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In the Matter of the Application of Nicholas Hamilton Cramer for Admission to the Bar of Maryland, Misc. No. 19, September Term 2006, filed August 21, 2012. Per Curiam Opinon.

http://mdcourts.gov/opinions/coa/2012/19a06m.pdf

ADMISSION TO THE BAR OF MARYLAND – CHARACTER MATTER

Facts:

On May 20, 2005, Mr. Nicholas Hamilton Cramer filed an application with the State Board of Law Examiners ("Board") for admission to the Maryland Bar pursuant to *Rule 2*. On the application, Mr. Cramer failed to disclose his criminal history and left many requisite items blank, the character questionnaire, his credit report, and the lawsuits to which he was a party. In addition, Mr. Cramer continuously displayed a lack of candor in only addressing the gaping omitted sections upon request and by supplementing requisite application material in an untimely, piecemeal fashion.

The Board found that Mr. Cramer "submitted an out of date credit report with his application instead of answering the questions with regard to finances." To complicate matters even more, "when the Character Committee Investigator told [Mr. Cramer] it was unacceptable, [he] submitted a redacted credit report[; however,] when it was made clear that [the redacted report] was also unacceptable, a full credit report was submitted." On his application, Mr. Cramer did not disclose (1) a citation in June 2005 for disorderly conduct; (2) a conviction for driving under the influence in April, 2004, in the State of New Jersey; (3) a conviction for driving under the influence in 1999 in the State of California; and (4) four speeding tickets between 1993-94.

The Character Committee determined that Mr. Cramer's failure to disclose so many items raised an issue as to whether he possessed the candor and truthfulness necessary for admission to the Maryland Bar, but ultimately the Committee recommended his admission.

The Board reviewed the matter. Pursuant to *Rule 5(c)*, the Board gave Mr. Cramer an opportunity to be heard on September 8, 2006. Following the hearing with regard to the applicant's fitness to practice law, the Board concluded, unanimously, that Mr. Cramer's application be denied.

Held:

An applicant for admission to the Maryland Bar has the burden to prove that he or she possesses the present moral character and fitness to practice law in this State. Where the applicant fails to disclose material facts on his or her application, exercises poor judgment with regard to the application process and his or her financial responsibilities and, in addition, his or her behavior demonstrates a pattern of alcohol related criminal offenses, it is the applicant's responsibility to show convincingly that he or she has rehabilitated himself/herself such that it is proper that he or she become a member of the legal profession. On the basis of the record, the applicant failed to satisfy his burden considering, among other factors, his incomplete and inaccurate character questionnaire, responses to questions and demands of the character investigator, and omissions of material facts with regard to his criminal history and financial records.

Attorney Grievance Commission v. Lawson, AG No. 4, September Term 2008, filed August 21, 2012. Per Curiam Opinion.

http://mdcourts.gov/opinions/coa/2012/4a08ag.pdf

ATTORNEY DISCIPLINE – APPROPRIATE SANCTIONS – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Jeffrey Lawson. The Commission alleged violations of the Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.1; 1.2(a); 1.5(a); 1.8(a); 1.15(a); and 8.4(a), (c), and (d). The matter was referred to Judge Robert E. Cahill, Jr. of the Circuit Court for Baltimore County. Following a hearing, he issued findings of fact and conclusions of law, agreeing with the Commission as to all alleged violations except that of MLRPC 1.1.

The hearing judge found that Mr. Lawson, in his 2006 representation of Harry F. Fields in a divorce and property settlement matter, disregarded Mr. Fields' wish not to return to the marital residence with his estranged wife and so violated MLRPC 1.2. The hearing judge further found that Mr. Lawson violated MLRPC 1.2 when he refused to negotiate a settlement with Mr. Fields' creditors. The hearing judge further found that Mr. Lawson violated the MLRPC 1.5 prohibition on charging an unreasonable fee because of an unreasonably high number of hours charged given the complexity of the matter and the low stake that the client had in the litigation. The hearing judge found that Mr. Lawson violated MLRPC 1.8's conflict of interest rules when Mr. Lawson induced Mr. Fields to sign an agreement resolving a fee dispute where there was no evidence that Mr. Fields was advised of the desirability of seeking independent counsel, no evidence that he was given the opportunity to do so, no evidence that he gave informed consent to the essential terms of the transaction, and where the agreement in question created a lien against Mr. Fields' interest in the case. The hearing judge found that Mr. Lawson violated his MLRPC 1.15 duty to safeguard the property of his client by failing to segregate the proceeds of the divorce settlement and failing to return the title to a van to Mr. Fields. Finally, the hearing judge found that Mr. Lawson violated MLRPC 8.4, the prohibition against violating the MLRPC.

Held:

The Court found that Mr. Lawson's conduct violated MLRPC 1.5, 1.8, 1.15, and 8.4. The Court found no evidence to support a violation of MLRPC 1.2. Given Mr. Lawson's prior disciplinary record – at the time of argument he was already indefinitely suspended from the practice of law – disbarment was the appropriate sanction.

Attorney Grievance Commission v. David A. Ross, AG No. 15, September Term 2011, filed August 21, 2012. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2012/19a11ag.pdf

ATTORNEY DISCIPLINE – APPROPRIATE SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission charged David A. Ross with violating several provisions of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), including MLRPC 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property), and 8.4 (misconduct); Md. Rules 16-604 (trust accounts - required deposits), 16-606 (name and designation of trust account), 16-606.1 (trust account record keeping), and 16-609 (prohibited transactions); and Md. Code, Bus. Occ. & Prof. § 10-306 (misuse of trust money).

Mr. Ross was admitted to practice law in Maryland in 2007. As a solo practitioner, he agreed to represent a client in a criminal appeal and administrative proceedings related to charges of possession of child pornography and child sexual abuse. Mr. Ross and the client executed a retainer agreement setting an hourly fee, describing the scope of the work, and stating that he would provide the client with monthly billing statements. He placed the unearned retainer payment into his personal bank account, rather than a client trust account. Pursuant to an agreement with the State's Attorney's Office, the client dropped his appeal in return for the prosecution's decision not to pursue additional charges; the administrative hearing resulted in a favorable result for the client.

Mr. Ross also agreed to assist the client and his wife in a contract dispute and the creation of a family trust, though these services were not contained in any retainer agreement. The client and his wife gave Mr. Ross a total of $93,000 that they believed would be placed in that trust. Mr. Ross, however, did not create such a trust, and took the funds for his legal fees without obtaining their consent to do so. He did not create records of the deposits or withdrawals of these funds or any funds given to him by his clients, and failed to give the clients any accounting of the funds when requested to do so. He also placed nearly $74,000 of personal monies into — and authorized personal payments from — his client trust account, which was improperly titled "DAVID A. ROSS, ESQ. IOLTA CLIENT TRT FUND."

Mr. Ross did not provide his client with monthly billing statements during the representation, but eventually delivered a final bill of $233,500 for 934 hours of work, including 185 hours attributed to the work of another attorney that was not provided for in the retainer agreement and had not been adequately communicated to the client. Upon investigation by the Attorney Grievance Commission, Mr. Ross created and submitted fraudulent and inflated billing statements and records that had never been delivered to the client.

Pursuant to Md. Rule 16-752, the case was referred to Judge Sharon Burrell of the Circuit Court for Montgomery County to conduct an evidentiary hearing and make findings of fact and conclusions of law. At the hearing, an expert witness testified that the hours Mr. Ross billed for various services were unreasonably excessive. Judge Burrell found violations of MLRPC 1.4, 1.5, 1.15, and 8.4; Md. Rules 16-604, 16-606.1, and 16-609; and Md. Code, Bus. Occ. & Prof. § 10-306. Mr. Ross filed numerous exceptions to the findings of fact and conclusions of law, arguing that money he had taken for legal fees had been earned and was not intended for a trust, that his billing statements were legitimate and had not been fabricated, and that the $233,500 bill had been merely an estimate that was not meant to be delivered to his client. He contended that his client was not credible and had stolen Mr. Ross' client files and trust account records. Mr. Ross also lodged several general objections to the proceedings against him, including that the Attorney Grievance Commission committed fraud and pursued an unconstitutional price-fixing scheme; that the disciplinary action constituted discrimination against him as a disabled person; that he was improperly denied the ability to introduce exculpatory testimony; and that Judge Burrell was required to recuse herself from the case. He filed a motion to dismiss all charges against him.

