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Table of Contents

Return to ToC

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Alfred Amos Page, Jr., AG No. 70, September Term 2011, filed March 5, 2013. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2013/70a11ag.pdf

ATTORNEY DISCIPLINE – DISBARMENT

Facts:

The Attorney Grievance Commission filed a Petition for Disciplinary or Remedial Action against Alfred Amos Page, Jr. ("Respondent"), for his alleged misconduct and violation of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") during his representation of a client, and in his representations toward this Court and Bar Counsel.

The Honorable Katherine D. Savage of the Circuit Court for Montgomery County found the following facts: Respondent failed to keep adequate records of payment from his client, and accepted and removed funds from his account before the funds were earned. Additionally, Respondent continually delayed his client's case and failed to provide his client with important documents and information. Furthermore, Respondent filed faulty Motions on his client's behalf, some of which contained misrepresentations.

Judge Savage also found that while representing his client, Respondent began employment with the Internal Revenue Service ("IRS"), failed to request or receive permission from the IRS to continue his legal representation, and misrepresented to his client that he was awaiting permission from the IRS to continue her case. Additionally, during this representation period, Respondent was suspended from the practice of law for thirty days and did not inform his client of his suspension. With regard to the terms of his suspension, Respondent was non-compliant because he continued to represent his client during the suspension period. Finally, Respondent made several misrepresentations to the Court and Bar Counsel when he stated in his Petition for Reinstatement that he complied with the rules governing his suspension, and he made misrepresentations during Bar Counsel's investigation of his client's complaint.

Based on these findings of fact, Judge Savage concluded that Respondent violated MLRPC 1.1 (Competence); 1.3 (Diligence); 1.4(a) and (b) (Communication); 1.15(a) and (c) (Safekeeping Property); 1.16(a) and (d) (Declining or Terminating Representation); 5.5 (Unauthorized Practice of Law); and 8.4(a),(c) and (d) (Misconduct), in connection with his representation of his client. Furthermore, with regard to Bar Counsel's complaint and Respondent's representations to Bar Counsel and this Court, Respondent violated 3.3(a)(1) (Candor Toward the Tribunal), and 8.1(a) (Bar Admission and Disciplinary Matters).

Respondent filed several exceptions. He argued that the evidence presented with regard to his deposited funds was not clear and convincing. Additionally, he excepted to his violation of the Rules for Competency and Diligence because the legal skill and services he provided on behalf of his client were reasonable under the circumstances. Respondent also challenged the conclusion that he violated the safekeeping rule, failed to terminate his relationship with his client after his suspension, did not promptly return his client's files after their professional relationship terminated, and was intentionally dishonest with his client and in his statements to the Court and Bar Counsel.

Held:

The appropriate sanction is disbarment for Respondent's dishonesty as it relates to his communications with his client regarding his employment with the IRS and his suspension from the practice of law, which is compounded by his intentional misrepresentations to this Court in his effort to gain reinstatement to practice law and in response to Bar Counsel's investigation. Additionally, not only was it a serious violation for Respondent to remove unearned fees from his trust account before the fees were earned, it was also a violation for Respondent to fail to maintain and monitor the records and funds in his possession. Finally, Respondent's failure to terminate his relationship with his client during his suspension from the practice of law was most egregious, and in violation of the Maryland Rules. Specifically, Respondent's violation of MLRPC 1.1; 1.3; 1.4(a) and (b); 1.15(a) and (c); 1.16(a) and (d); 5.5(a), (b)(1) and (b)(2); 3.3(a)(1); 8.1(a); and 8.4(a),(c) and (d) warrants the sanction of disbarment.

Deutsche Bank National Trust Company as Trustee for the Certificate Holders of ISAC 2006-5 MTG Pass-Through Certificates and Bank of America, N.A., as Successor by Merger to BAC Home Loans Servicing, LP v. Angela Brock, No. 55, September Term 2012, filed March 22, 2013. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2013/55a12.pdf

COMMERCIAL LAW – AUTHORITY TO ENFORCE THROUGH FORECLOSURE PROMISSORY NOTE INDORSED IN BLANK

Facts:

Angela Brock ("Brock") executed a promissory note ("the Note"), secured by a deed of trust, in favor of her lender, Amerifund Mortgage Services, LLC, for the purpose of financing the purchase of improved residential real property located in Silver Spring, Maryland. Although the Note originated with Amerifund Mortgage Services, LLC, it appears that it was later sold. The Note and the accompanying allonge contained three indorsements, negotiating the Note from Amerifund Mortgage Services, LLC to American Brokers Conduit, and from American Brokers Conduit to IMPAC Funding Corporation. The last, and most relevant, indorsement read as follows: "Pay to the Order of ; Without Recourse: IMPAC Funding Corporation." The last indorsement did not include a named payee.

Although not reflected in the Note's indorsements, it was alleged that the Note was securitized into a Trust, for which Deutsche Bank National Trust Company ("Deutsche Bank") was the Trustee. IMPAC was the servicer, and BAC Home Loans Servicing, LP ("BAC") (now known as Bank of America, N.A.) a sub-servicer, of the loan. Pursuant to a Pooling and Servicing Agreement, both BAC and IMPAC had the power of attorney from Deutsche Bank, as Trustee, to fulfill their duties – including, but not limited to, instituting legal proceedings and appointing attorneys for the purpose of effectuating foreclosure.

Due to personal financial difficulties, Brock fell behind on her loan payments. After she became delinquent, BAC appointed, in 2009, substitute trustees to initiate foreclosure proceedings. Shortly before the foreclosure sale was to take place, Brock filed a separate action in the Circuit Court for Montgomery County on 16 February 2010 against BAC, Deutsche Bank (referred to collectively as "Petitioners"), and the Substitute Foreclosure Trustees, seeking, among other things, a permanent injunction preventing the foreclosure sale of her home and a declaration that Deutsche Bank is not empowered to enforce the deed of trust. The Circuit Court entered summary judgment in favor of Petitioners on 1 December 2010, and dismissed the complaint.

The Court of Special Appeals, in an unreported opinion, reversed. The court determined that a genuine dispute of material fact existed with respect to the ownership of the Note and the continued existence of the Trust. Moreover, because BAC, which claimed to be in possession of

the Note, did not demonstrate the transfer history of the Note, the intermediate appellate court determined that, on the record before it, BAC did not have the authority to enforce the Note.

The Court of Appeals issued a writ of *certiorari* to consider whether an entity in possession of a promissory note indorsed in blank is a holder of the note, or whether it is merely a non-holder in possession, and thus required to establish how it came into possession of the note.

Held: Reversed.

The Court of Appeals concluded that, because BAC was in possession of a promissory note indorsed in blank, BAC had the authority to enforce that Note, including initiating foreclosure proceedings, without the obligation to prove how it came into possession of the Note. The last indorsement on the Note did not state a named payee, and was thus an indorsement in blank. A note indorsed in blank properly is negotiated by transfer of possession alone. The Court noted that there was no gap in the indorsements purporting to transfer the Note, nor did Brock argue before the Court of Appeals that the indorsements were insufficient to negotiate the Note to BAC. Rather, because BAC was in possession of the Note, which was indorsed in blank, the Court determined that BAC was the holder of the Note, and, as the holder, was a person or entity entitled to enforce it, without proving how it came into possession of the Note. This situation was distinguished from that in *Anderson v. Burson*, 424 Md. 232, 35 A.3d 452 (2011) (requiring a transferee in possession of a promissory note to account for possession of the instrument by proving the transaction through which the transferee acquired it).

