is a question of law. The appellate court undertakes its own independent constitutional appraisal of the record by reviewing the law and applying it to the case's facts.

A law enforcement officer has reasonable articulable suspicion to initiate a traffic stop where a vehicle is being driven contrary to the laws governing the operation of vehicles. A violation of any statute of the Transportation Article of the Code of Maryland–even a statute that concerns a vehicle's equipment rather than moving violations–provides a law enforcement officer with reasonable articulable suspicion to initiate a traffic stop.

In determining whether a law enforcement officer had reasonable articulable suspicion to initiate a traffic stop, a court should consider only the events that led to the initial traffic stop. What the law enforcement officer did or did not do after the initial traffic stop–including what type of citations, if any, that the law enforcement officer issued to the vehicle's driver–is not dispositive of reasonable articulable suspicion.

A law enforcement officer's belief in reasonable articulable suspicion to initiate a traffic stop need not be ultimately proven correct. A traffic stop's fundamental purpose is to confirm or dispel reasonable articulable suspicion.

Because probable cause is a higher standard than reasonable articulable suspicion, a trial court, by definition, finds that a law enforcement officer had reasonable articulable suspicion to initiate a traffic stop by finding that the law enforcement officer had probable cause to initiate the traffic stop.

A trial court's determination of probable cause for a warrantless arrest is entitled to deference, and, if an appellate court determines that there was a substantial basis for the trial court to conclude that there was probable cause, then the trial court's determination will not be disturbed.

Pursuant to Maryland Rule 8-131(a), to be preserved for appellate review, an issue simply needs to have been "raised in or decided by the trial court," regardless of which party raised the issue. Despite not having raised the issue in the trial court, a defendant may argue, on appeal, an issue that only the State raised in the trial court.

The Fourth Amendment's exclusionary rule applies to the fruit of the poisonous tree–that is, evidence that results from law enforcement officers' unconstitutional actions. The Fourth Amendment's exclusionary rule does not apply to evidence that law enforcement officers properly recovered before a defendant's arrest.

A law enforcement officer has probable cause to arrest all of a vehicle's occupants where the vehicle contains contraband in a location that is accessible to all of the vehicle's occupants. Probable cause to arrest all of the vehicle's occupants is not extinguished where one of the vehicle's occupants claims ownership of the contraband. Suspicious behavior by the vehicle's occupants bolsters the probability of a common enterprise among the vehicle's occupants.

A defendant forfeits the right to appellate review of any issue as to the waiver of the right to a jury trial where the defendant's first complaint arises on appeal.

Plain error review is an extraordinary phenomenon, and is an especially tenuous remedy where, on appeal, a defendant fails to acknowledge forfeiture or to request plain error review.

Maryland Rule 4-246(b) requires that a defendant's waiver of the right to a jury trial must be "made knowingly[.]" The defendant's waiver of the right to a jury trial is knowing where the record shows that the defendant, who is represented by counsel, has some knowledge of what a

jury trial entails. Such knowledge must include: (1) that a jury is comprised of twelve persons, and (2) that the defendant is presumed innocent–or, in other words, the defendant would not be convicted until proven guilty beyond a reasonable doubt. To determine whether or not the defendant knowingly waived the right to a jury trial, an appellate court may consider not only oral exchanges in the trial court, but also any documents in the record that the defendant signed.

Maryland Rule 4-246(b) provides in pertinent part: "[A trial] court may not accept [a] waiver [of the right to a jury trial] until . . . the [trial] court determines and announces on the record that the waiver is made knowingly[.]" Although Maryland Rule 4-246(b) provides the procedures for waiver of the right to trial by jury, the ultimate inquiry regarding the validity of a waiver is whether or not there has been an intentional relinquishment or abandonment of a known right. A trial court complies with Maryland Rule 4-246(b)'s procedural requirements by stating, on the record and in an intelligible form, its determination that a defendant has knowingly waived the right to a jury trial. The trial court's determination may be in the form of a leading question rather than a declarative sentence. Any error by the trial court in following Maryland Rule 4-246(b)'s procedural requirements is harmless beyond a reasonable doubt where the error does not prejudice the defendant.

Karl Marshall Walker, Jr. v. State of Maryland, No. 2733, September Term 2010, filed June 28, 2012. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2012/2733s10.pdf

CRIMINAL LAW AND PROCEDURE – CRIMINAL OFFENSES – SEXUAL CRIMES – SEXUAL ABUSE OF A MINOR

CRIMINAL LAW AND PROCEDURE – SEARCHES AND SEIZURES – REVIEW OF MOTION TO SUPPRESS

CRIMINAL LAW AND PROCEDURE – SEARCHES AND SEIZURES – REASONABLE EXPECTATION OF PRIVACY

Facts:

Appellant, Karl Marshall Walker, was indicted in the Circuit Court for Howard County for sexual abuse of a minor and attempted sexual abuse of a minor. The circuit court denied appellant's motion to suppress evidence seized from the desk he used while employed as an assistant to the special education teachers at an elementary school. Following a bench trial, the court convicted appellant of both charges and imposed a sentence of thirteen years, with all but seven years suspended and five years of supervised probation. Appellant timely appealed, challenging the warrantless search of the desk and the sufficiency of the evidence to convict of sexual abuse of a minor.

Held: Affirmed.

The Court first addressed appellant's challenge to the circuit court's denial of his motion to suppress. Appellant challenged the admissibility of notes from the victim that police found in a box in an unlocked desk at school. Appellant was assigned the desk, but it was owned by the school system and was located in a large, open, well-traversed room that connected several classrooms. Special education assistants used other desks in the room. Additionally, students and faculty routinely passed the desk, and after-school programs often held events in the room. Finally, labels on the desk drawers suggested that the drawers contained school-related materials for communal use, rather than appellant's personal, private items.