Held:

Ms. Ross violated MLRPC 1.4, 1.5, 1.15, and 8.4, Md. Rules 16-604, 16-606.1, and 16-609, and Md. Code, Bus. Occ. & Prof. § 10-306 by failing to adequately communicate with his client, charging unreasonable fees for his services, placing unearned fees into his personal bank account rather than a client trust account, improperly titling his client trust account, failing to keep accurate records of deposits and disbursements from client funds, and taking monies intended for a trust as legal fees without obtaining his client's consent. Mr. Ross' motion to dismiss was denied and he was disbarred.

The Court agreed with Judge Burrell's conclusions and accepted her findings of fact. An attorney who engages in dishonest and deceitful conduct, misappropriates client funds, and submits fraudulent evidence to the Attorney Grievance Commission has committed misconduct and MLRPC violations. The Court rejected Mr. Ross' general objections to the disciplinary proceedings as frivolous. To properly protect the public, disbarment was the necessary sanction.

Attorney Grievance Commission of Maryland v. Katrice Selena Stinson, AG Nos. 30 and 70, September Term 2009, filed August 21, 2012. Per Curiam Opinon.

http://mdcourts.gov/opinions/coa/2012/30a09ag.pdf

ATTORNEY DISCIPLINE – DISBARMENT

Facts:

Pursuant to Maryland Rule 16-751, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Katrice Selena Stinson ("Respondent"), a Maryland attorney who alleged she had offices in the State. Bar Counsel charged that Stinson committed professional misconduct arising out of the fees she charged to two clients. Bar Counsel contends that Respondent exhibited a pattern of misconduct when she repeated the same offense with her two clients and also charges that a dishonest or selfish motive is present in this case.

Honorable Michele D. Jaklitsch of the Circuit Court for Anne Arundel County conducted evidentiary hearings and concluded that Respondent, in two separate representations, did not provide a written fee agreement, charged substantial non-refundable "engagement" fees, refused to provide clients with an itemization of earned fees, and refused to return unearned fees. In one instance, this resulted in a client being unable to retain other counsel for her meeting with the F.B.I. and the client "perjuring" herself. For her communications with clients, Respondent used letterhead that contained only a Washington, D.C. address without any indication that she was not licensed to practice in the District of Columbia.

The hearing judge noted "grave concerns about Respondent's lack of remorse and her failure to recognize any impropriety in her fee arrangement and handling of client funds paid in advance." Because of Respondent's failure to respond to Bar Counsel's January 21, 2009, letter that requested the addresses of her Maryland offices and to answer related questions during Bar Counsel's deposition of her, Respondent was charged with bad faith obstruction of disciplinary proceeding.

Nearly five pages of exceptions were filed by Respondent and are devoted to a contract law analysis of the fee agreements. Respondent also argues that all fees were earned and that she is still owed money from one client. These exceptions from the Respondent show that she has not acknowledged the wrongful and unethical nature of her conduct. The hearing judge also concluded that Respondent is indifferent to making restitution.

Held:

The appropriate sanction is disbarment for an improper engagement fee that resulted in an unreasonable fee where the attorney refused to refund any portion to the client and for otherwise

violating Maryland Lawyers' Rules of Professional Conduct 1.4(b), 1.5(a), 1.5(b), 1.15(a) and (c), 1.16(d), 7.5(b), 8.1(b), 8.4(a), and 8.4(c).

Attorney Grievance Commission v. Harry Tun, AG No. 71, September Term 2011, filed on August 22, 2012. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2012/71a11ag.pdf

ATTORNEY DISCIPLINE – INDEFINITE SUSPENSION – RECIPROCAL DISCIPLINE – VIOLATIONS OF MLRPC 1.5(A), 3.3(A)(1), 8.4(C) AND (D).

Facts:

Respondent, Harry Tun, was suspended from the practice of law in the District of Columbia for 18 months, with six months stayed, followed by a one year conditioned probationary period by the D.C. Court of Appeals for his violations of D.C. Rules of Professional Conduct (D.C. RPC) 1.5(a) and (f), 3.3(a)(1), and 8.4(c) and (d). The charges arose from Tun's acceptance of a substantial number of appointments to represent indigent defendants before the D.C. Superior Court. Tun submitted payment vouchers to the Superior Court for the same time period for two or more clients 162 times. A Superior Court judge noticed an occasion of "double-billing" and referred the matter to the United States Attorney General for the District of Columbia, who declined to prosecute the case, but required Tun to self-report the misconduct to D.C. Bar Counsel. Tun "self-reported," as required. D.C. Bar Counsel initiated an investigation and filed charges against Tun. Tun and the D.C. Bar Counsel entered into a petition for negotiated discipline, where both parties stipulated to the facts and agreed to the D.C. RPC violations.

Petitioner, the Maryland Attorney Grievance Commission, charged Tun (also admitted in Maryland) with violation of the Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.5(a), 3.3(a)(1), and 8.4(c) and (d) based on the admitted misconduct and the corresponding D.C. RPC violations. The Court of Appeals issued a show cause to Tun and Bar Counsel requiring them to provide, in writing, any grounds for why corresponding discipline should not be imposed by this Court. Both parties responded in writing and the Court heard oral argument on 6 June 2012. Bar Counsel recommended that Tun be suspended indefinitely from the practice of law in Maryland. Tun requested that this Court impose lesser discipline, "i.e. six month suspension with same conditions imposed by [the] District of Columbia Court of Appeal[s]" or, alternatively, to impose identical discipline to that imposed by the D.C. Court of Appeals.

Held:

The Court of Appeals concluded that the appropriate sanction was an indefinite suspension, with the right to reapply for admission in Maryland after Tun is readmitted unconditionally in the District of Columbia. In a reciprocal discipline case, where the Court of Appeals does not have an identical sanction available in the attorney discipline regulatory scheme to that imposed by the originating jurisdiction, it evaluates which sanction and precedents would be applied had the attorney's conduct occurred in Maryland. In Maryland's two-tiered approach for determining

the appropriate sanction, where an attorney misappropriated intentionally a client or third party's funds, disbarment is the ordinary sanction unless the attorney's conduct is negligent, or unintentional, and there is no finding of financial loss to the client. In the latter instance, indefinite suspension is the ordinary sanction imposed. The petition for negotiated discipline stated that Tun's double-billing was a result of his "abysmal record-keeping." He repaid to the Superior Court all of the double-billed fees. Thus, the appropriate sanction for Tun is an indefinite suspension rather than disbarment, conditioned as above.

Attorney Grievance Commission v. John Wayne Walker-Turner, Misc. Docket AG No. 16, September Term, 2011, filed 22 August 2012. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2012/16a11ag.pdf

ATTORNEY DISCIPLINE – 60 DAY SUSPENSION – VIOLATIONS OF MLRPC 1.1, 1.3, 1.4 (a) AND (b), AND 8.4(a) AND (d).