Additionally, the Court noted that, generally, which person or entity owns the Note is irrelevant in determining who or what entity is entitled to enforce it. Indeed, as the Commercial Law Article makes clear, the holder of a note may enforce it even if it is not the owner of that note. Thus, because BAC was the holder of the Note, and thus entitled to enforce it, ownership of the Note was irrelevant to the questions at issue before the Court of Appeals. Moreover, because BAC was the holder of the Note and therefore entitled to enforce it, any dispute regarding the Trust's continued existence was not a genuine dispute of material fact precluding summary judgment.

Gladys Gardner, Individually and on behalf of all persons similarly situated v. Ally Financial Incorporated f/k/a GMAC Incorporated & Randolph Scott, Individually and on behalf of all persons similarly situated v. Nuvell National Auto Finance, LLC, d/b/a Nuvell National Auto Finance; Nuvell Financial Services LLC, Misc. No. 10, September Term 2012, filed March 12, 2013. Opinion by Battaglia, J.

http://mdcourts.gov/opinions/coa/2013/10a12m.pdf

CERTIFIED QUESTION OF LAW – CREDITOR GRANTOR CLOSED END CREDIT ACT – SECTION 12-1021(J) OF THE COMMERCIAL LAW ARTICLE – PUBLIC AUCTION OR PRIVATE SALE OF REPOSSESSED PROPERTY

Facts:

The United States Court of Appeals for the Fourth Circuit certified the following question of law to the Court of Appeals pursuant to the Maryland Uniform Certification of Questions of Law Act, Sections 12-601 to 12-613 of the Courts and Judicial Proceedings Article, Maryland Code (1973, 2006 Repl. Vol.), and Maryland Rule 8-305:

> Where tangible personal property financed pursuant to Maryland's Creditor Grantor Closed End Credit Act ("CLEC"), Md. Code Ann., Com. Law §§ 12-1001 et seq., is subsequently repossessed and sold by the credit grantor at an auction that is publicly advertised but requires a $1,000 refundable fee for a person to enter and observe the auction, regardless of whether the person intends to bid, is the sale a private sale under CLEC, and thus subject to the post-sale disclosure requirements in Md. Code Ann., Com. Law § 12-1021(j)(2), or is it a "public auction" (or "public sale"), subject instead to the requirements of § 12-1021(k)?

Held:

The Court of Appeals answered that the sale of the repossessed personalty was a "private sale," because attendance was limited to those who paid a refundable $1,000 cash deposit, even to observe. The Court explained that the Creditor Grantor Closed End Credit Act ("CLEC"), Section 12-1021(j) of the Commercial Law Article, Maryland Code (1975, 2005 Repl. Vol.) provides two methods of selling repossessed property, "public auction" or "private sale," Section 12-1021(j)(1), and requires greater qualitative and quantitative information about the sale to be disclosed to the debtor following a "private sale," Section 12-1021(j)(2). Any sale, whether "public auction" or "private sale," must be accomplished in a commercially reasonable manner.

Neither “public auction” nor “private sale” is defined in the statute. The legislative history of CLEC elucidated that “private sale” was added to CLEC as an alternative to the “public auction,” in order to benefit the creditor. In the same amendment to CLEC, the Legislature also added the provisions requiring that the creditor provide a post-sale disclosure following a “private sale,” in response to legislative concern that a private sale could occur in a collusive manner to the detriment of the defaulting buyer and that any sale must be commercially reasonable. The Court determined that the use of “commercial reasonableness,” as interpreted under the Uniform Commercial Code, is related “to evaluating the procedures utilized to sell collateral.”

The Court considered the definition of “public auction” embraced by the creditor, as well as that adopted by the Court of Special Appeals in real estate sales, as “a method of selling [property] in a public forum through open and competitive bidding.” The Court referred to instances in which “open” was considered synonymous with “transparent,” for the purpose of allowing interested parties to observe the procedures employed during the sale, so to ensure the integrity of the sale. The Court held that in this case, involving two sales, the admission fee limited the public’s ability to observe the procedures, and, therefore, the sales were“private sales” under Section 12-1021(j) of CLEC.

John Doe v. Department of Public Safety and Correctional Services, No. 125, September Term 2011, filed March 4, 2013. Opinion by Greene, J.

Harrell, Adkins, and McDonald, JJ., concur.
Barbera, J., dissents.

http://mdcourts.gov/opinions/coa/2013/125a11.pdf

CONSTITUTIONAL LAW - EX POST FACTO

Facts:

John Doe ("Doe") pled guilty and was convicted in 2006 with the crime of child sexual abuse. The charge was based upon inappropriate contact Doe had with a thirteen-year-old student when he was a middle school teacher during the 1983-84 school year.

In 1995, the General Assembly enacted the Maryland sex offender registration statute, currently codified in Sections 11-701 *et seq.* of the Criminal Procedure Article. The statute originally applied prospectively to crimes committed after it went into effect on October 1, 1995. The statute, however, was amended a number of times, and among other changes, in 2009 the statute was applied retroactively to a child sex offender who committed his or her crime before October 1, 1995 if the offender was convicted on or after October 1, 1995. As a result of this amendment, Doe was required to register in October 2009. In 2010, Doe was reclassified as a Tier III sex offender and as a result of that designation Doe must now remain registered for the rest of his life.

Doe challenged the requirement that he register. After the Circuit Court concluded that Doe could be required to register, Doe appealed the decision to the Court of Special Appeals which affirmed the Circuit Court's judgment. This Court granted certiorari.

Held: Reversed and Remanded.

The plurality opinion of the Court concluded that requiring Doe to register violated the *ex post facto* prohibition in Article 17 of the Maryland Declaration of Rights independent of the prohibition against *ex post facto* laws in Article 1 of the federal Constitution.

The plurality noted that since at least 1987, we have held that the prohibition against ex post facto laws "extends broadly to any law passed after the commission of an offense which . . . in relation to that offense, *or its consequences*, alters the situation of a party to his disadvantage[,]" *Anderson v. Dep't of Health & Mental Hygiene*, 310 Md. 217, 224, 528 A.2d 904, 908 (1987) (emphasis in original) (quotations omitted). While the United States Supreme Court has

disavowed the "disadvantage" standard when interpreting the federal Constitution's *ex post facto* prohibition, we continue to apply that standard when analyzing Article 17 allegations.

The plurality further noted that as the disadvantage standard has been applied in our cases, the retroactive application of laws that have the effect on an offender that is the equivalent of imposing a new criminal sanction or punishment violates Article 17. In the present case, requiring Doe to register is tantamount to imposing the criminal sanctions of probation and shaming for life, and, thus, the retroactive application of the sex offender registration statute to Doe violates Article 17.

Two Judges of this Court concurred in the judgment that Doe could not be required to register but reached that judgment by reading Article 17 *in pari materia* with Article 1 of the federal Constitution, and concluding that amendments to the sex offender registration statute changed it "from [one] of civil regulation to an element of the punishment of offenders," thus precluding retroactive application of that law to Doe. One other Judge of this Court concurred in judgment, based instead on the determination that requiring Doe to register violated the terms of his plea agreement.