Applying Fourth Amendment precedent, the Court held that, a public sector employee may have a reasonable expectation of privacy in his or her workplace, but under the circumstances presented, appellant did not have a reasonable expectation of privacy in the desk. *See O'Connor v. Ortega*, 480 U.S. 709, 716-18 (1987). The circuit court's factual findings were not clearly erroneous, and the Court upheld the constitutionality of the search and seizure in its own *de novo* constitutional analysis. *Williamson v. State*, 413 Md. 521, 531-32 (2010).

Addressing appellant's challenge to the sufficiency of the evidence, the Court recited the State's evidence, including the multitude of notes and letters that appellant and the eight year old victim exchanged. The victim's teachers testified that appellant was "friendly" with all students, but paid particular attention to the victim. The victim's mother detailed how she found the papers from appellant in her daughter's backpack. She also described her daughter being upset and displaying temper tantrums when they discussed appellant.

Sexual abuse of a minor, codified in Md. Code (2002), § 3-602 of the Criminal Law Article, is "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." The Court reviewed case law addressing sexual abuse of a minor, noting that there is no specific intent or special *mens rea* requirement, but that prior cases addressed varieties of physical contact with a minor child. *See e.g.*, *Crispino v. State*, 417 Md. 31, 45 (2010) (french kissing a minor for ten minutes while on top of her in bed); *Tribbitt v. State*, 403 Md. 638, 642 (2008) (teacher and coach grabbing a student's buttocks and inner thigh, rubbing her vaginal area, and sticking his hand down her pants). Nevertheless, "the General Assembly, through its various changes to the language of the [child sexual abuse] statute, consistently expanded [the statute's] scope and applicability to better achieve the goal of protecting 'children who have been the subject of abuse.'" *Degren v. State*, 352 Md. 400, 419 (1999) (quoting 1973 Md. Laws, Chap. 835 (title clause)). In *Brackins v. State*, 84 Md. App. 157, 162 (1990), we defined "sexual exploitation" to have occurred when "the parent or person having temporary or permanent custody of a child took advantage of or unjustly or improperly used the child for his or her *own* benefit." The benefit need not be for sexual gratification or sexual benefit.

The circuit court relied on the interactions between appellant and the victim, the content and sheer volume of the notes and letters, and the obvious emotional distress the victim suffered as a result of appellant's actions. It was undisputed that appellant had temporary care or custody of the victim. The Court held that the State presented sufficient evidence that appellant "took advantage of or unjustly or improperly used [the victim] for his . . . *own* benefit[,]" as the sheer volume of communications evidenced a fascination or attachment of a sexual nature. Moreover, appellant's actions clearly had an extensive emotional or psychological impact on the victim, which the General Assembly sought to prevent by enacting and amending the sexual abuse of a minor statute. The magnitude of appellant's conduct provided sufficient evidence for the circuit court to convict appellant of sexual abuse of a minor.

Bashawn Moneak Montgomery v. State of Maryland, No. 1063, September Term 2011, filed July 2, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/1063s11.pdf

CRIMINAL LAW & PROCEDURE – JURY – JURY'S SWEARING – SWEARING OF JURY – JURY'S OATH – ADMINISTRATION OF JURY'S OATH – DETERMINING WHETHER OR NOT JURY WAS SWORN – PRESUMPTION OF REGULARITY – PRESUMPTION OF REGULARITY OR CORRECTNESS – PRESERVATION – STRUCTURAL ERROR – SUFFICIENCY OF EVIDENCE – PRESERVATION OF SUFFICIENCY OF EVIDENCE – SUFFICIENT EVIDENCE OF ROBBERY – SUFFICIENT EVIDENCE OF SECOND-DEGREE ASSAULT – SUFFICIENT EVIDENCE OF OBTAINING PROPERTY BY USE OF A STOLEN CREDIT CARD – MULTIPLICITY – PRESERVATION OF MULTIPLICITY – SINGLE LARCENY DOCTRINE – MERGER – MERGER OF CONVICTIONS FOR SENTENCING PURPOSES – REQUIRED EVIDENCE TEST – ELEMENTS TEST – SAME EVIDENCE TEST – BLOCKBURGER TEST – RULE OF LENITY – PRINCIPLE OF FUNDAMENTAL FAIRNESS

Facts:

A jury in the Circuit Court for Washington County convicted Bashawn Moneak Montgomery, appellant, of one count of robbery, one count of second-degree assault, two counts of theft of property with a value of at least $500, two counts of obtaining property with a value of over $500 by use of a stolen credit card, and two counts of unauthorized use or disclosure of a credit card number. The circuit court sentenced appellant to fifteen years' imprisonment, with all but ten years suspended, for robbery; fifteen years' imprisonment consecutive, with all but ten years suspended, for the first count of obtaining property by use of a stolen credit card; fifteen years' imprisonment concurrent, with all but ten years suspended, for the second count of obtaining property by use of a stolen credit card; eighteen months' imprisonment concurrent for each of the two counts of unauthorized use or disclosure of a credit card number; and three years' supervised probation, with $2,120 in restitution as a condition of probation.

At trial, the State offered evidence that appellant was involved in the robbery of a jewelry store in Hagerstown, Maryland. Appellant entered the jewelry store with two companions, and told a cashier to stand in a certain spot and to keep her hands above the counter, where he could see them. Whenever the cashier moved her hands, appellant became hostile. Appellant showed the cashier a piece of paper with a credit card number and an expiration date written on it, and demanded that the cashier use the credit card number to make a purchase of two rings. Although the cashier was not supposed to charge a credit card number without seeing the customer's credit card or identification–and the cashier continuously asked appellant for his identification, telling him that she could not do it–appellant kept saying, "You're going to do this" and told the cashier that she had to do it. Appellant's voice was very angry and very strong and loud. Because of appellant's actions, the cashier was scared for her life and did not feel that she was free to leave

the area. The credit card number worked, and appellant left the store with the two rings. After an investigation by The jewelry store's corporate office, the credit card number was discovered not to have belonged to appellant, and the charges were reversed, leaving The jewelry store without the rings or the payment.