Facts:

Petitioner, the Attorney Grievance Commission, charged Respondent, John Wayne Walker-Turner, with violating the following Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.1, 1.3, 1.4(a) and (b), and 8.4(a) and (d) during his representation of two clients (Leslie's Limousine Service and Leslie Anderson individually) in a contractual damages case in the District Court of Maryland, sitting in Prince George's County. Walker-Turner negotiated a $6,500 settlement in principle with the opposing counsel, Michael Botsaris, on the evening prior to the scheduled trial date (26 January 2007). Botsaris drafted, signed, and faxed the written settlement agreement to Walker-Turner at 5:10 p.m on 25 January 2007. Anderson was not available to sign the settlement agreement that night, but agreed to come to Walker-Turner's office timely the next morning before court to sign and provide a check for the first payment. Anderson did not come to Walker-Turner's office the next morning (e.g., before court commenced that morning) so, after attempting to contact his client by cell phone, Walker-Turner went to the courthouse. Walker-Turner entered the courtroom where the trial was scheduled to be held, but did not see a judge on the bench and left the room. He did not check in with the courtroom clerk or seek to speak to Botsaris, who he had not met in person yet. While Walker-Turner was out of the courtroom attempting to contact his client again, the case was called and Botsaris obtained an affidavit judgement in the amount of $7,827.23, plus $2,694.28 in pre-judgment interest, $90.00 in costs, and $2,582.00 in attorneys fees. Walker-Turner met coincidentally Botsaris exiting the courtroom and asked whether the case had been called. Botsaris responded affirmatively. Walker-Turner then introduced himself and asked whether "everything was still on," to which Botsaris responded "Yes, just get me the documents." Walker-Turner did not investigate the official disposition of the case and, thus, was unmindful of the judgment entered against his client. On 7 March 2007, Anderson received a Request for Oral Examination which was filed by Botsaris in an attempt to collect on the judgment. Anderson contacted Walker-Turner who said he would look into the matter. After talking with Botsaris, Walker-Turner filed an inadequately explained Consent Motion to Vacate the judgment which was denied. The motion also was filed more than 30 days after the judgment was enrolled. Walker-Turner ensured that his clients' payments were made timely under the agreement, but the judgment remained on his clients' credit record, impacting a home refinance and a job opportunity requiring a security clearance.

Held:

The Court of Appeals concluded that even a single, inadvertent failure to appear at a trial is a violation of MLRPC 1.1, 1.3, and 8.4(d). Walker-Turner violated also MLRPC 1.1 and 1.3 by failing to file timely a revisory motion after the judgment was entered against his clients. Walker-Turner's reliance on his brief questioning of Botsaris in the courthouse hallway did not excuse his failure to investigate the outcome of what may have happened in the courtroom in his absence, failed to check in with the courtroom clerk or opposing counsel before leaving the courtroom, and failed to provide the signed settlement agreement to Botsaris before the case was called for trial. Because Walker-Turner did not know about the judgment, he failed to communicate properly with his clients' about the issue, thus violating MLRPC 1.4(a) and (b). Because the Court of Appeals concluded Walker-Turner violated MLRPC 1.1, 1.3, and 1.4, it also concluded necessarily that he violated MLRPC 8.4(a). The Court of Appeals considered Walker-Turner's prior 30-day suspension and two reprimands for violating many of the same rules as in the present case and imposed a 60-day suspension.

Jarmal Johnson v. State of Maryland, No. 84, September Term 2011, filed July 10, 2012. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2012/84a11.pdf

CRIMINAL PROCEDURE – ILLEGAL SENTENCE: A sentence is inherently illegal, within the meaning of Maryland Rule 4-345(a), if the trial court was not authorized to impose it. One situation in which a trial court is not authorized to impose a sentence is when the crime that served as the basis of the conviction was not included in the indictment and was not a lesser included offense of any crime in the indictment. A motion to correct such an illegal sentence may be filed at any time, and is not subject to waiver. When an illegal sentence is premised on an illegal conviction, both shall be vacated.

CRIMINAL PROCEDURE – AMENDMENT OF AN INDICTMENT: Maryland Rule 4-204 details the exclusive means to amend an indictment.

CRIMINAL PROCEDURE – DOCTRINE OF LACHES: Laches shall not apply when the moving party has not alleged prejudice arising from the delay.

CRIMINAL PROCEDURE – SUFFICIENCY OF THE RECORD: The record is sufficient to review an appellant's contention when it contains all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal.

Facts:

In 1992, Petitioner Jarmal Johnson was convicted of assault with intent to murder even though the indictment returned by the Grand Jury did not charge that crime. Petitioner did not raise the issue at trial, at sentencing, or on direct appeal. Not until 16 years after his conviction did Petitioner file a motion to correct an illegal sentence, claiming that the trial court lacked the power to convict and sentence him for a crime not charged in the indictment. The Circuit Court for Baltimore City denied Petitioner's motion, and he appealed. The Court of Special Appeals affirmed, and he petitioned for *certiorari*.

Held: Reversed.

The Court of Appeals reversed the judgment of the Court of Special Appeals, holding that Petitioner's sentence for assault with intent to murder was illegal because that crime was not contained in the indictment. The Court held that Petitioner's motion to correct an illegal sentence was timely because Maryland Rule 4-345(a) allows the trial court to correct an illegal sentence "at any time," and was not waived by his acquiescence at trial or sentencing. Accordingly, the Court vacated his conviction and sentence for assault with intent to murder.

Dexter Ingram v. State of Maryland, No. 121, September Term 2011, filed August 21, 2012, Opinion by Harrell, J.

Bell, C.J., joins in the judgment only.

http://mdcourts.gov/opinions/coa/2012/121a11.pdf

CRIMINAL LAW – CLOSING ARGUMENT – LEGAL STANDARDS – ABUSE OF DISCRETION:

Facts:

Petitioner, Dexter Ingram, contributed to causing a deadly car accident. He failed to remain at the scene. During his jury trial, prior to closing argument, the trial judge prohibited, on the motion of the prosecutor, Petitioner's defense counsel from including in his anticipated argument an explanation of the significance of the legal thresholds of suspicion, reasonable articulable suspicion, probable cause, and a "tie," by way of contrasting these thresholds along the continuum of standards, leading to the one in play in Petitioner's case, proof beyond a reasonable doubt. The trial court allowed, however, Petitioner's counsel to present to the jury, for the same purpose, the thresholds of preponderance of the evidence and clear and convincing evidence, as well as to render a lengthy dissertation on what is the burden of proof beyond a reasonable doubt. The jury found Petitioner guilty of reckless driving and failing to remain at the scene of an accident resulting in bodily injury, but not guilty of manslaughter by motor vehicle, participating in a race or speed contest, and failing to remain at the scene of an accident resulting in death. Petitioner filed timely an appeal to the Court of Special Appeals, arguing, among other points, that the trial court "unduly restricted" his counsel during closing argument by limiting which comparative standards of proof he could argue to the jury. The Court of Special Appeals affirmed Petitioner's convictions in an unreported opinion. He filed timely a petition for a writ of certiorari, which the Court granted, *Ingram v. State*, 424 Md. 628, 37 A.3d 317 (2012), to consider the question:

> Did the lower court err by relying on *Drake v. State*, 186 Md. App. 570, 975 A.2d 204 (2009), and limiting trial counsel's attempt in closing argument to compare the State's burden of proof beyond a reasonable doubt to other legally recognized standards of proof?

Held: Affirmed.

The Court of Appeals concluded that the trial judge's refusal to allow Petitioner's counsel to explain the legal thresholds of suspicion, reasonable articulable suspicion, probable cause, and a "tie," in his closing argument was not an abuse of discretion. The Court explained that the refusal to allow discussion of extraneous, extrinsic, remote, and largely irrelevant legal standards

in a criminal trial is within the trial judge's broad discretion to control the scope of closing argument, in a way calculated to reduce the potential for juror confusion. The Court stated, moreover, that even if it were to assume that an abuse of discretion occurred, it was harmless error on this record, due to the wide latitude given actually to Petitioner's counsel during the closing argument.

State of Maryland v. Isaac Neger, No. 108, September Term 2011, filed August 20, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2012/108a11.pdf

CRIMINAL LAW – COUNTERFEITING – SPECIFIC INTENT TO DEFRAUD ANOTHER

CRIMINAL LAW – COUNTERFEITING – SPECIFIC INTENT TO DEFRAUD ANOTHER – GOOD FAITH

Facts:

Respondent, Isaac Neger, was convicted in the Circuit Court for Baltimore City of violating Maryland Code § 8-601 of the Criminal Law Article. Section 8-601 provides: "A person, with intent to defraud another, may not counterfeit, cause to be counterfeited, or willingly aid or assist in counterfeiting any[] . . . (3) deed."