Jorge Appraicio v. State of Maryland, No. 49, September Term 2012, filed March 26, 2013. Opinion by Barbera, J.

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

http://mdcourts.gov/opinions/coa/2013/49a12.pdf

CRIMINAL PROCEDURE – JURY INSTRUCTIONS – RESPONDING TO JURY QUESTIONS CONCERNING EVIDENCE

Facts:

Petitioner Jorge Aparicio (his name had been misspelled during court proceedings) was convicted of second-degree assault in connection with a July 12, 2010 attack on his girlfriend. Petitioner's girlfriend testified at trial that Petitioner came home intoxicated and hit her. The police arrived and ordered him to leave, but she testified that he returned later and hit her again. The defense presented no evidence. During closing argument, defense counsel argued that there was no corroboration for the girlfriend's story in the form of a police report or officer testimony.

During its deliberations, the jury sent a note to the trial court asking whether it could "consider the fact that there was no police report in evidence or no police testimony or to what extent can we consider the lack of above." After a lengthy discussion between the trial court and counsel, the court gave an answer that hewed closely to the pattern jury instruction on what constitutes evidence, which had been read earlier. That instruction informs jurors that evidence constitutes testimony from the witness stand, physical items of evidence, and any exhibits that had been presented. The instruction also tells jurors that they may draw any reasonable conclusions from the evidence they believe are justified based on their own experiences. Petitioner appealed his conviction, arguing that the trial court abused its discretion by not telling jurors that they could consider the lack of evidence in determining whether the State met its burden to prove the case beyond a reasonable doubt. In an unreported opinion, the Court of Special Appeals affirmed the conviction.

Held: Affirmed.

The Court of Appeals observed that trial courts have a duty to answer, as directly as possible, questions posed by jurors. The Court noted, though, that answers must be more circumscribed when the questions deal with the evidence in a case rather than the law. The Court stated that this is because jurors place a great deal of weight on statements made by trial courts, and judges must be careful not to invade the province of the jury to decide the facts of a case. The Court observed that the question posed by jurors asked to what extent they could consider the lack of specific evidence in the case, namely the lack of a police report or officer testimony. The Court held that the trial court did not abuse its discretion in repeating the substance of the pattern jury instruction on what constitutes evidence in response to the jury's question.

Angel Ochoa v. Department of Public Safety and Correctional Services, No. 123, September Term 2011, filed January 30, 2013. Opinion by Adkins, J.

Bell, C.J. and Greene, J. dissent.

http://mdcourts.gov/opinions/coa/2013/123a11.pdf

CRIMINAL LAW – A sex offender subject to lifetime registration because of a conviction under the former Article 27 criminal law statutes is still subject to lifetime registration under the current statutory scheme, even though it does not explicitly reference Article 27.

Facts:

Angel Ochoa was convicted in 1998 of two sex offenses committed against his eleven year old step-daughter. At the time of his conviction, he was subject to a ten-year term of registration. In 1999, the General Assembly significantly changed the laws concerning the registration requirements and procedures concerning individuals convicted of certain crimes against children, sexually violent offenses, or other sexual offenses. Ochoa sought declaratory relief in 2010, claiming that he had satisfied the ten-year registration requirement accompanying his conviction and that he was not subject to lifetime registration under Section 11-707(a)(4)(iii) of the Criminal Procedure Article. Md. Code (2001, 2008 Repl. Vol., 2010 Cum. Supp.). The Circuit Court for Prince George's County denied Ochoa's claim and declared he was subject to lifetime registration. Ochoa appealed to the Court of Special Appeals, but this Court, on its own motion, granted certiorari to hear his case.

Held: Affirmed.

The Court of Appeals held that the General Assembly's revisions of the sex-offender registration requirements in 1999 were retroactive and applicable to Ochoa. Under the 1999 revisions, an individual who violated Sections 35C (child sexual abuse) and 464B (third degree sexual offense) of the former Article 27, as Ochoa did, was both a "sexually violent offender" and a "child sexual offender." Therefore, since Ochoa was subject to the ten-year registration requirement at the time of the revision, and committed his crimes before the effective date of the revision, he met both of the requirements that triggered retroactivity.

In 2002, the General Assembly moved many of the criminal offenses contained in Article 27, including those under which Ochoa was convicted, to the Criminal Law Article. Concurrently, the Criminal Procedure Article was altered to reflect which crimes required lifetime registration. One of these crimes was a "sexually violent offense," which then included "a violation of §§ 3-303 through 3-307 or §§ 3-309 through 3-312 of the Criminal Law Article." The Court interpreted the statute to mean that certain convictions under the former Article 27—including Ochoa's conviction for third degree sexual offense—were not excluded from the definition of a

"sexually violent offense." Since, under Criminal Procedure § 11-707(a)(4)(iii), any person who is subject to registration on September 30, 2010, having been convicted of a sexually violent offense, is subject to lifetime registration, Ochoa was required to register for life.

The Court of Appeals also found that, under the most recent version of the sex-offender registration statute, Ochoa is required to register for life because he is a tier III sex offender who was required to register on September 30, 2010.

In re: Adoption of Sean M., No. 54, September Term 2012, filed March 22, 2013. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2013/54a12.pdf

FAMILY LAW – INDEPENDENT ADOPTION – CONSENT OF NATURAL PARENT – TERMINATION OF RIGHTS – UNTIMELY OBJECTION – DUE PROCESS

PUTATIVE FATHER WHO, AFTER RECEIVING PROPER NOTICE, FAILED TO FILE TIMELY A NOTICE OF OBJECTION TO THE INDEPENDENT ADOPTION OF HIS SON BY STEPFATHER WAS CONSIDERED TO HAVE CONSENTED IRREVOCABLY TO THE ADOPTION BY OPERATION OF LAW. THE PERTINENT STATUTORY SCHEME FOR NOTICE AND OPPORTUNITY TO OBJECT IS FUNDAMENTALLY FAIR AND DOES NOT DEPRIVE THE PUTATIVE FATHER OF ANY DUE PROCESS RIGHT TO PARTICIPATE IN RAISING HIS SON.

Facts:

Moira M. ("Mother") and William H. engaged in a romantic relationship from April to November of 2008. They were not married. Sean M. ("Sean") was born to Mother on 16 June 2009. Moira M. became engaged to Jeffrey Craig K. ("Stepfather") in November of 2009. Since that time, she and Sean lived with Stepfather in Queen Anne's County. Mother and Stepfather married on 16 October 2011.

On 14 July 2009, Mother filed a Complaint against William H. in the Circuit Court for Anne Arundel County, asserting that William H. is the natural father of Sean (although Sean's birth certificate does not identify a father) and seeking sole legal and physical custody. In his Answer, William H. denied that he was the natural father of Sean and stated that he had no objection to Mother having custody. On 14 January 2010, the suit was dismissed by agreement of the parties.

On 30 March 2011, Stepfather filed a Petition for Stepparent Adoption of a Minor and Change of Name ("Petition") in the Circuit Court for Queen Anne's County, stating his intention to continue to reside with Sean's mother, and that no natural father of Sean has been identified. The Petition stated also that, even if William H. was the natural father of Sean, he has "abandoned his parental rights" as to Sean because William H.: (1) denied that he was the natural father of the minor child during the earlier custody proceeding in the Circuit Court for Anne Arundel County; (2) has not "exercised any parental rights since the minor child's birth;" and, (3) has not attempted to support and maintain Sean since his birth.