At trial, after *voir dire*, a twelve-member jury was selected. The circuit court picked a foreperson, dismissed the jury panel's remainder, and took a brief recess. The circuit court resumed, ordered the witnesses sequestered, addressed a defense motion, and summoned the jury to begin opening statements. The swearing of the jury appeared nowhere in the record. The docket entries said nothing about whether or not the jury was sworn. The record reflected that neither party requested that the jury be sworn, nor raised any issue as to the jury not having been sworn. After hearing all of the evidence and deliberating, the jury delivered a verdict.

On appeal, appellant contended that: (I) The circuit court erred in purportedly failing to swear the jury; (II) The evidence was insufficient to support the convictions for robbery, second-degree assault, and obtaining property by use of a stolen credit card; and (III) Appellant was improperly convicted of and sentenced for two separate counts each of theft, unauthorized use or disclosure of a credit card number, and obtaining property by use of a stolen credit card.

Held:

The Court of Special Appeals reversed the second conviction for theft and the second conviction for obtaining property by use of a stolen credit card, and vacated the second sentence for obtaining property by use of a stolen credit card. The Court affirmed all other sentences and judgments of conviction.

Maryland Rule 4-312(g)(1) provides, in pertinent part: "The individuals to be impaneled as sworn jurors . . . shall be sworn." Maryland Rule 4-312(g)(1) represents the codification of a long-standing common law requirement.

There is a rebuttable presumption of regularity or correctness as to trial court proceedings. To rebut the presumption of regularity or correctness, a defendant has the burden of producing a sufficient factual record for an appellate court to determine whether a variation from the regular or correct trial court proceedings occurred.

The rebuttable presumption of regularity or correctness as to trial court proceedings applies to the issue of whether or not the jury in a criminal case was sworn. A defendant fails to rebut the presumption, and demonstrate or show that the jury in a criminal case was unsworn, where there is merely an absence in the record of any information negating the administration of the oath to the jury.

Maryland Rule 8-131(a) provides in pertinent part: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided

by the trial court[.]" An unpreserved structural error, like any other unpreserved error, is not automatically reversible, but, instead, is subject to plain error review.

In reviewing a challenge to the sufficiency of the evidence to support a conviction, an appellate court views the evidence in the light most favorable to the State and determines whether any rational fact-finder could have found the crime's essential elements beyond a reasonable doubt. The appellate court defers to the fact-finder's decisions on which evidence to accept and which inferences to draw where the evidence supports different inferences. The appellate court defers to all reasonable inferences that the fact-finder draws, regardless of whether the appellate court would have chosen a different reasonable inference.

Pursuant to Md. Code Ann., Crim. Law Art. § 3-402, evidence is sufficient to support a finding of intimidation, as an element of robbery, where a defendant approaches a victim and–using a threatening tone or threatening body language, in such a way that would put an ordinary, reasonable person in fear of bodily harm–demands that the victim give the defendant goods or money to any value.

Pursuant to Md. Code Ann., Crim. Law Art. § 3-203, evidence is sufficient to support a conviction for second-degree assault where a defendant enters a victim's workplace and–using a threatening tone or threatening body language, in such a way that the victim is placed in reasonable apprehension of an imminent battery–demands that the victim take a certain action within the scope of the victim's employment.

Pursuant to Md. Code Ann., Crim. Law Art. § 8-206(a), evidence is sufficient to support a conviction for obtaining property by use of a stolen credit card where the evidence shows that a defendant obtained goods or services by using, without the credit cardholder's permission, a credit card number that did not belong to the defendant. Md. Code Ann., Crim. Law Art. § 8-201(c)(2)(iii)1 provides in pertinent part: "'Credit card' includes . . . [an] account number[.]" A defendant obtains property by use of a stolen credit card whether the defendant uses only a credit card number, or an actual or purported credit card.

An appellate court has the discretion to review a defendant's claim of multiplicity–the charging of the same offense in more than one count–where the defendant does not object in the trial court.

Multiplicity–the charging of the same offense in more than one count–arises in one of two situations. (1) A statute–or a portion thereof–proscribes certain conduct, and the issue is whether the defendant's conduct constitutes more than one violation of this proscription. (2) Two statutes–or two portions of a single statute–proscribe certain conduct, and the issue is whether a defendant can be punished twice because the defendant's conduct violates both proscriptions.

Multiplicity–the charging of the same offense in more than one count–affects the defendant at three stages: (1) multiplicity in the charging document, (2) multiple convictions for the same offense, and (3) multiple sentences for the same offense.

Pursuant to the single larceny doctrine, a defendant who takes multiple items commits only one theft where the separate takings were part of a single scheme or continuing course of conduct. If so, only one offense may be charged. The Court held that, pursuant to the single larceny doctrine, appellant should have received only one conviction each for theft and obtaining property by use of a stolen credit card.

Pursuant to Md. Code Ann., Crim. Law Art. § 8-214(a), a defendant commits two punishable offenses–and can be charged, convicted, and sentenced twice–where the defendant, without the credit cardholder's authorization, discloses a credit card number to a third party, who then, without the credit cardholder's authorization, attempts to make a purchase by using the stolen credit card number. The acts of disclosure and use are distinct. The defendant commits both unauthorized disclosure of a credit card number (through the disclosure to the third party) and unauthorized use of a credit card number (through the use).

An appellate court has the discretion to review the trial court's failure to merge convictions for sentencing purposes where the defendant does not object in the trial court.