In 1990, a deed was recorded granting title to property in Baltimore, Maryland to "Ephraim Ohana and E.I. Associates, Inc.," a non-registered corporation purportedly owned equally by Ohana and Respondent. In 2000, Ohana acknowledged in a signed, notarized document that since 1992, Respondent had "taken over all rights and interest from Ephraim Ohana in the [p]roperty." No other deed was recorded until June 5, 2008, when a deed ostensibly transferred the property from "Ephraim Ohana, sole owner of E.I. Associates, Inc." to Respondent.

During a bench trial, the State sought to prove that Respondent altered the 2008 deed prior to filing. The State presented evidence that the deed recorded in 2008 was originally executed in 2005 and listed E.I. Associates, Inc. as the sole grantee, rather than Respondent. The trial court found that Respondent "caused to be presented for recordation" a deed containing "material alterations as to material elements, including the grantor and grantee," which constituted a "fraud on the system of recording deeds." Further, the trial court found that even if Respondent had a good faith belief that the property was his own, that belief does not negate the intent to record a deed which was materially altered. Respondent appealed the conviction, arguing that the State did not meet its burden of proving the element of "intent to defraud another," given Respondent's good faith belief and other corroborating evidence that the property equitably belonged to him.

The Court of Special Appeals reversed the conviction, reasoning that the specific intent requirement of "intent to defraud another" in § 8-601 refers to another "person." Here, Respondent intended to conform the deed to reflect the ownership he and Mr. and Mrs. Ohana believed to be accurate and, therefore, defrauded no one. Furthermore, because the Circuit Court judge found that the Respondent intended to defraud "the system" of recording land deeds rather than another person, the specific intent requirement of the statute was not met.

Held: Reversed. Respondent's conviction reinstated.

In interpreting the Criminal Law Article, the Court of Appeals held that Maryland Code § 8-601 requires specific "intent to defraud another," where "another" refers to another "person." However, the statute does not require the State to prove that a defendant defrauded a particular individual person. Seeking to harmonize the interpretation of § 8-601 with other pertinent provisions of the Criminal Law Article, the Court looked to § 1-401, which provides that in a trial for fraud, theft or related crimes, "it is sufficient to prove that the defendant did the act charged with an intent to defraud without proving intent by the defendant to defraud a particular person." Moreover, the Court found the present case indistinguishable from *Reddick v. State*, 219 Md. 95 (1959). In *Reddick*, the defendant, an officer of the Board of Medical Examiners, issued a medical license to an individual lacking requisite qualifications. The Court of Appeals recognized in *Reddick* that because the license could have defrauded a member of the public, it was unnecessary to allege that the defendant intended to defraud a particular person. Therefore, in the matter sub judice, the trial court's finding that Respondent acted with intent to defraud the system of deed recordation satisfies the specific intent element of § 8-601, because it reflects an intent to defraud persons who would rely on the accuracy of the recorded deed, including subsequent purchasers, creditors and the general public.

Turning to Respondent's good faith defense, the Court of Appeals held that the trial court's findings do not reflect good faith on the part of Respondent. While good faith generally negates a finding of intent to defraud, and would be a complete defense to a crime requiring specific intent to defraud, the Respondent here did not act in good faith. Instead, the trial court determined that while Respondent did maintain a good faith belief that the property was equitably his, Respondent was also aware that the legal title to the property remained in the name of E.I. Associates and Ohana. By attempting to have the property transferred to his own name by materially altering a previously executed deed, Respondent demonstrated he did not have a good faith belief that he possessed legal title to the property, and he did not act in good faith when he materially altered the deed before filing it.

Grayson Darnell Taylor v. State of Maryland, No. 95, September Term 2011, filed August 24, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2012/95a11.pdf

INEFFECTIVE ASSISTANCE OF COUNSEL – ACTUAL CONFLICT – PRESUMPTION OF PREJUDICE

Facts:

Petitioner, Grayson Darnell Taylor, retained an attorney to represent him in a criminal case where Petitioner was charged with distributing and possessing a controlled dangerous substance. Before trial, defense counsel filed suit against Petitioner, his client, for the unpaid fees due under their representation agreement. Defense counsel represented Petitioner at his criminal trial on January 9, 2007, at the conclusion of which, the jury convicted him of both charges. Counsel obtained a judgment against Petitioner on February 23, 2007, for the unpaid fees. The trial court was not made aware of the suit between counsel and Petitioner until the sentencing hearing on March 5, 2007. Petitioner filed a Petition for Postconviction Relief, arguing that he had received ineffective assistance of counsel in his criminal trial based on the conflict of interest inherent in counsel's filing suit against Petitioner while representing him before and during the trial.

The postconviction court granted Petitioner a new trial based on his claim of ineffective assistance of counsel. The postconviction court reasoned that Petitioner's defense counsel had a conflict of interest pursuant to Rule 1.7 of the Maryland Lawyers' Rules of Professional Conduct, and granted Petitioner a new trial on that ground, applying *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which establishes a rule for assessing ineffectiveness of counsel claims alleging a conflict of interest during the representation of the defendant at trial.

The Court of Special Appeals granted the State's application for leave to appeal and reversed the judgment of the postconviction court. The Court reasoned that the *Sullivan* rule does not apply to conflict of interest cases others than those involving joint representation. The Court of Special Appeals held that Petitioner's case was governed instead by the generally applied, two-pronged test for assessing ineffectiveness of counsel claims established by *Strickland v. Washington*, 466 U.S. 668 (1984), under which the defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. Applying the *Strickland* test, the Court of Special Appeals held that Petitioner was unable to demonstrate that his counsel's conflict of interest resulted in prejudice to the defense.

Held: Reversed.

Judgment of the Court of Special Appeals reversed with directions to remand the case to the Circuit Court for Dorchester County for further proceedings.

The Court of Appeals held that Petitioner's case is governed by the rule of *Sullivan.* The Court noted first that the claim of conflict of interest was presented only after the trial concluded, thus implicating the *Sullivan* line of conflict of interest cases, rather than the line of cases marked by *Glasser v. United States*, 315 U.S. 60 (1942), and *Holloway v. Arkansas*, 435 U.S. 475 (1978), in which the claim of attorney conflict of interest is raised at trial. The Court then clarified that in Maryland, the *Sullivan* rule is not limited to conflicts involving multiple representation, but includes attorney conflicts of interest inherent in an attorney's filing suit against the client before trial for unpaid legal fees arising from the very action where the attorney is representing the client. *Sullivan* requires, though, that the conflict be "actual" in the sense that it adversely affected counsel's performance at trial. Only if the defendant establishes such adverse effect is the defendant entitled to the *Sullivan* presumption of prejudice to the defense. The Court adopted the three-part test set forth in *Mickens v. Taylor*, 240 F.3d 348 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002), for determining adverse effect. That test requires a petitioner to establish: (1) "a plausible alternative defense strategy or tactic that his defense counsel might have pursued"; (2) "that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney"; and (3) "that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Id.* at 361.

The postconviction court granted Petitioner relief under *Sullivan* without giving any indication whether the court had found that defense counsel's conflict of interest adversely affected his representation of Petitioner. The Court of Appeals directed that the case be remanded to the postconviction court for further proceedings, at which that court can make the requisite determination of whether, and if so, how, counsel's conflict of interest had an adverse effect upon his performance at Petitioner's trial.

David Reid v. State of Maryland, No. 113, September Term 2011, filed August 24, 2012. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2012/113a11.pdf

Harrell, Barbera and McDonald, JJ., dissent.

CONSTITUTIONAL LAW – FOURTH AMENDMENT – SEIZURE – USE OF A TASER

Facts:

Baltimore City Police received a tip from an anonymous source that there was a tall, black male, who may have been armed, selling drugs from a black Honda. When police arrived at the location provided by the tipster, they encountered a group of black males standing near a black Honda, which was unoccupied. When the officers approached the group, one of the men, Reid, attempted to open the passenger side door of the car, and, when that failed, turned his body away from the officers. As the police got closer to Reid, he began to run away, but one of the officers fired his Taser, which propelled two metal darts that pierced Reid's body and incapacitated him. While Reid was on the ground, the officers surrounded him and asked if he had any weapons, to which Reid replied that he had a handgun in his pocket, which the police recovered. Reid was then formally arrested and charged with being a felon in possession of a handgun and wearing, carrying, or transporting a handgun without a permit.