The Circuit Court issued a show cause order and form notice of objection to William H. (himself an attorney admitted in Maryland at the time), who was served properly by personal service on 29 April 2011. The required deadline for William H. to file with the Circuit Court for Queen Anne's County any objection to Stepfather's petition for adoption of Sean was 31 May 2011.

The Circuit Court received William H.'s written objection on Wednesday, 1 June 2011, one day after the expiration of the thirty-day deadline.

Stepfather filed a Motion to Strike Late Notice of Objection, requesting that the adoption proceed as an uncontested matter. Judge J. Frederick Price granted Stepfather's motion, noting that William H. did not allege any disability or any other circumstance to excuse the requirement, pursuant to Maryland Rule 9-107(b)(1), of filing a notice of objection to an adoption within thirty days after the show cause order is served. William H. filed a Motion to Alter and Amend Judgment on 18 August 2011, and, a week later, an Emergency Motion to Stay Adoption Proceeding. The court denied both motions. William H. appealed the denial of the orders to the Court of Special Appeals.

On 27 April 2012, a panel of the intermediate appellate court affirmed, in a reported opinion, the Circuit Court's grant of Stepfather's Motion to Strike William H.'s untimely objection. The court held that the time period established in Md. Rule 9-107(b)(1) applied equally to guardianships as well as adoptions, and that it rendered the late filing of a notice of objection to an adoption as an irrevocable consent to termination of the pertinent parent's rights, *In re: Adoption of Sean M.*, 204 Md. App. 724, 742, 42 A.3d 722, 732 (2012). The intermediate appellate court held also that this statutory scheme did not offend any due process right of William H. *Id.* at 749, 42 A.3d at 737. The Court of Appeals granted William H.'s petition for Writ of Certiorari, *In re: Adoption of Sean M.*, 427 Md. 606, 50 A.3d 605 (2012), to consider (1) whether a putative parent's failure to file a timely objection to a proposed independent adoption, as directed in a show cause order, constitutes an irrevocable consent to the adoption; and, (2) whether the statutory scheme resulting in an irrevocable deemed consent to an independent adoption offends the due process rights of the putative parent.

Held: Affirmed.

The Court determined first that the failure of William H. to file timely a notice of objection to the proposed independent adoption constituted an irrevocable consent to the adoption. The analysis began with a comparison of the independent adoption statutory and regulatory provisions with the guardianship statutory scheme, which applies a similar thirty-day objection period. In guardianship proceedings, any late-filed objection results in an irrevocable consent to the guardianship petition. The Court held that, because the statutory schema of guardianship and adoption procedures are sufficiently similar in their plain language and legislative intent as to the effect of a late-filed notice of objection, an untimely objection acts as an irrevocable consent in either a guardianship or an adoption proceeding.

Second, the Court held that, based on the multi-factor test of *Matthews v. Eldridge*, 424 U.S. 319 (1976), the procedures established in the independent adoption statutory and rule-based provisions provide fair notice to a parent or putative parent that his or her right to participate in raising his child will terminate by requiring that (1) the parent receives notice that an adoption petition is filed and (2) the parent is made aware clearly that the court may enter an order for

adoption only if each of the adoptee's parents consents by writing or by failure to file a notice of objection within the thirty-day statutory time period. The Court determined that, because William H. offered no excuse for his late-filed objection and did not contend that the pertinent statutory and regulatory provisions were unclear, the independent adoption statutory scheme provided fundamentally fair procedures that did not deprive William H. of due process.

Travco Insurance Company v. Crystal Williams, Misc. No. 7, September Term 2012, filed February 25, 2013. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2013/7a12m.pdf

INSURANCE – MOTOR VEHICLE INSURANCE LAW – LIMITATIONS ON RECOVERY OF BENEFITS

Facts:

The United States District Court for the District of Maryland certified questions to this Court arising from a motor vehicle insurance dispute under Md. Code, § 19-513(e) of the Insurance Article (" § 19-513(e)").

Crystal Williams purchased a Maryland personal auto policy from Travco that included uninsured motorist coverage ("UM") and personal injury protection ("PIP"). During the effective coverage period, Ms. Williams was injured while traveling on a work assignment in a District of Columbia ("DC") government vehicle. Ms. Williams's vehicle was rear-ended by an unknown driver who left the scene and about whom no information is known. Ms. Williams suffered a loss of earning capacity and incurred medical expenses. She received workers' compensation ("WC") benefits from the DC government. Additionally, Ms. Williams's medical providers applied WC "write-downs."

The DC government asserted a subrogation claim against any UM or PIP recovery by Ms. Williams, and Ms. Williams intends to reimburse the District. Travco and Ms. Williams dispute the effect of § 19-513(e) over Ms. Williams's PIP or UM recovery.

Held:

In response to the certified questions, this Court held:

The statute is clear and unambiguous. It states that "[b]enefits payable under [the PIP and UM statutes] shall be reduced to the extent that the recipient has recovered benefits under the [WC] laws of a state or the federal government for which the provider of the [WC] benefits has not been reimbursed." "Reimbursement" is defined as "Repayment." Under the statute, therefore, the repayment to the WC provider must have occurred in the present, or have occurred in the past, for the previously-compensated insured to avoid the statutory PIP and/or UM reduction by the insurer. Accordingly, mere reimbursement in the future is insufficient under the statute. In the present case, Ms. Williams "has recovered" WC benefits and the WC provider "has not been reimbursed" for those benefits. As such, under the plain meaning of § 19-513(e), the insurer shall reduce UM and PIP benefits to the extent of the recipient's un-reimbursed WC benefits.

Additionally, assuming that the law applicable to the underlying auto accident and to the WC claim treats “write-downs” of medical bills as WC benefits, such “write-downs” would reduce the benefits payable under § 19-513(e).

Edward Bruce Lowery, Jr. v. State of Maryland, No. 26, September Term 2012, filed February 28, 2013. Opinion by Greene, J.

Harrell, Barbera, and McDonald, JJ., dissent.

http://mdcourts.gov/opinions/coa/2013/26a12.pdf

STATUTORY INTERPRETATION – NATURAL RESOURCES LAW

Facts:

Edward Bruce Lowery, Jr. ("Lowery") was given a citation for illegally using a hydraulic clam dredge in a submerged aquatic vegetation protection zone ("SAV zone") in Cook's Point Cove in Dorchester County, Maryland. The use of hydraulic clam dredges violates Section 4-1006.1 of the Natural Resources Article of the Maryland Code ("§ 4-1006.1"). Lowery was convicted of the violation in the District Court for Dorchester County, and subsequently, the Circuit Court for Dorchester County reviewed the conviction in a *de novo* trial.

Subsection (e)(3) of § 4-1006.1 dictates that the Department of Natural Resources ("DNR") "shall publish, by public notice, delineations of SAV protection zones and revisions to SAV protection zones." Lowery challenged his conviction in the circuit court based on, among other things, the failure of DNR to comply with NR § 4-1006.1(e)(3). At the circuit court trial, the State presented as evidence that it complied with subsection(e)(3), a "public notice" that allegedly had been published. The document indicated that there was a SAV zone within, among other bodies of water, Cook's Point Cove, and provided the contact information for two DNR employees who could provide the specific locations of the SAV zones. Lowery argued that publishing the "public notice" did not comply with NR § 4-1006.1(e)(3).