Pursuant to the required evidence test–also known as the elements test, the same evidence test, and the Blockburger test–one conviction should merge with another conviction for sentencing purposes where the second offense requires proof of an additional fact, so that all of the first offense's elements are present in the second offense. One conviction does not merge with another conviction for sentencing purposes where each offense requires proof of a fact which the other offense does not, so that each offense contains an element that the other offense does not.

Under the principle of fundamental fairness, where the required evidence test–also known as the elements test, the same evidence test, and the Blockburger test– is not satisfied, one conviction will not merge with another conviction for sentencing purposes where an act by the defendant resulted in harm to two victims.

Pursuant to the rule of lenity, even if the required evidence test–also known as the elements test, the same evidence test, and the Blockburger test– is not satisfied, a trial court may not merge one conviction with another conviction for sentencing purposes where the General Assembly intended the two offenses to be punished separately.

Princeton Feaster v. State of Maryland, No. 408, September Term 2011, filed June 29, 2012. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2012/408s11.pdf

FOURTH AMENDMENT – SEARCH AND SEIZURE – FOURTH AMENDMENT STANDING – WARRANTLESS SEARCH OF PAROLEE OR PROBATIONER – DIMINISHED EXPECTATION OF PRIVACY – SEARCH INCIDENT TO ARREST – *CHIMEL* PERIMETER – SCOPE OF SEARCH – EXIGENCY – HARMLESS ERROR

Facts:

Princeton Feaster ("Feaster") appealed his conviction by a jury in the circuit court for Wicomico County of a variety of narcotics offenses.

The Wicomico County Narcotics Task Force was completing surveillance of a Days Inn in Salisbury, Maryland after it had received several tips that drugs were being sold on premises. During this surveillance, a corporal spotted a suspected drug purchaser sitting in the Days Inn parking lot, attempting to inject heroin. When questioned, the drug purchaser stated that he had purchased the drugs at the Days Inn from an individual named "Ditty," with whom the corporal was familiar and whom the corporal knew to be Feaster. Feaster was a parolee.

The Days Inn management confirmed that someone matching a police file photo of Feaster had been regularly in and out of Room 133. Room 133 was rented by an individual other than Feaster. After an hour of surveying Room 133, the State Apprehension Team was called in, and a standoff ensued for approximately ten minutes. Three Squad members finally entered the room, and as one arrested Feaster, the other two scanned the area immediately surrounding Feaster to ensure that he did have access to a weapon. In the course of securing the room, the officers looked into two black bags on which the suppression hearing focused.

The first bag was sitting on top of the desk located next to the entrance of Room 133, approximately 16 feet from where Feaster was placed under arrest. The second bag was located on top of a bed and was approximately 7 feet from where Feaster was placed under arrest. Once Feaster was led out of Room 133, the officers opened the bags. The bags contained heroin, zip-type baggies, stamp pads, wax baggies, wooden stamps, and pocket scales. The officers also recovered three stacks of money and two cell phones from the hotel room.

The jury convicted Feaster of various narcotics offenses.

On appeal, Feaster alleged that the motions judge erroneously denied Feaster's pre-trial motion to suppress physical evidence seized in alleged violation of the Fourth Amendment.

Held: Affirmed.

The Court first noted that while the State initially argued an abandonment theory at the suppression hearing as justification for opening the bags, it was quickly dismissed as being implausible by the motions judge.

The Court next noted that Feaster lacked standing to bring a Fourth Amendment challenge because he was not the renter of Room 133 and therefore had no proprietary interest in the room. While Feaster might have enjoyed derivative standing, had he shown that he was a legitimate guest in the room at the renter's invitation, this derivative standing would have been overcome if it was shown, as it surely would have been, that Feaster was there for the criminal purpose of packaging and selling narcotic drugs. Because, however, the State did not challenge Feaster's standing, the Court was required to proceed to the merits of the case.

The Court began by explaining the diminished Fourth Amendment protections afforded to a parolee. The Court traced the relatively recent development of this concept, beginning with the Supreme Court's decision in *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L.Ed.2d. 497 (2001), which held that, under a balancing test employing the totality of the circumstances, a warrantless search of a *probationer* was legitimate because the defendant's status as a probationer was a salient circumstance. The Court noted that the Supreme Court stated that the balancing was between the governmental interest being served by the search and the privacy interest of the individual in avoiding the search. The Court next noted that the requirement for searching the home of a probationer is merely reasonable suspicion that evidence of a crime will be found, a much-diluted Fourth Amendment protection.

The Court then discussed the followup case, *Samson v. California*,547 U.S. 843, 126 S. Ct. 2193, 165 L.ed.2d 250 (2006), which held that a parolee suspect's 4th Amendment rights were not violated when he was searched even without an outstanding warrant, then arrested for a baggie of methamphetamine found on him. The Supreme Court held that parolees maintain even less of an expectation of privacy than do probationers because a parolee's status is similar to that of a prisoner's. Samson stands for the proposition that a warrantless, suspicionless search by a law enforcement agent of a released prisoner does not necessarily offend the parolee's Fourth Amendment reasonable expectation of privacy. The Court next noted that the Maryland Court of Appeals acknowledged the *Knights-Samson* line of cases in *King v. State*, __ Md. __, __ A.3d __ (No. 68, September Term, 2011, filed on April 24, 2012). The Court then stated that the case *sub judice* did not deal with a suspicionless search: it dealt with, at minimum, an abundant reasonable suspicion that Feaster was engaged in criminal activity. The search, therefore, was justified under the balancing test set forth in *Knights*.