Prior to trial, Reid filed a motion to suppress his statement, as well as the gun itself; he argued that he had been arrested without probable cause when the detective deployed the Taser in "dart mode," so that any evidence obtained as a result of the arrest was inadmissible. The trial judge denied his motion, and Reid was convicted on an agreed-upon statement of facts and appealed. The Court of Appeals granted certiorari on its own motion to consider whether the officer's use of a Taser in "dart mode" effected an arrest or merely a *Terry* stop.

Held:

The Court of Appeals reversed and held that a suspect who has been shot by darts fired from a Taser is not free to end the encounter and leave and, therefore, has been subjected to a *de facto* arrest rather than a *Terry* stop. The Court also determined that the police did not have probable cause to make the arrest and that neither of the exceptions asserted by the State, the public safety exception articulated in *United States v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) and the derivative evidence exception identified in *United States v. Patane*, 542 U.S. 630, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004) (plurality opinion), applied because those exceptions cover violations of the Fifth Amendment rather than of the Fourth Amendment. Finally, the Court held that the admission of the gun itself was not harmless error.

Millicent Sumpter v. Sean Sumpter, No. 120, September Term 2011, filed August 21, 2012, Opinion by Harrell, J.

Bell, C.J., and Adkins, J., dissent.

http://mdcourts.gov/opinions/coa/2012/120a11.pdf

FAMILY LAW – CHILD CUSTODY PROCEEDINGS – ACCESS TO COURT-ORDERED CUSTODY INVESTIGATION REPORT.

Facts:

In 2010, Sean Sumpter (Respondent) and Millicent Sumpter (Petitioner) contested physical and legal custody of their two daughters in the Circuit Court for Baltimore City. The judge ordered the Adoption and Custody Unit (ACU) to prepare a custody investigation report to evaluate the custodial abilities of each parent. The ACU completed the report late, approximately one week before the merits hearing. Petitioner's counsel urged that a local, unwritten Circuit Court policy or "rule" limited their ability to review the report the week prior to the hearing. Purportedly, the policy or rule limits the counsel of record in a custody dispute to viewing the report in person, within the confines of the Family Division Clerk's Office, and during normal public business hours. Counsel of record may make only hand-written notes of the contents of the report and may not make photocopies of it. Further, the parties' counsel must share the single copy of the report during hearings and may not remove the report from the courtroom. The case record, however, did not contain a printed version of this policy or rule.

Petitioner's counsel moved pre-hearing to exclude the report or, alternatively, to be provided with a copy of the report. The Circuit Court denied the motion. The Circuit Court admitted into evidence later the report over Petitioner's objection. Ultimately, the Circuit Court awarded custody of the children to Respondent. The Court of Special Appeals affirmed the Circuit Court's judgment in an unreported opinion. The Court of Appeals granted Petitioner's motion for writ of certiorari.

Held: Remanded, without affirming or reversing the lower court.

Petitioner contended that the unwritten Circuit Court local policy or "rule" was unconstitutional, in that it deprived her of due process. Problematically, the appellate record did not elucidate sufficiently the contours, application, and purpose of the policy or rule. Moreover, Petitioner's contentions were unchallenged by an opposing party or amicus curiae in either appellate court. The Court of Appeals remanded the case to the Circuit Court for Baltimore City, without affirmance or reversal, for supplementation of the record as to the Circuit Court policy or rule. The Court invited also the Office of the Attorney General of Maryland, in its role as legal counsel to the Circuit Court and/or the hearing judge, to address as amicus curiae Petitioner's

arguments regarding the viability and effect of the policy when the case returns to the Court of Appeals.

Montgomery County, Maryland v. Fraternal Order of Police, Montgomery County Lodge 35, Inc., No. 105, September Term 2011, filed August 20, 2012. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/105a11.pdf

COLLECTIVE BARGAINING – LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS

Facts:

The Fraternal Order of Police, Montgomery County Lodge 35, Inc. ("FOP") filed a grievance with an arbitrator pursuant to its collective bargaining agreement ("CBA") with Montgomery County ("County"). The FOP alleged that a long-standing practice of allowing shop stewards in-training to sit in on disciplinary interrogations amounted to a "past practice" that was incorporated into the CBA and preserved under the "Maintenance of Standards" provision of the CBA. The FOP argued that the County violated the CBA when it unilaterally decided to discontinue this practice.

The County filed a motion to dismiss the grievance, arguing that the Law Enforcement Officers' Bill of Rights, Maryland Code (2003, 2011 Repl. Vol.), §§ 3-101-113 of the Public Safety Article ("LEOBR") governs the presence of individuals during an interrogation and preempts collective bargaining and arbitration on matters relating to the "subject and material" of the LEOBR. The arbitrator denied the motion, determining that the grievance involved "a practice affecting the rights of the FOP and its stewards" and not "the discipline of a law enforcement officer" and the procedures under the LEOBR.

The County then filed a petition to vacate the "arbitration award" in the Circuit Court for Montgomery County, arguing that the LEOBR preempted collective bargaining and arbitration on the issue and, therefore, the arbitrator exceeded his authority in asserting jurisdiction over the underlying dispute. Both parties filed motions for summary judgment, and the Circuit Court granted summary judgment for the FOP, affirming the arbitrator's decision that the LEOBR did not preempt arbitration. The Circuit Court reasoned that "[T]his really doesn't have anything to do with the rights of a police officer subject to possible discipline. It does have everything to do with [the] training of union employees..."

The County appealed to the Court of Special Appeals, and the Court of Appeals granted certiorari prior to review by the intermediate appellate court.

Held: Affirmed.

Under the facts of this case, the LEOBR does not preempt arbitration. The LEOBR was enacted with the primary purpose of "guarantee[ing] certain procedural safeguards to law enforcement officers during an investigation or interrogation that could lead to disciplinary action, demotion, or dismissal." *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 122, 797 A2d 770, 778-79 (2002)(quotation and citations omitted). The LEOBR provides that it "supersedes any other law of the State, a county, or a municipal corporation that conflicts with this subtitle," § 3-102(a), and that "[a]ny local law is preempted by the subject and material of this subtitle." § 3-102(b) of the Public Safety Article.

The plain language of the LEOBR indicates that the statute is focused exclusively on the rights of law enforcement officers. The LEOBR does not provide the FOP, or any other union, with an opportunity to assert its own rights or file an application for a show cause order on its own behalf. Because under the facts of this case, the FOP is attempting to assert its own rights under the CBA, rather than the rights of any of its members, the grievance is not preempted by the LEOBR.

Even assuming, *arguendo*, that the FOP's grievance implicated the LEOBR, the grievance would not be preempted by the "subject and material" of the statute. In previous cases, this Court determined that the LEOBR preempted instances of collective bargaining where pursuing a grievance directly conflicted with the LEOBR by adding or curtailing existing rights under the statute. In the instant case, the FOP's grievance deals only with its own right to train its employees. It would be too broad of a reading of the LEOBR's "subject and material" preemption provision to not allow parties to bargain as to the presence of a union trainee at an interrogation, when the trainee is not a participant in the interrogation, and the trainee's presence is not alleged or demonstrated to affect the rights of a police officer subject to interrogation in any way. Therefore, under the facts presented, the LEOBR does not preempt collective bargaining and subsequent arbitration of the underlying grievance.