The Circuit Court rejected that argument, along with Lowery's other challenges, and affirmed Lowery's conviction. This Court granted certiorari.

Held: Reversed and Remanded.

NR § 4-1006.1(e)(3)'s requirement that DNR publish "delineations" and "revisions" of SAV zones imposes an obligation upon DNR to publish either maps or written descriptions with specific details of SAV zones and new, amended, improved, up-to-date, or corrected versions of the same. What was published by DNR, namely the general locations of SAV zones and the contact information for DNR employees, did not satisfy this requirement.

So that no subsection of NR § 4-1006.1 is rendered meaningless, the State must prove, among other things, as an element of its case when prosecuting an alleged violation of NR § 4-1006.1 that DNR complied with the obligations of subsection (e)(3). Additionally, a violation of NR §

4-1006.1 is not a strict liability offense. Because in the present case the State did not prove that DNR complied with NR § 4-1006.1(e)(3), Lowery's prosecution cannot stand.

Board of Directors of Cameron Grove Condominium II, et al v. State Commission on Human Relations, No. 47, September Term 2012, filed March 28, 2013. Opinion by Battaglia, J.

Harrell, J., joins in judgment only

http://mdcourts.gov/opinions/coa/2013/47a12.pdf

STATUTORY INTERPRETATION – HOUSING DISCRIMINATION – BURDEN OF PROOF

Facts:

Two disabled residents of Cameron Grove Condominium II requested keys to access the side and back doors, which were used as emergency exits only, of their building as accommodations for their disabilities under Section 22(a)(9) of Article 49B of the Maryland Annotated Code. Their requests were denied by the Board of Directors of Cameron Grove (Cameron Grove). The residents filed separate complaints with the Maryland Commission on Human Relations (Commission) alleging that Cameron Grove had discriminated against them by failing to grant their reasonable accommodation. The Commission investigated the complaints and issued a finding that there was probable cause to believe the residents had been discriminated against. After conciliation failed, the Commission filed complaints against Cameron Grove on behalf of the residents.

A hearing was held before an administrative law judge from the Office of Administrative Hearings, who issued an opinion recommending that the charges be dismissed. The Commission appealed this decision to an Appeal Board, which overruled the administrative law judge and determined that Cameron Grove discriminated against the residents by failing to give them the requested keys. Notably, the Appeal Board based its conclusion on the fact that Cameron Grove had not demonstrated that giving keys to the residents was unreasonable. The Appeal Board also imposed fines and awarded damages against Cameron Grove. Cameron Grove petitioned for judicial review, and the circuit court judge reviewing the matter remanded the case back to the Appeal Board for further consideration, noting that the Commission, as the complaining party, should have been required to prove reasonableness. The Commission appealed this decision, and the Court of Special Appeals vacated, affirming the Appeal Board's decision. Cameron Grove petitioned for certiorari.

Held:

The Court of Appeals held that the Appeal Board properly allocated the burden of proof when it required Cameron Grove to demonstrate the requested accommodation was unreasonable, after the Commission made a prima facie showing that it was reasonable. The Court noted that there

was a split in the federal Circuit Courts regarding the burden of proving reasonableness under the Federal Fair Housing Act, Sections 3600 et. seq. of Title 42 of the United States Code (2006), but that the majority of circuits have adopted the policy that once the complaining party has made a prima facie showing of reasonableness, the burden shifts to the defending party. The Court then held that the Appeal Board's decision was supported by the evidence in the record and affirmed the decision of the Appeal Board.

State Department of Assessments & Taxation v. Baltimore Gas & Electric Company, No. 14, September Term 2012, filed March 22, 2013. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2013/14a12.pdf

TAX LAW – STATE AND LOCAL TAXES – FRANCHISE TAX – EFFECT OF ELECTRICITY DEREGULATION AND RATE STABILIZATION

Facts:

After deregulation of the electric power market in 1999, the state franchise tax applied to an electric utility's income from its *distribution* of electricity, not its *sale* of electricity. In 2006, the General Assembly enacted a rate stabilization plan, under which an anticipated increase in the rates charged by Baltimore Gas & Electric Company ("BGE") for the sale of electricity would be mitigated through the application of credits and subsequent charges to residential customers' bills. The legislation directed BGE to show the credits and charges on the distribution portion of a customer's bill to make them "nonbypassable" – i.e., a customer could not switch electricity suppliers simply to obtain the credit and to avoid the offsetting charge.

BGE contended that the credits offset its taxable distribution income. The placement of the credit on the portion of the bill with BGE's distribution charges but not sale charges, the utility concluded, had the effect of reducing its distribution income subject to the tax.

The State Department of Assessments and Taxation ("SDAT") denied BGE's request for a refund based on reported decreased distribution revenues resulting from the credits – a decision upheld by the Tax Court. On appeal, the Circuit Court of Anne Arundel County reversed the Tax Court, holding that BGE was entitled to the refund; the Court of Special Appeals later affirmed the Circuit Court. SDAT appealed the decision of the Court of Special Appeals, arguing that the credits related to increased rates for the sale of electricity and therefore did not impact BGE's distribution revenue subject to the franchise tax.

Held:

The placement of the deferral credits, pursuant to the 2006 rate stabilization plan, on the distribution portion of the bill did not alter the nature of the credits and offset distribution revenue. The credits were placed there in order to make them "nonbypassable" so that BGE did not have a competitive advantage in the energy supply market. The requirement was not meant to, and did not, affect BGE's distribution revenue or its liability for the franchise tax.

Exxon Mobil Corporation v. Thomas M. Albright, et al., No. 15, September Term 2012, filed February 26, 2013. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2013/15a12.pdf

TORTS – FRAUD – DETRIMENTAL RELIANCE REQUIRED

TORTS – DAMAGES – EMOTIONAL DISTRESS FOR FEAR OF DEVELOPING DISEASE

TORTS – RECOVERY OF DAMAGES FOR MEDICAL MONITORING RECOGNIZED

TORTS – DAMAGES – EMOTIONAL DISTRESS FOR FEAR OF INJURY TO REAL PROPERTY NOT PERMITTED ORDINARILY, ABSENT FRAUD OR LIKE MOTIVES

DAMAGES – INJURY TO REAL PROPERTY – DUPLICATIVE AND SPECULATIVE COMPENSATION PROHIBITED

TORTS – INJURY TO REAL PROPERTY – SHOWING OF SUBSTANTIAL INTERFERENCE REQUIRED ABSENT PHYSICAL IMPACT TO LAND

EXPERT TESTIMONY – USE OF COMPARABLE SALES DATA IN VALUATION OF REAL PROPERTY

Facts:

Exxon Mobil Corporation ("Exxon") owned a gasoline fueling station in Jacksonville, Maryland, a community that relies principally on private wells, rather than municipal water supplies, for its potable water. While performing maintenance on 13 January 2006, an Exxon contractor drilled unknowingly a hole in the underground fiberglass gasoline feed line. An alarm sounded and shut down the product line. Contractors sent to the station to investigate the leak concluded (incorrectly) that no actual leak existed. The technicians recalibrated the leak detection system (incorrectly), such that the alarm system could no longer detect the actual leak when the fuel system was reactivated. As a result of this confluence of events, the underground leak continued uninterrupted until 16 February 2006, releasing ultimately 26,000 gallons of gasoline into the underground environment.