The Court then addressed the possibility of an alternative holding under a search incident to lawful arrest justification. The Court first stated that every search must overcome two obstacles to pass Fourth Amendment muster: (1) the initial intrusion must be justified and (2) the scope of the intrusion must be permissible. The purpose of the second obstacle is to prevent a fishing expedition by police. Turning its attention to the permissible geographic scope of a search incident to arrest,

the Court discussed the dimensions of the perimeter set forth in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed.2d 685 (1969), the seminal case defining permissible scope of searches incident to lawful arrest. A search incident to arrest is aimed at two exigencies - weapons and evidence. The permissible perimeter therefore includes the area within the reach, lunge, or grasp of the arrestee: the arrestee's wingspan. The size of the perimeter varies based on the age, size, and physical prowess of the arrestee.

The Court noted that in the case at bar, there were two sets of entries: one when the officers first entered Room 133 to arrest Feaster, during which the officers first looked into the two bags at issue, and the other when they returned after escorting Feaster out of the room to retrieve the bags and contraband therein. The Court stated that the initial looking into of the bags for weapons was contemporaneous with the arresting process, and would, therefore, qualify as a legitimate search incident to lawful arrest. The Court concluded that the bag within 7 feet of Feaster was definitively within Feaster's wingspan. The Court noted that while the bag 16 feet away was a more difficult call, it would not overcome the deference an appellate court affords a motions court's fact-finding decisions.

The Court stated that while a search incident to arrest theory would not justify the second entry because the twin exigencies were no longer operative once Feaster was placed under arrest and escorted out of Room 133, the second set of intrusions was justified by the Plain View Doctrine. Because the initial intrusion was a prior valid intrusion by virtue of search incident law, and because during the course of those valid intrusions, the police saw drugs in plain view coupled with probable cause to believe that they were, indeed, drugs, the subsequent Plain View Doctrine seizure of the drugs was *ipso facto* justified.

The Court finally noted, *arguendo*, that if it was wrong in holding the bag 16 feet away was within Feaster's *Chimel* perimeter, the error would be harmless. Feaster was convicted of possession of heroin with the intent to distribute and of the possession of drug paraphernalia. The bag only 7 feet away contained both of these items. The addition of the more minimal contents of the second bag had no effect whatsoever of the outcome of the case.

Long Green Valley Association, et al. v. Prigel Family Creamery, et al., No. 350, September Term 2011, filed June 29, 2012. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2012/0350s11.pdf

ENVIRONMENTAL LAW – ZONING & LAND USE – AGRICULTURE & FARMLAND

ADMINISTRATIVE LAW – JUDICIAL REVIEW – STATUTORY INTERPRETATION

Facts:

By opinion and order issued on March 25, 2010, the Baltimore County Board of Appeals ("Board") upheld the Baltimore County Deputy Zoning Commissioner's grant of a petition for special exception filed by appellee, Prigel Family Creamery ("Creamery"). The Creamery sought a permit for "a Farm Market; or alternatively for a Farmer's Roadside Stand" pursuant to the Baltimore County Zoning Regulations ("BCZR"), in order to sell milk, butter, yogurt, ice cream, jams, beef, pork, chicken, eggs, and crafts, with about 95% of the merchandise being dairy products. Appellants, Long Green Valley Association, Carol Trela, John Yoder, Susan Yoder, and Charlotte Pine, opposed the Creamery's petition, arguing that the County Council, by passing Bill 34-09, explicitly prohibits the sale of dairy products at a farm market or farmer's roadside stand. Appellants further averred that the use intended by the Creamery is commercial in nature and inconsistent with the use of land that is subject to an agricultural easement. Following the Board's grant of the Creamery's petition, appellants and the People's Counsel for Baltimore County filed motions for reconsideration, which the Board denied.

On July 16, 2010, appellants filed a petition for judicial review in the Circuit Court for Baltimore County. After holding a hearing on January 14, 2011, the court issued a memorandum opinion and order on April 5, 2011, affirming the Board's decision. On April 21, 2011, appellants filed this appeal.

Held: Affirmed.

The circuit court acted properly in upholding the Board's decision to grant the Creamery's petition for special exception to establish a farm market or a farmer's roadside stand. Amendments to the BCZR brought on by Bill 34-09 demonstrate the County Council's intent to allow operators of farm markets and farmer's roadside stands to sell dairy products on their premises.

Victoria Gillespie v. David Gillespie, Nos. 960 and 2153, September Term 2011, filed June 29, 2012. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2012/0960s11.pdf

EVIDENCE – BASIS OF EXPERT OPINION – ADMISSIBILITY – FAMILY LAW – CUSTODY MODIFICATION – BEST INTEREST ATTORNEY'S FEES

Facts:

Victoria Gillespie ("Mother") and David Gillespie ("Father") were divorced on October 5, 2009. Following the divorce, the parties, pursuant to a voluntary agreement, had joint legal and shared physical custody of their three children. On June 9, 2010, Father filed a motion to modify custody. The custody modification trial took place on April 19, 20, and 22, 2010. The circuit court rendered its opinion from the bench at the conclusion of trial and subsequently issued a written order on May 5, 2010. The order modified the physical access of the children, granting significantly more access to Father than Mother. The court also modified legal custody to grant Father tie-breaking authority in the event of an impasse. The circuit court also issued an order requiring Father to pay the fees of the children's best interest attorney and the court appointed evaluator.

At trial, Father argued that a material change in circumstances had occurred that justified a modification in custody. After the divorce, a great deal of tension developed between Mother and the couple's son. Various incidents occurred where, as a result, the son reported to his psychologist that he felt unwelcome in his mother's home. The psychologist testified that the son was much happier and calmer when he was with his father and was much more stressed when he was with his mother.

There was also evidence presented that indicated Mother's mental health deteriorated since the divorce. Mother displayed erratic behavior, including one incident where she assaulted Father's girlfriend at a youth baseball game in front of the children. The son's psychologist also reported that the parents initially were able to communicate and co-parent effectively after the divorce, but they were no longer able to do so. The court appointed evaluator also reported that Mother had a tendency to minimize her role in the conflict. The circuit court found that a material change in circumstances had occurred and that it was in the best interests of the children to modify custody to grant Father significantly more access than Mother.