Camille C. Shepherd v. John S. Burson, No. 110, September Term 2011, filed August 20, 2012. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2012/110a11.pdf

REAL PROPERTY – FORECLOSURE PROCEEDINGS – NOTICE OF INTENT TO FORECLOSE – "SECURED PARTY"

REAL PROPERTY – FORECLOSURE PROCEEDINGS – NOTICE OF INTENT TO FORECLOSE – REMEDY FOR DEFECTIVE NOTICE

Facts:

Camille Shepherd challenged the foreclosure sale of her home, alleging that she received a defective Notice of Intent to Foreclose (required by Md. Code, Real Prop. § 7-105.1(c)). Specifically, Ms. Shepherd contended that the notice incorrectly named the *holder* of the note as the "secured party" rather than the *owner* of the note. The notice otherwise provided information by which Ms. Shepherd could pursue a loan modification. Ms. Shepherd had learned the identity of the owner of the note from a previous bankruptcy proceeding, but did not move to dismiss the foreclosure action on the ground of defective notice until more than a year later. The substitute trustees argued that the holder of the note was a valid "secured party" for the purposes of the § 7-105.1(c), and the notice therefore was not defective. The circuit court agreed, and held that, even if the notice was defective, Ms. Shepherd was not entitled to a remedy because she had not been prejudiced or deprived of any substantive rights. The Court of Appeals granted certiorari prior to consideration by the Court of Special Appeals.

Held:

In light of the statute's purpose, the Court of Appeals held that a Notice of Intent to Foreclose under Md. Code, Real Prop. § 7-105.1(c) should normally identify all secured parties, including both the holder and owner of the note. However, the remedy for a failure to disclose all secured parties is not, in every instance, dismissal of the foreclosure action. When the notice identifies a secured party and provides sufficient information for the borrower to pursue a loan modification, the identities of other secured parties have been disclosed to the borrower well prior to the foreclosure sale, and the borrower waits more than a year after such disclosures to complain of a defective notice, a circuit court may exercise discretion to permit the foreclosure sale to proceed.

Judy Curtis v. US Bank National Association, etc, No. 96, September Term 2011, filed August 20, 2012. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2012/96a11.pdf

REAL PROPERTY – FORECLOSURE PROCEEDINGS – PROTECTING TENANTS AT FORECLOSURE ACT

Facts:

Appellant, Judy Curtis, rented her residence from a landlord who defaulted on the mortgage on that property. Appellee, U.S. Bank National Association (USBNA), as trustee for a mortgage-backed security that owned that debt, foreclosured on the landlord's deed of trust and sought to terminate Ms. Curtis' lease. In doing so, it sent conflicting notices to Ms. Curtis about her right under the Federal Protecting Tenants at Foreclosure Act (PTFA) to remain on the property temporarily, in this case 90 days from a properly filed notice. USBNA also filed a motion for immediate possession of the property. The circuit court process delayed a ruling on the motion until more than 90 days from the date when the conflicting notices were given.

The Circuit Court for Anne Arundel County granted USBNA's motion for possession. Ms. Curtis appealed to the Court of Special Appeals, and prior to the appeal being considered by that court, she petitioned for a writ of certiorari, which was granted.

Held: Reversed

The Court held that, when a purchaser at a foreclosure sale sends a *bona fide* tenant (as defined in the PTFA) contradictory and misleading notices – one of which directs the tenant to vacate the property "immediately" – and fails to correct the misleading notice, the purchaser has not met its obligation under the PTFA to provide an accurate advance notice to the tenant.

The Court further held that a motion for possession filed by the purchaser before it has a right to immediate possession is premature. Even if a delay in the court process results in the tenant remaining in the property for a period of time equal to that contemplated by the PTFA, the circuit court should dismiss the premature motion for possession.

Matthew C. Baker, et al. v. Montgomery County, Maryland, et al., No. 124, September Term 2011, filed August 21, 2012. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2012/124a11.pdf

CIVIL PROCEDURE – PERMISSIVE COUNTERCLAIM – ABILITY TO FILE SUBSEQUENT STATUTORY CHALLENGE TO LEGALITY OF SPEED MONITORING SYSTEM CITATIONS, BASED ON ALLEGED ULTRA VIRES COMPENSATION FORMULA BETWEEN LOCAL GOVERNMENTS AND PRIVATE CONTRACTOR, AFTER PLAINTIFFS PAID CIVIL MONETARY FINES FOR CITATIONS, WITHOUT PROTEST

STATUTORY CONSTRUCTION – IMPLIED PRIVATE CAUSES OF ACTION – MARYLAND CODE, TRANSPORTATION ARTICLE § 21-809 – NONE EXISTS.

Facts:

Between 2007 and 2008, Respondents Montgomery County, the Mayor and Council of Rockville, the City of Gaithersburg, and Chevy Chase Village issued speed monitoring system (i.e., speed cameras) citations to Petitioners. Petitioners paid the accompanying penalties. Petitioners filed subsequently a complaint in the Circuit Court for Montgomery County, alleging that Respondents' contracts with their common speed camera contractor, ACS State and Local Solutions, Inc. (ACS), violated Maryland Code (1977, 2009 Repl. Vol.), Transportation Article, § 21-809(j). Section 21-809(j) prohibits "Montgomery County" from remunerating a contractor who operates a speed camera system on its behalf based on the number of citations issued. Petitioners argued that § 21-809 contains a private cause of action that supported their tort, injunctive relief, and declaratory judgment claims. The Circuit Court granted Respondents' motions for summary judgment, ruling that Respondents, not ACS, operated the speed camera systems (thus § 21-809(j) did not apply here), that § 21-809 did not create a private cause of action, and, in any event, that Petitioners waived their right to pursue a private cause of action by paying the speed camera penalties instead of contesting them in the District Court. Petitioners appealed. The Court of Special Appeals concluded that § 21-809 did not create a private cause of action, and affirmed the dismissal of Petitioners' claims sounding in tort. Further, it opined that amendments to Respondents' contracts with ACS made clear that Respondents operated the speed cameras, and affirmed the dismissal of Petitioners' injunctive and declaratory relief claims. Petitioners petitioned successfully the Court of Appeals to review the intermediate court's judgment.

Held: Affirmed.

The Court concluded that Petitioners did not waive their ability to file a claim under § 21-809, if actionable, by paying previously the speed camera penalties. Maryland's permissive counterclaim rule of procedure permits a party in an initial action to file a claim in a subsequent

action, even if the claim could have been filed in the first instance. Moreover, whether Petitioners were speeding and whether Respondents violated § 21-809(j) are distinct enough questions that finding a violation of § 21-809(j) by the local governments would not nullify Petitioners' admission that they were speeding, i.e., payment of the penalties. Section 21-809, however, does not provide an express or implied private cause of action. The statute is a general welfare statute that does not benefit a particular class of persons, provides already a remedy for challenging speed camera citations in the District Court, and lacks legislative history endorsing an implied private right of action. With regard to Petitioners' injunctive and equitable relief claims, Petitioners conceded that, if no private cause of action existed, they did not have the necessary standing to pursue them.

Pro-Football, Inc. t/a The Washington Redskins, et al. v. Darnerien McCants, No. 116, September Term 2011, filed August 23, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2012/116a11.pdf

WORKER'S COMPENSATION – COVERED EMPLOYEE

Facts:

Respondent Darnerien McCants sustained six injuries on four separate occasions while playing football as a wide receiver for Petitioner, The Washington Redskins, in 2003 and 2004. In 2007, McCants filed six separate claims with the Maryland Workers Compensation Commission (Commission) to recover for those injuries against his employer Pro-Football, Inc. (Redskins). McCants claimed the injuries occurred during away games in Pennsylvania and New York, at a home game at FedEx Field in Landover, Maryland, and during practice at the Redskins's training facility in Ashburn, Virginia.

Under § 9-203 of the Maryland Code (1999, 2008 Repl. Vol.), Labor and Employment Article, a covered employee for purposes of the Workers' Compensation Act includes an individual who is"regularly employed" within the state and works outside the state on a "casual, incidental, or occasional basis." During his career, McCants played 18 games in Maryland and 16 games outside the state, in addition to spending hundreds of hours at team practice sessions in Virginia. The Commission determined that it did not have jurisdiction over five of the six claims that involved out-of-state injuries, but awarded McCants relief for the injury he sustained in Maryland. The Circuit Court for Prince George's County agreed with the Commission's decision, holding that McCants was not regularly employed in Maryland because he spent the bulk of his time practicing at the Redskins training facility in Virginia or playing in games outside the state. As a result, McCants's time in Maryland was merely incidental to his regular employment in Virginia, and he was not a covered employee for workers' compensation purposes.