Approximately 466 residents and business proprietors in the Jacksonville community (collectively referred to as "Appellees") filed suit in the Circuit Court for Baltimore County on 5 April 2007, seeking compensatory and punitive damages for fraud, emotional distress for fear of contracting cancer, medical monitoring, emotional distress for fear of loss of property value, diminution in value of real property, and loss of use and enjoyment of real property. Appellees submitted six instances of alleged fraud to the jury: (1) 1983 construction fraud, stemming from design plan statements made by an Exxon engineer at a County Board of Appeals hearing; (2)

1992 permit fraud, based on the destruction of a portion of the underground leak containment system during 1992 retrofitting construction; (3) 2001 double-walled piping fraud, stemming from a document filed with the Maryland Department of the Environment ("MDE") containing an incorrect statement that the station used double-walled piping; (4) sign fraud, based on a misleading sign placed outside of the Jacksonville Exxon station for approximately five days following the discovery of the leak; (5) remediation fraud, based on allegedly false representations made to the community regarding the extent of the leak, recovery efforts, and safety of well water; and, (6) remediation fraud based on allegedly intentional misleading statements made to the MDE. Additionally, Appellees submitted claims for damage to real property based on nuisance, negligence, strict liability for an abnormally dangerous activity, and trespass.

After an approximately six-month jury trial, Appellees recovered, for all causes of action alleged, $496,210,570 in compensatory damages and $1,045,550,000 in punitive damages. Exxon filed motions for judgment, a motion for judgment notwithstanding the verdict, and a motion for a new trial and/or remittitur. The trial court granted Exxon's motion for judgment on evil motive, ill will, or intent to injure, and granted remittitur as to five Appellees, but denied Exxon's post-trial motions otherwise. The Court of Appeals issued a writ of *certiorari*, on its initiative before the Court of Special Appeals decided the appeal, to consider the following questions: (1) Does Maryland recognize third party reliance in a fraud action?; (2) Was there sufficient evidence to support the jury's fraud awards?; (3) Where a Plaintiff alleges multiple instances of fraud, must the jury verdict sheet allocate compensatory damages among the various instances of fraud?; (4) Was the punitive damages award excessive?; (5) Was there sufficient evidence to support the jury's award of emotional distress damages for fear of cancer?; (6) Does Maryland recognize a claim for medical monitoring?; (7) Were the jury's awards for property damages duplicative, excessive, and speculative?; and, (8) Is the release of a contaminant into an aquifer sufficient to establish trespass to land regardless of the level of detected contamination in an individual Plaintiff's well?

Held: Affirmed in part, reversed in part, remanded in part.

The Court of Appeals reversed the jury's verdict as to all six alleged instances of fraud. The Court concluded that Appellees' attenuated third-party reliance theory, which permitted recovery by Appellees upon a demonstration that a governmental entity relied detrimentally on a false statement made by Exxon, and was asserted as to three instances of alleged fraud, was insufficient as a matter of law. Maryland law does not permit a third party to recover damages for fraud purely on the basis of a false statement made to a governmental entity and in the absence of a demonstration that Appellees relied, either directly or indirectly, on the relevant misrepresentation to his or her detriment. As to the remaining allegations of fraud, the Court determined that Appellees did not meet their burden of proving, by clear and convincing evidence, detrimental reliance on an intentionally false representation. Therefore, the Court reversed the finding of fraud and the award of punitive damages as to all Appellees.

The Court held further that, to recover emotional distress damages for fear of developing a latent disease, a plaintiff must show that (1) he or she was exposed actually to a toxic substance due to the defendant's tortious conduct; (2) which led him or her to fear objectively and reasonably that he or she would contract a disease; and, (3) as a result of the objective and reasonable fear, he or she manifested a physical injury capable of objective determination. Because most Appellees' wells had not tested positively for contamination at or exceeding the MDE and Environmental Protection Agency levels of concern for the contaminants at issue (benzene and MTBE), the Court determined that only eight Appellees had an objectively reasonable fear of contracting a latent disease (cancer). Of the remaining Appellees, the Court determined that only one manifested a physical injury capable of objective determination related causally to the Exxon spill, as demonstrated by the expert testimony offered in support of her claim, and remanded her claim for a new trial.

The Court held that damages for medical monitoring costs, usually to be administered through an equitable fund, may be recovered upon a showing of the following: (1) the plaintiff was exposed significantly to a proven hazardous substance through the defendant's tortious conduct; (2) as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease greater than the general public; (3) the increased risk makes periodic diagnostic medical examinations reasonably necessary; and, (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. The Court reversed medical monitoring damages as to all Appellees, determining that most Appellees did not demonstrate "significant" exposure, and, of those that did, no Appellee provided particularized expert testimony demonstrating a significantly increased risk of contracting a latent disease.

The Court reversed additionally Appellees' awards for emotional distress for fear of loss of property value, noting that, ordinarily, emotional distress damages attendant to injury to real property are not compensable, absent fraud, ill will, or like motives. Further, the Court determined that Appellees with potable wells that had not tested positive for contamination, and to whom Exxon had not admitted liability, could not recover damages for diminution in value or past loss of use and enjoyment because they did not demonstrate a substantial interference with the use of their property resulting from Exxon's actions.

Further, the Court reversed the damages awards for loss of use and enjoyment in favor of all non-owner occupier Appellees, as well as the Appellees who recovered damages for both loss of use and enjoyment and diminution in value. The Court noted that, under the facts of this case, the damages awarded for loss of use and enjoyment were not distinguishable from and were subsumed in the diminution in value of real property, and thus the award of both constituted duplicative compensation. For those Appellees who did not claim diminution in value, but recovered damages for loss of use and enjoyment, the Court determined that the award may not exceed the fair market, unimpaired value of the property at issue. Thus, the Court affirmed all but one award, which was reversed and remanded for a new trial because no evidence was introduced at trial regarding the pre-leak fair market value of the property.

Lastly, the Court reversed and remanded for a new trial the awards for diminution in value of real property, finding that the expert testimony on which the jury awards were premised was speculative. Specifically, because the expert did not proffer a reasonable justification for ignoring the relevant available market data, the Court determined that the trial court abused its discretion in permitting the expert to testify.

Exxon Mobil Corporation v. Paul D. Ford, et al., No. 16, September Term 2012, filed February 26, 2013. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2013/16a12.pdf

CIVIL PROCEDURE – APPEALS – APPELLATE JURISDICTION – IN BANC DETERMINATIONS

TORTS – DAMAGES – EMOTIONAL DISTRESS FOR FEAR OF DEVELOPING DISEASE – MEDICAL MONITORING

TORTS – DAMAGES – EMOTIONAL DISTRESS FOR FEAR OF INJURY TO REAL PROPERTY – DUPLICATIVE COMPENSATION FOR INJURY TO REAL PROPERTY PROHIBITED – NO PHYSICAL IMPACT TO LAND – LOSS OF USE AND ENJOYMENT

EXPERT TESTIMONY – VALUATION OF REAL PROPERTY

LAY TESTIMONY – VALUATION OF REAL PROPERTY

Facts:

This is the companion case to *Exxon Mobil Corp. v. Albright*, __ Md. __, __ A.3d __ (filed 26 Feb. 2013 and decided immediately prior to the present case) involving an underground gasoline leak from an Exxon Mobil-owned gasoline fueling station, located in the Jacksonville area of Baltimore County, that began on 13 January 2006. The station's leak detection system failed to detect a punctured underground line leak, which caused a gasoline leak of approximately 26,000 gallons into the underground aquifer and resulted in the contamination of wells supplying water to a number of households over a period of more than thirty days before being discovered and disclosed. Beginning in February 2006, by order of the Maryland Department of the Environment (MDE), Exxon began testing the residents' potable wells for chemical contamination and installed monitoring wells to find and measure the presence and extent of the gasoline leak's contamination and remediation wells to recover the fuel.