One issue that arose at trial was the admissibility of a report prepared by Dr. R. Allen Lish (the "Lish report"). The Lish Report was prepared pursuant to a voluntary evaluation in April 2009 and was entirely independent of any litigation. In that report, Dr. Lish diagnosed Mother with bipolar disorder. Despite the fact that the circuit court had ordered that the court appointed evaluator be provided with all of Father's and Mother's medical records, the evaluator did not receive the Lish Report. It was not included in the records of Mother's treating psychiatrist, Dr. Halpern, and Dr. Halpern's office told the evaluator that the report had been returned to Mother. Mother told the

evaluator that she did not have the report. Father had also attempted to depose Dr. Lish, but Dr. Lish did not appear; Father later learned that Dr. Lish had moved to North Carolina and had taken all of his records with him. The evaluator was ultimately able to locate Dr. Lish in North Carolina and received a copy of the report on the first day of trial. The court concluded that the evaluator should have been provided with the Lish Report and that it was appropriate for her to review it. The court also allowed the Lish Report into evidence to illuminate the basis of the evaluator's opinion.

On appeal, Mother argued that the circuit court erred by allowing the Lish Report into evidence given that it included inadmissible hearsay. Father responded that the court was within its discretion to admit the Lish Report as the basis for the evaluator's opinion and that the circuit court did not consider the Lish Report as substantive evidence. Father also pointed out that Mother herself had testified at trial that she had previously been diagnosed with bipolar disorder, and therefore, her bipolar diagnosis was already in evidence through a different source.

After trial, the children's best interest attorney filed petitions for fees for the court appointed evaluator and for himself. Both parties filed responses to the petitions and included financial information with their responses. The court ordered Father to pay the court appointed evaluator's fees in the amount of $3,669 and the best interest attorney's fees in the amount of $23,237.50. The court did not hold a hearing on the matter nor did it state the basis for its determinations in its orders. Father appealed the orders, arguing that the court failed to consider the appropriate factors in reaching its decision. The Court of Special Appeals elected to treat Father's appeal as a cross-appeal.

Held: Order modifying custody affirmed. Order requiring Father to pay fees of best interest attorney and court appointed evaluator vacated. Case remanded for the limited purpose of determining fees in accordance with the statute.

The Court of Special Appeals held that the circuit court did not err in finding a material change of circumstances justifying a modification of custody. Courts must engage in a two-step process when presented with a request to change custody. First, the court must assess whether there has been a material change in circumstance. If the court finds a material change of circumstances, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody. The term "material" relates to a change that may affect the welfare of a child. Here, the circuit court did not err in finding a material change in circumstances when there was significant evidence that Mother's mental health had deteriorated since the original custody agreement.

Regarding the Lish Report, the Court of Special Appeals held that the circuit court did not err in admitting the Lish Report into evidence to illuminate the basis for the court appointed evaluator's opinion. Otherwise inadmissible evidence may, under Maryland Rule 5-703(b), be properly admitted if it is relied upon by an expert or is necessary to illuminate testimony. Such evidence is admissible only for the purpose of evaluating the validity and probative value of the expert's opinion. In the instant case, the Court of Special Appeals determined that there was no indication that the circuit court considered the Lish Report as substantive evidence and it was properly admitted for the

purpose of evaluating the expert's opinion. Moreover, the Court noted that even had the Lish Report been admitted in error, such error was harmless given that Mother herself had testified that she had previously been diagnosed with bipolar disorder.

The Court of Special Appeals vacated the orders requiring Father to pay the fees of the best interest attorney and court appointed evaluator. The circuit court did not state the basis for its determination that Father should pay the fees, and accordingly, the Court of Special Appeals was unable to properly review the circuit court's decision.

Additionally, the Court of Special Appeals noted that although § 1-202 of the Family Law Article ("FL")(governing fees for best interest attorneys) does not set forth specific factors a court should consider in awarding counsel fees for a best interest attorney, the factors set forth in FL § 12-103(b), are relevant to the analysis and should be considered by the circuit court. Accordingly, the court vacated the orders requiring Father to pay the fees of the best interest attorney and court appointed evaluator and remanded for a determination of fees in accordance with the statute.

Daniel J. Barufaldi v. Ocean City, Maryland Chamber of Commerce, Inc. et al., No. 270, September Term 2011, filed June 29, 2012. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/0270s11.pdf

ATTORNEYS FEES – MARYLAND WAGE PAYMENT AND COLLECTION LAW

Facts:

The Chamber of Commerce (the "Chamber") hired Mr. Barufaldi in 2005 to be its executive director. After a dispute arose regarding the Chamber's failure to pay Mr. Barufaldi's wages pursuant to his employment contract, Mr. Barufaldi filed suit alleging breach of contract and violations of the Maryland Wage Payment and Collection Law (the "WPCL"). After a three-day jury trial, the jury found in favor of Mr. Barufaldi, finding that: (1) the Chamber breached its employment contract with Mr. Barufaldi; (2) Mr. Barufaldi was damaged as a result of the contract breach in the amount of $60,000; (3) the Chamber violated the WPCL; (4) the Chamber's failure to pay wages to Mr. Barufaldi was not the result of a *bona fide* dispute; and (5) Mr. Barufaldi was not entitled to damages under the WPCL above the $60,000 in contract damages awarded. Mr. Barufaldi then filed a motion, pursuant to the WPCL, requesting $160,275.97 in attorneys' fees and costs. The circuit court denied the motion.