In an unreported opinion, the Court of Special Appeals reversed the Commission's decision and held that McCants was a covered employee under § 9-203. The amount of time McCants spent in Virginia was not dispositive, according to the Court. Instead, the Court focused on the main purpose of McCants's employment—playing in football games—and found that practicing in Virginia was merely incidental to that objective. More of McCants's games occurred in Maryland than in any other state, making McCants regularly employed in the state and thus a covered employee under the workers' compensation statute.

Held: Affirmed.

The Court focused on two factors in determining whether McCants was regularly employed in the state: the nature of his work and whether that work was incidental to the main purpose of his employment. The Court found persuasive two similar cases from the Court of Special Appeals and the District of Columbia Court of Appeals involving former Redskins players. In *Pro-Football, Inc. v. Tupa*, the Court of Special Appeals held that Tupa, a former Redskins punter, was a covered employee because the purpose of his job was to play in football games, more of which took place in Maryland than in any other state. 197 Md. App. 463, 14 A.3d 678 (2011), *aff'd* ___Md.___, ___ A.3d ___ No. 29 September Term 2011 (filed August 22, 2012). The large amount of time Tupa spent practicing in Virginia was geared towards improving his performance in those games, the Court noted. A similar result was reached by the District of Columbia Court of Appeals in *Pro-Football, Inc. v. Dep't of Emp't Services*, 588 A.2d 275 (D.C. 1991).

The Court reasoned that the main purpose of a football player's employment is to play in football games, not to practice. Practice is a means to an end, designed to help a player achieve wins for the team, and thus is "incidental" activity under the workers' compensation statute. Additionally, McCants's presence in other states for away games was not substantially greater than the time spent playing in home games in Maryland. Therefore, the away games where McCants was injured constituted "occasional" work outside the state under the statute. For these reasons, the Court held that McCants was regularly employed in Maryland and a covered employee for purposes of § 9-203.

Board of Education of Prince George's County, et al. v. Stephanie Marks-Sloan, No. 117, September Term 2011, filed August 21, 2012. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2012/117a11.pdf

STATUTORY CONSTRUCTION – COURTS & JUDICIAL PROCEEDINGS ARTICLE § 5-518

STATUTORY CONSTRUCTION – WORKERS' COMPENSATION ACT EXCLUSIVITY RULE

Facts:

Respondent, Stephanie Marks-Sloan, was injured in an automobile collision involving Norman Iglehart while both were acting within the scope of their employment with the Board of Education of Prince George's County (the Board). Respondent filed for workers' compensation benefits and received compensation for medical expenses, temporary total disability, and attorney's fees. The Board, a self-insured employer, began making the required payments to Respondent. Thereafter, Respondent brought suit against Mr. Iglehart, the Board, and Prince George's County in the Circuit Court for Prince George's County, seeking damages based on Mr. Iglehart's negligence and the respondeat superior liability of the Board and County. The parties ultimately stipulated to the dismissal of the County as a party to the case. Petitioners, the remaining defendants, filed a Motion to Dismiss Plaintiff's Complaint or, in the alternative, a Motion for Summary Judgment. Petitioners asserted that § 5-518 of the Courts and Judicial Proceedings Article (CJ) provided immunity for Mr. Iglehart as a county board of education employee acting within the scope of his employment and without malice or gross negligence. Petitioners also contended that under § 9-509 of the Labor and Employment Article (LE), Respondent's exclusive remedy against the Board, her employer, was through the Workers' Compensation Act. The trial judge denied the Motion as to Mr. Iglehart, granted the Motion as to the Board, but required the Board to remain a party in the case for the purpose of any potential indemnification. Following a series of motions and responses filed by the parties, the trial judge issued an Order entering judgment on behalf of Respondent against the Board. The trial judge later issued an Amended Order for judgment against Mr. Iglehart and the Board.

Petitioner appealed to the Court of Special Appeals, which affirmed, concluding that CJ § 5-518 contains an indemnification provision, rather than an immunity provision. The statute allows a tort suit to be brought against Mr. Iglehart and requires that the Board be joined as a party to indemnify Mr. Iglehart by paying any damages entered against him. The Court of Special Appeals concluded that the Legislature's decision to require the Board to indemnify Mr. Iglehart does not violate the exclusivity rule in the Workers' Compensation Act.

Held: Affirmed.

The statute, CJ § 5-518, is ambiguous on its face with regard to whether it provides for immunity or indemnification for county board of education employees. A review of the statute's legislative history and statutory scheme as a whole shows that the Legislature's intent was to offer protection from tort liability to county board of education employees in the form of indemnification. The rational reading of the statute's provision requiring the county board of education to be joined as a party indicates that a suit may be brought against the county employee, and if the employee was acting in the scope of his or her employment without malice or gross negligence, the board must be joined as a party in the suit to satisfy any judgment entered against the employee.

Furthermore, this statutory scheme does not violate the exclusivity rule under LE § 9-509, which states that the Workers' Compensation Act is the injured employee's sole remedy against his or her employer for an accidental personal injury sustained during the course of employment. The purpose of the exclusivity rule is to ensure swift compensation to the injured employee and to prevent a double recovery, through a workers' compensation award and a tort judgment, from an employer by an injured employee. In a situation where an employer is required to pay workers' compensation to an injured employee and the employer is also responsible for indemnifying the third party tortfeasor, the employer is entitled to offset the amount of workers' compensation paid or awarded from the amount of the tort judgment so as to avoid the unfairness of double recovery.

COURT OF SPECIAL APPEALS

Montgomery Mutual Insurance Co. v. Josephine Chesson, et al., No. 2454, September Term 2009, filed August 29, 2012. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2012/2454s09.pdf

HEADNOTE – EVIDENCE – TESTIMONY – EXPERTS – FRYE-REED

Facts:

Appellees, Josephine Chesson, Martha Knight, Carole Silberhorn, Linda Gamble, Kenneth Lyons, and Connie Collins, were employees of the Baltimore Washington Conference of the United Methodist Church ("BWCUMC"). In late 2002, several employees complained that there was an odor emanating throughout the walls of the facility. A maintenance crew investigated the situation and discovered mold in the walls. Because of the exposure, each appellee filed a claim against BWCUMC and its insurer, appellant, Montgomery Mutual Insurance Company, with the Maryland Worker's Compensation Commission ("the Commission"). The claims alleged that appellees suffered an accidental injury or occupational disease, known as sick building syndrome, as a result of the exposure. The Commission disallowed two of appellees' claims and awarded the remaining appellees partial compensation.

Each appellee noted an appeal and the cases were consolidated. Before trial, appellant filed a motion *in limine* to preclude the testimony of Ritchie Shoemaker, M.D. ("Dr. Shoemaker"). Appellant argued that Dr. Shoemaker's testimony should be excluded because his methodologies and theories regarding the causal nexus between exposure to mold and human health effects were not generally accepted in the relevant scientific community. The court denied the motion and noted that a *Frye-Reed* hearing was unnecessary. Subsequently, the Commission's decisions were reversed.

Appellant noted an appeal, arguing, among other things, that the circuit court should have conducted a *Frye-Reed* hearing. *Montgomery Mut. Ins. Co. v. Chesson*, 170 Md. App. 551, 556 (2006). We affirmed the circuit court. *Id*. at 551. In reversing our decision, the Court of Appeals held that a *Frye-Reed* hearing should have been held "to determine whether the medical community generally accepts the theory that mold exposure causes the illnesses that [appellees] claimed to have suffered, and the propriety of the tests Dr. Shoemaker employed to reach his medical conclusions." *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314, 328 (2007). Ultimately, the case was remanded for the limited purpose of determining "whether Dr. Shoemaker's methodologies used for diagnosis and theories regarding the causal connection

between mold exposure and certain human health effects are generally accepted in the scientific community." *Id*. at 336.