Eighty-seven plaintiffs in the present case filed suit in the Circuit Court for Baltimore County against Exxon, claiming that their alleged exposure to their potable well water caused their properties to decrease in value, and that their health was threatened as a result of exposure to toxic chemicals – specifically, methyl tertiary-butyl ether ("MTBE"), a possible carcinogen, and benzene, a known carcinogen. Plaintiffs sought compensatory and punitive damages based on allegations of fraudulent concealment, intentional infliction of emotional distress, strict liability, trespass, private nuisance, and negligence. They sought punitive damages and three types of compensatory damages: (1) monetary damages for diminution in the fair market value of their real property; (2) non-economic damages for emotional distress, including fear of contracting cancer; and (3) damages for the costs of future medical monitoring. Plaintiffs dismissed

subsequently the intentional infliction of emotional distress claims, but only some plaintiffs dismissed the trespass counts. Exxon denied liability for fraud and punitive damages, but admitted liability for trespass, private nuisance, negligence, and strict liability. Exxon further maintained that certain of the compensatory damages claimed – non-economic emotional distress damages arising from injury to property and fear of cancer, and damages for future medical monitoring costs – were not compensable under Maryland law.

A jury trial began on 14 October 2008. Experts for both parties testified as to the extent of well water contamination and after-effects of the gas leak to the plaintiffs' properties, the plaintiffs' mental anguish, and their need for medical monitoring. Plaintiffs proffered testimony as to their alleged emotional distress, need for medical monitoring, and diminution in value of their properties as a result of the gas leak. On 12 March 2009, the jury returned a verdict in favor of Exxon regarding the fraudulent concealment and punitive damage claims, but (1) found that each of the plaintiffs' properties was worthless, and awarded monetary damages for diminution of real property value in an amount equal to the full value of the properties before the leak; and (2) awarded to all plaintiffs non-economic damages for emotional distress, including fear of contracting cancer, and damages for the cost of future medical monitoring. The total amount of damages awarded was approximately $147 million.

Exxon filed several post-judgment motions, which the court denied generally. On 9 September 2009, Exxon noted an appeal to the Court of Special Appeals, challenging the sufficiency of the evidence for the jury's verdicts and the jury instructions regarding the legal standards applied by the jury in reaching its verdicts for fear of contracting cancer and medical monitoring. Appellees contended that Exxon's attorney at trial waived Exxon's right to challenge the compensatory damage awards by certain things he said in opening statement and closing argument intending to induce the jury not to award punitive damages if Exxon agreed to pay reasonable compensatory damages. A three-judge panel heard argument, but did not issue a decision. Rather, on 9 February 2012, an en banc panel, consisting of nine incumbent members of the court, after re-argument, issued a per curiam opinion and a number of attributed opinions on the questions presented by the appeal. *Exxon Mobil Corp. v. Ford*, 204 Md. App. 1, 40 A.3d 514 (2012). The court rejected unanimously the Appellees' contention that Exxon was estopped from challenging the compensatory damages awards, and concluded unanimously that the Circuit Court had not abused its discretion in admitting Appellees' expert testimony in support of their claims of diminution in property values. *See id.* at 10–11, 40 A.3d at 519 (per curiam). Different majorities of the sitting court explained, in various written opinions, their support for the remaining portions of the judgment announced by the per curiam opinion. A majority, however, (1) affirmed the judgments awarding damages to each Appellee the full value of their property before the leak; (2) reversed the awards for damages for fear of contracting cancer as to all but fifty-three Appellees, for whom the court ordered a new trial; and (3) reversed the awards for damages for the costs of future medical monitoring. *Id.* at 10–12, 40 A.3d at 519-20.

On 27 February 2012, Appellees filed a motion requesting that the Court of Special Appeals reconsider its February 9 in banc decision, claiming that portions of that decision were supported by fewer than seven judges and therefore violated Section 1-403(c) of Court and Judicial

Proceedings Article, which authorizes the court to decide an appeal through the in banc mechanism. The intermediate appellate court denied Appellees' motion in a per curiam opinion filed on 6 March 2012, *Exxon Mobil Corp. v. Ford*, 204 Md. App. 274, 277, 40 A.3d 674, 675 (2012).

The Court of Appeals granted Exxon's and Respondents' petitions for Writs of Certiorari on 9 May 2012, *Exxon Mobil Corp. v. Ford*, 426 Md. 427, 44 A.3d 421 (2012) after it issued a Writ for Certiorari in *Exxon Mobil Corp. v Albright*, 426 Md. 427, 44 A. 3d 421 (2012), a then pending related case in the Court of Special Appeals. The two cases were argued on the same day in the Court of Appeals.

Held: Affirmed in part, reversed in part.

The Court of Appeals held, first, that regardless of whether the en banc panel of the Court of Special Appeals lacked a concurrence of a majority of the entire court in reaching its decision, the Court of Appeals's grant of Respondents' and Exxon's petitions for Writs of Certiorari enabled the Court of Appeals to consider and decide all issues that would have been cognizable by the intermediate appellate court. Further, the Court concluded that evidence at trial demonstrated that Exxon's attorney at trial did not waive Exxon's right to challenge the jury's verdicts awarding of compensatory damages.

The Court reversed the awards for damages for fear of contracting cancer, based on the elements required for recovery established in *Exxon Mobil Corp. v. Albright*, __Md. __, __ A.3d. __ (slip op. at 39-56). It held that some Respondents failed to show any actual exposure to a toxic substance, other Respondents failed to show they had an objective reasonable fear of contracting cancer despite actual exposure to a toxic substance, and that the remaining Respondents failed to provide sufficient evidence that they suffered a physical injury as a result of exposure to the gas leak. The Court noted, however, that its decision does not preclude any Respondent who may develop a future latent disease as a result of exposure to the 2006 leak from filing a future claim for developing such a disease, as such claims would not be barred by res judicata or the statute of limitations.

The Court also reversed the awards for future costs of medical monitoring, based on the elements required for recovery as established in *Exxon Mobil Corp. v. Albright*, __ Md. __, __ A.3d. __ (slip op. at 77), holding that the evidence at trial failed to show that Respondents suffered from a significantly increased risk, if any, of contracting a latent disease that is greater than the risk posed to the general public.