Both parties appealed to this Court. In *Barufaldi I*, this Court affirmed the circuit court's judgment in favor of Mr. Barufaldi, but we vacated the order denying Mr. Barufaldi's request for attorneys' fees. We noted that the circuit court gave no explanation regarding its reason for denying the motion for attorneys' fees, and thus, we could not "tell whether the court exercised discretion in making its ruling or, if it did, how it did." We stated: "Given that the jury made the predicate finding of willfulness on the part of the Chamber, and given the remedial purposes of the WPCL, it was incumbent upon the trial court to set forth particular circumstances militating against any award of fees in this case." We remanded for further proceedings, noting that where a jury finds no *bona fide* dispute, the "court may choose not to award fees for many reasons, but not on the basis that the wages in fact were withheld as a result of a bona fide dispute."

On remand, Mr. Barufaldi filed a supplemental motion for an award of attorneys' fees and costs, requesting additional attorneys' fees in the amount of $41,770.50 and costs in the amount of $11,125.86. The supplemental fees and costs were for legal services Mr. Barufaldi's counsel rendered in connection with the successful appeal.

In its written response, the Chamber argued that the circuit court should deny any request for fees or costs. It asserted that, in deciding whether to award fees, the court should adopt the factors, discussed *infra*, that federal courts use in determining whether to apply the fee-shifting provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). The Chamber asserted that application of the ERISA factors weighed against an award of fees.

With respect to one of the ERISA factors, the ability to pay, the Chamber attached the affidavit of Melanie Pursel, its Executive Director. In the affidavit, Ms. Pursel stated that "[a]ny meaningful award of fees and costs in this case would jeopardize in a very real sense the existence and continuing financial viability of the Chamber, which has existed as an important promoter of the business community for over fifty years." She stated that the Chamber, a private, non-profit entity organized to promote tourism and commerce in Ocean City, had not earned any net profit for over a decade, and that, to secure a stay of enforcement of the money judgment, the Chamber had to borrow $60,000 from a financial institution. On March 25, 2011, the circuit court denied the motion, concluding that the circumstances weighed against awarding attorneys' fees.

Held: Reversed and remanded.

The WPCL provides that a court "may" award attorneys' fees to a prevailing plaintiff. There is nothing in the legislative history of the WPCL that suggests that the General Assembly intended there to be a presumption that the plaintiff is entitled to such fees. Indeed, the legislative history shows that the General Assembly rejected an automatic award of attorneys' fees in favor of providing that the decision be discretionary.

That does not mean, however, that a trial court's discretion in determining whether to award fees is unlimited. The court must exercise its discretion liberally, in a manner that is consistent with the legislature's remedial purpose. Thus, in determining whether a fee award is appropriate, the court must focus on the purpose of the statute, which is "to provide a vehicle for employees to collect, and an incentive for employers to pay, back wages." *Battaglia v. Clinical Perfusionists, Inc.*, 338 Md. 352, 364 (1995).

The circuit court applied the wrong legal standard in determining to deny attorneys' fees in this case, using a test employed by the federal courts in ERISA cases. This test is not relevant to the WPCL's goal of enabling claimants of unpaid wage violations to obtain counsel and receive access to justice. It is improper for a court to consider whether the employer acted in bad faith, given that the jury must determine whether the employer had a good faith basis to withhold wages. Similarly, the ability of the employer to pay is not an appropriate factor to consider. It would undermine the goal of the fee-shifting provision in the WPCL if an attorney approached to represent a claimant first had to investigate the employer's financial condition to determine the likelihood that attorneys' fees would be awarded if the employee prevailed in the lawsuit.

Martin McLaughlin v. Gill Simpson Electric, et al., Case No. 376, September Term 2011, filed June 29, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/0376s11.pdf

WORKERS' COMPENSATION ACT – PETITION TO REOPEN – WITHDRAWAL OF ISSUES – MODIFICATION OF DISABILITY AWARD – STATUTE OF LIMITATIONS PROVISION

Facts:

This case involves an order of the Circuit Court for Baltimore County affirming the Workers' Compensation Commission's (the "Commission") denial of a Petition to Reopen appellant's Workers' Compensation claim. Appellant sustained a compensable work-related injury to his back. Following treatment, a hearing was held as to the nature and extent of any permanent disability appellant suffered as a result of the injury. The Commission made findings as to appellant's disability and awarded appellant 100 weeks of payments, to be paid by appellees, Gill Simpson Electric and Zurich American Insurance Company. The last payment of compensation to appellant was July 27, 2004.

On February 15, 2005, appellant filed a Petition to Reopen accompanied by an Issue asking for Authorization of Medical Treatment. On the Petition to Reopen, appellant checked two boxes on a pre-printed form–one box labeled "[t]he claimant's permanent disability has increased" and another box labeled "Other." In the box labeled "Other," appellant included the following additional information: "The Claimant requires additional medical treatment." Appellees agreed medical treatment was causally related, reasonable and necessary, and appellant withdrew the Issue. During the next several years, various Issues arose between the parties regarding the payment and provision of medical treatment, which were resolved without a hearing. Each time, appellant withdrew the Issues and no hearing was held.

On October 22, 2009, appellant filed Issues with the Commission requesting a hearing on the issue of "Worsening–Back." Appellees filed an Issue with the Commission questioning whether appellant's claim was barred by Section 9-736 of the Labor and Employment Article of the Annotated Code of Maryland as the last compensation payment took place on July 27, 2004. After a hearing on January 14, 2010, the Commission found that appellant's Petition to Reopen for Worsening of Condition was barred by limitations, as appellant did not file the Issue until October 22, 2009, more than five years after the last compensation payment.