At the *Frye-Reed* hearing, Dr. Shoemaker testified about his theories and methodologies. In treating patients who were exposed to water damaged buildings, Dr. Shoemaker would remove samples of visible mold from a person's workplace or residence. He would then remove the patient from the exposure and prescribe Cholestyramine. The person would remain on Cholestyramine and away from his or her workplace or residence for approximately two weeks. If the symptoms subsided, Dr. Shoemaker would remove the patient from Cholestyramine and instruct him or her to stay away from the exposure. The patient would then be evaluated approximately two to three days later. Assuming the patient was not exhibiting the previous symptoms, the patient, again, would be exposed to the mold. This exposure would occur without Cholestyramine being prescribed. If the symptoms arose again, the patient would be retreated with Cholestyramine.

Dr. Shoemaker added blood tests to review whether the treatment was working. Namely, he created a two-tiered case definition. To satisfy the first tier, the following had to occur: (1) a patient had a potential for exposure to water damaged buildings, (2) there was the "presence of multiple health symptoms for multiple health systems," and (3) confounders were absent (i.e. untreated or uncontrolled medical conditions). If a patient satisfied these requirements, the results from the blood and visual contrast sensitivity tests would be reviewed to determine whether three of the following were present: (1) one of fifty-four kinds of immune response genotypes known as HLA, (2) reduced levels of melancyte stimulating hormone ("MSH"),(3) elevated levels of matrix metalproteinase-9 ("MMP9"), (4) deficits in visual contrast sensitivity, (5) dysregulation of ACTH and cortisol, and (6) dysregulation of ADH and osmolality. These measurements were supposed to illustrate inflammation, which, according to Dr. Shoemaker, was a biomarker for illnesses related to exposure to water damaged buildings.

Following the *Frye-Reed* hearing, the circuit court concluded that the differential diagnosis performed by Dr. Shoemaker was reliable and acceptable to establish general and specific causation, and that the differential diagnosis method is generally accepted in the medical community. Appellant noted a timely appeal.

Held: Reversed.

Dr. Shoemaker considers himself to be a physician who practices family medicine and uses a differential diagnosis to treat individuals exposed to water damaged buildings. Differential diagnosis "is a scientific method that laymen would refer to as the process of elimination." *CSX Transportation, Inc. v. Miller*, 159 Md. App. 123, 204 (2004). In conducting his differential diagnosis, Dr. Shoemaker testified that he interviews a patient to review his or her medical history, conducts the repetitive exposure protocol, and reviews the results of blood and visual contrast sensitivity tests. Appellant argues that repetitive exposure, blood testing, and visual

contrast sensitivity testing are not generally accepted in diagnosing and treating illnesses from exposure to mold.

"[B]efore a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field."*Reed v. State*, 283 Md. 374, 381 (1978). To be sure, "if a new scientific technique's validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence." *Id*. However, unanimity is not required to establish general acceptance. *Wilson v. State*, 370 Md. 191, 210 (2002).

At the *Frye-Reed* hearing in this case, the parties acknowledged that the primary issue was whether exposure to mold caused appellees' neurocognitive and musculoskeletal problems. Dr. Shoemaker testified that there were scientific publications that supported the theory that exposure to water damaged buildings caused the human health effects at issue. Conversely, Dr. Cheung testified that there was scientific research that provided there was no association between exposure to mold and certain human health effects, or in the alternative, more research was necessary. Because there were several articles that supported each position, the Court held that there was a genuine controversy within the scientific community with regard to whether exposure to water damaged buildings causes the human health effects Dr. Shoemaker suggests were caused by exposure to water damaged buildings.

Charles Vernon Bordley v. State of Maryland, No. 464, September Term 2010, filed June 27, 2012. Opinion by Sharer, J.

http://mdcourts.gov/opinions/cosa/2012/0464s10.pdf

CRIMINAL LAW – SEARCH AND SEIZURE – HOTEL ROOM – EXPECTATION OF PRIVACY

Facts:

A hotel room rented by appellant became the focus of apparent use by unauthorized persons after appellant claimed to have vacated the room, but before the term of rental expired.. For security and safety reasons, hotel staff "locked out" the room denying access to appellant, and then opened the room for police, who discovered, in plain view, CDS and related paraphernalia. Appellant was not in the room at the time.

The Circuit Court for Queen Anne's County denied appellant's motion to suppress, reasoning that the lock-out of the room was for legitimate security purposes and that, thereafter, appellant enjoyed no expectation of privacy. In a bench trial that followed, the circuit court convicted appellant of possession, possession with intent to distribute, and conspiracy offenses.

On appeal, appellant challenged the circuit court's denial of his motion to suppress, and sufficiency of the evidence to convict him of possession of the contraband.

Held: Affirmed.

In affirming the denial of appellant's motion to suppress, the Court held that because hotel management "locked out the room for legitimate reasons of security and safety of staff and other guests, appellant thereafter did not have a subjective expectation of privacy in the room, and that hotel staff reasonably authorized police to enter the room without a warrant.

Moreover, the Court concluded that the evidence was sufficient to support appellant's possession convictions based on constructive possession concepts.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated August 1, 2012, the following attorney has been suspended for 30-days by consent:

JOE DONALD WATSON, JR.

*

By an Order of the Court of Appeals dated August 1, 2012, the following attorney has been disbarred by consent:

MARK LAWRENCE GITOMER

*

By an Order of the Court of Appeals dated August 1, 2012, the following attorney has been placed on inactive status by consent:

WILL ABERCROMBIE, JR.

*

This is to certify that

ANTHONY IGNATIUS BUTLER, JR.

has been replaced on the register of attorneys in this state as of August 1, 2012.

*

By an Order of the Court of Appeals dated August 6, 2012, the following attorney has been reprimanded by consent:

RICHARD J. REINHARDT

*

By an Order of the Court of Appeals dated August 15, 2012, the following attorney has been disbarred by consent:

KEVIN EDWARD SNIFFEN

*

By an Order of the Court of Appeals dated August 17, 2012, the following attorney has been disbarred by consent:

WILLIAM CARPENTER DONOVAN, JR.

*

By an Order of the Court of Appeals dated August 20, 2012, the following attorney has been reprimanded by consent:

KENNETH JOHN MACFADYEN

*

By an Opinion and Order of the Court of Appeals dated August 21, 2012, the following attorney has been disbarred:

DAVID ARTHUR ROSS

*

By an Opinion and Order of the Court of Appeals dated August 21, 2012, the following attorney has been disbarred:

GODSON M. NNAKA

*

By an Opinion and Order of the Court of Appeals dated August 21, 2012, the following attorney has been disbarred:

JEFFREY LAWSON

*

By an Opinion and Order of the Court of Appeals dated August 21, 2012, the following attorney has been disbarred:

KATRICE SELENA STINSON

*

By an Opinion and Order of the Court of Appeals dated August 22, 2012, the following attorney has been indefinitely suspended:

HARRY TUN

*

By an Opinion and Order of the Court of Appeals dated August 22, 2012, the following attorney has been suspended for sixty days:

JOHN WAYNE WALKER-TURNER, JR.

*

By an Order of the Court of Appeals dated August 24, 2012, the following attorney has been reprimanded by consent:

JOHN WILLIAM SELLERS

*

By an Opinion and Order of the Court of Appeals dated August 27, 2012, the following attorney has been disbarred:

COTIE W. JONES

*

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JUDICIAL APPOINTMENTS

On July 19, 2012, the Governor announced the appointment of **JOHN PHILLIP RUE, II** to the Wicomico County District Court. Judge Rue was sworn in on August 6, 2012 and fills the vacancy created by the retirement of the Honorable R. Scott Davis.

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On July 19, 2012, the Governor announced the appointment of **JEANNIE EUN KYUNG CHO** to the Montgomery County District Court. Judge Cho was sworn in on August 24, 2012 and fills the vacancy created by the retirement of the Honorable Gary L. Crawford.

*

On July 19, 2012, the Governor announced the appointment of **HON. DANA MOYLAN WRIGHT** to the Washington County District Court. Judge Wright was sworn in on August 24, 2012 and fills the vacancy created by the retirement of the Honorable W. Kennedy Boone.

*

On July 19, 2012, the Governor announced the appointment of **KARLA NATASHA SMITH** to the Montgomery County District Court. Judge Smith was sworn in on August 30, 2012 and fills the vacancy created by the retirement of the Honorable Brian G. Kim.

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