On February 4, 2010, appellant filed a Petition for Judicial Review. On September 24, 2010, appellant filed a motion for summary judgment. On November 1, 2010, appellees filed a response to the motion and a cross-motion for summary judgment. In the memorandum in support of the cross-motion, appellees argued that appellant's withdrawal of the Issue was tantamount to a withdrawal of the Petition to Reopen. On February 8, 2011, the circuit court held a hearing on the motions. On April 25, 2011, the circuit court issued an Opinion and Ruling, granting appellees'

cross-motion for summary judgment and affirming the Commission's order. The circuit court found that appellant's withdrawal of the Issue constituted a withdrawal of the Petition to Reopen.

Held: Affirmed.

Pursuant to Section 9-736(b)(3) of the Labor and Employment Article of the Annotated Code of Maryland, the Workers' Compensation Commission (the "Commission") may not modify an award unless the modification is applied for within five years after the latter of the date of the accident, the date of disablement, or the last compensation payment.

A request for modification of a previous award by the Commission pursuant to Title 9 of the Annotated Code of Maryland must comply with the Code of Maryland Regulations (COMAR), namely, COMAR 14.09.01.16, COMAR 14.09.01.12, and any other applicable regulation.

COMAR 14.09.01.16 provides that a claimant seeking modification of an award by the Commission shall file a Petition to Reopen specifically stating the facts and law upon which the claimant is relying as grounds for modification and shall comply with other regulations, including COMAR 14.09.01.12.

COMAR 14.09.01.12A, in turn, instructs that a claimant alleging permanent disability "shall file with the Commission an [I]ssue expressly claiming permanent disability."

Where a claimant files a Petition to Reopen within the five-year statute of limitations set forth in Section 9-736, in conjunction with Issues required by COMAR 14.09.01.12 and COMAR 14.09.01.16, and later withdraws the Issues, the withdrawal of the Issues constitutes a withdrawal of the Petition to Reopen.

Where a claimant files a Petition to Reopen accompanied by Issues requesting only continuing medical treatment, the party fails to expressly claim permanent disability as required pursuant to COMAR 14.09.01.02. The Issues are insufficient to support a petition to reopen based on increased disability.

Continuing medical treatment is different from increased permanent disability. As a result, a request for continuing medical benefits does not put the Commission or an employer/insurer on notice of an alleged increase in disability.

Where a claimant files a Petition to Reopen indicating an increase in disability and the need for continuing medical treatment, but files Issues requesting only continuing medical treatment–which are later withdrawn, the five-year statute of limitations set forth in Section 9-736 is not tolled as to the claim for permanent disability.

Bernard Dixon, etc., et al. v. Ford Motor Company, No. 536, September Term 2011, filed June 29, 2012. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2012/0536s11.pdf

STRICT LIABILITY – NEGLIGENCE – SUBSTANTIAL CONTRIBUTING FACTOR CAUSATION – MD. RULE 5-702 – SCIENTIFIC EVIDENCE – EXPERT OPINION – EPIDEMIOLOGICAL EVIDENCE

Facts:

Joan Dixon died of pleural mesothelioma on February 28, 2009, having initiated a suit against Ford and various other entities involved in the asbestos market, including the Georgia-Pacific Corporation ("GP"), Honeywell International, Inc., and the Union Carbide Corporation ("UCC"). Mrs. Dixon had been exposed to asbestos dust from her work on home construction and renovation projects using GP and UCC products. Appellants also alleged that asbestos in brake dust from Ford and Honeywell products had been transmitted to her on her husband's clothing and were a substantial contributing cause of her disease. Prior to trial, appellants settled with GP and UCC, who remained as nominal defendants to Ford's cross-claims as alleged joint tortfeasors. Ford moved *in limine* for a hearing to challenge appellants' proffered expert on the issue of causation, as well as to exclude the expert's testimony. The court denied Ford's motions at trial, along with certain objections Ford raised during the expert's testimony. Appellants' expert on causation testified that "every exposure to asbestos is a substantial contributing cause" of mesothelioma and did not provide any quantitative evidence or opinion regarding Mrs. Dixon's exposure and risk of disease, with and without exposure. On April 27, 2010, the jury returned a verdict awarding appellants a total of $15,000,000 in compensatory damages, which the court reduced to $6,065,000 in accordance with the non-economic damages cap of Maryland Code (2006), § 11-108 of the Courts and Judicial Proceedings Article. The court denied Ford's motions for new trial and JNOV, but ruled that the jury's verdict was inconsistent and revised the judgments against Ford and GP to adjust for the latter's contribution as a joint tortfeasor. The court entered its revised judgment in favor of appellants in the collective amount of $3,032,500.00, from which both appellants and Ford filed timely appeals.

Held: Vacated and remanded for new trial.

The generally accepted scientific theory of causation in epidemiology is probabilistic causation. Probabilistic causation is a model that states causal assertions as continuous conditional probabilities and, in epidemiology, measures the change in risk of harm with and without exposure to a causal agent. By contrast, "substantial contributing factor causation" is a discrete threshold for legal action set at some level of belief in specific causation, as determined by popular and reasonable notions of responsibility. Where the science of causation is probabilistic, "substantiality" necessarily implies some measure of the change in risk of harm with and without the defendant's actions.

Where an expert on causation asserts that any change in risk, however small, is "substantial," that opinion provides nothing more than a subjective opinion of "responsibility," not scientific evidence of causation. If expert epidemiological evidence is required to prove causation, it must be quantified; if not, it cannot assist the jury and is therefore inadmissible under Rule 5-702.

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ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals dated July 10, 2012, the following attorney has been disbarred:

PERRY ALLEN LONDON

*

By an Order of the Court of Appeals dated July 10, 2012, the following attorney has been disbarred by consent:

HOWARD SCOTT KALIN

*

This is to certify that

PAUL BYRON ROYER

has been replaced on the register of attorneys in this state as of July 10, 2012.

*

This is to certify that

IRA C. COOKE

has been reinstated on the register of attorneys in this state as of July 11, 2012 by court order.

*