Lastly, the Court turned to awards for damages for diminution in property value. As it held in *Albright*, the Court determined that emotional distress damages attendant to injury to real property are not recoverable where, as in this case, there was no evidence of fraud. The Court held that Respondents could not recover damages for both loss of use and enjoyment and diminution in value. The Court concluded further that the trial court was correct in admitting the

testimony of Respondents' real estate appraisal expert, where the expert supported his assessments by various, but rationally-based, methodologies, despite the exclusion from ultimate consideration of comparable real sale market data. The Court determined that the trial court denied erroneously Exxon's motions for a new trial or judgment not withstanding the verdict because there was substantial evidence at trial that the Respondents' properties did not have "zero sale value," but rather suffered diminution in value. Respondents' lay testimony as to their properties' value, the Court held, was not admissible or probative because the testimony did not offer any substantive valuation or any specialized valuation expertise, and therefore did not support the actual damage awards made by the jury based on "zero sale value" of Respondents' properties. Therefore, the Court reversed the judgments awarding damages for diminution in property value as to those Respondents whose properties lacked any toxic contamination, and reversed and remanded for a new trial the remaining judgments for damages for diminution in property value, in light of the Court's decision in *Albright*, __ Md. at __, __ A.3d at __ (slip op. at 93–129).

Cherie Ross v. Housing Authority of Baltimore City, No. 10, September Term 2012, filed March 22, 2013. Opinion by McDonald, J.

http://mdcourts.gov/opinions/coa/2013/10a12.pdf

EXPERT TESTIMONY – MARYLAND RULE 5-702

TORTS – PROOF OF CAUSATION – SUMMARY JUDGMENT

Facts:

As a child, Cherie Ross had abnormally high levels of lead in her blood. Between her birth in October 1990 and June 1992, she lived with her mother in a house on North Gilmor Street in Baltimore City. From June 1992 through at least 1996, they lived in a house on North Payson Street, also in Baltimore City. The Payson Street home was owned by the Housing Authority of Baltimore City. As an adult, Ms. Ross filed suit against the Housing Authority and against the owners of the Gilmor Street home, though the latter settled prior to the hearing on motions in limine. In her complaint, Ms. Ross alleged "developmental and behavioral injuries" resulting from exposure to lead at the properties.

The record revealed four categories of evidence supporting Ms. Ross's claims.

First, she offered records of her blood lead levels taken throughout her childhood, at both properties. These records indicated that she had elevated blood lead levels while living at both properties, with her levels peaking approximately fourteen months after moving to the Payson Street home.

Second, she offered three reports from lead paint inspections performed in the Payson Street home. These indicated the presence of lead in a small number of locations around the house: an exterior window well to a living room window, the exterior entrance to the cellar, and an interior stair riser.

Third, she offered the testimony of her mother that both the exterior and interior of the home suffered from flaking and peeling paint, that Ms. Ross and her mother often spent time on the front steps near to flaking paint and the window well that tested positive, and that Ms. Ross displayed delayed mental development as a child.

Fourth, she offered the testimony of Dr. Jacelyn Backwell-White, a pediatrician, whose proposed testimony was that, among other things, the Payson Street home was "the source" of Ms. Ross's exposure to lead.

The Circuit Court granted the Housing Authority's motion in limine to exclude the testimony by Dr. Blackwell-White as to source, reasoning that the proposed testimony did not satisfy the

requirements of Maryland Rule 5-702. The Circuit Court then granted the Housing Authority's motion for summary judgment on the theory that the plaintiff could not prove causation without that testimony. On review, the Court of Special Appeals affirmed the Circuit Court's ruling excluding the expert testimony, but did not separately analyze whether summary judgment was appropriate without that testimony.

Held: Affirmed in part, reversed in part.

The Court of Appeals held that the Circuit Court acted within its discretion in ruling that Dr. Blackwell-White's testimony did not satisfy Maryland Rule 5-702. That rule requires a court to determine whether a witness's opinion will help the trier of fact to understand the evidence or to determine a fact in issue. Dr. Blackwell-White's proposed testimony on source consisted of reciting the information she took into account and then stating the ultimate conclusion, but she offered no explanation linking the two. Additionally, the evidence highlighted by the parties suggested that there were multiple potential sources of lead exposure. Therefore, an expert opinion identifying the Payson Street home as "the source" without any scientific explanation was as likely to confuse as to assist the jury.

The Court of Appeals also held that the Circuit Court erred in granting summary judgment to the Housing Authority. Building on the logic of the Court of Special Appeals in *Dow v. L & R Properties, Inc.*, 144 Md. App. 67 (2002), the Court held that circumstantial evidence could be sufficient to permit a factfinder to make an inference that supported causation. Thus, exclusion of the expert testimony on source alone did not mandate that the Circuit Court grant summary judgment. The Court remanded for reconsideration of the summary judgment motion.

CSX Transportation, Inc. v. Edward L. Pitts, Sr., Case No. 34, September Term 2012, filed February 28, 2013. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2013/34a12.pdf

TORTS – TRANSPORTATION LAW – RAIL TRANSPORTATION – FEDERAL EMPLOYERS LIABILITY ACT – FEDERAL PRECLUSION – BALLAST

TORTS – TRANSPORTATION LAW – RAIL TRANSPORTATION – FEDERAL EMPLOYERS LIABILITY ACT – FEDERAL PRECLUSION – AFFIRMATIVE DEFENSE – BURDEN OF PROOF

CIVIL PROCEDURE – JURY INSTRUCTIONS – PREJUDICIAL ERROR

TORTS – DAMAGES – COLLATERAL SOURCE RULE

EVIDENCE – CROSS-EXAMINATION – SCOPE

EVIDENCE – RELEVANCE – WORKLIFE EXPECTANCY STATISTICS

Facts:

Edward L. Pitts, Sr., filed suit in the Circuit Court for Baltimore City against his employer CSX Transportation, Inc. ("CSX") under FELA, alleging that CSX was negligent in its use of large ballast rather than small ballast in the areas where Pitts worked. Pitts claimed that walking on the large ballast caused him to develop severe osteoarthritis which required him to have arthroscopic surgery on both knees .

Pitts began working for CSX in 1970 at the age of 19. He was still employed with CSX at the time of trial, at which point he was 59 years old. At trial, Pitts and his experts testified as to the different job positions Pitts held with CSX, the duties required of him in each position, and the stress and damage that such duties caused him. Pitts also testified that before being injured he had planned to work until the age of 67 or 68. Pitts then put on an expert economist to calculate his loss of future wages based on the assumption that Pitts would have worked until age 67. CSX sought to cross-examine the economist with work-life expectancy statistics compiled by the industry that showed that the average railroad worker retires at age 60. The trial court allowed only limited questions regarding such statistics. The jury then returned a verdict in Pitts' favor and he was awarded $1,246,000. The Court of Special Appeals affirmed the verdict.

Held: Affirmed

First, Pitts's FELA claim was not precluded by 49 C.F.R. § 213.103, a federal regulation governing the use of ballast enacted pursuant to FRSA. A FELA claim will be precluded by FRSA only if the regulation "substantially subsumes" the subject matter of the claim. 49 C.F.R. § 213.103 does "cover" and "substantially subsume" the use of ballast that supports the track, but it does not "cover" or "substantially subsume" the use of ballast in walkways that do not perform a track-support function. Because federal preclusion is an affirmative defense, CSX bore the burden at trial of proving that Pitts's FELA claim was based on ballast that performed a track-support function. CSX failed to meet this burden, and therefore, Pitts's FELA claim was not precluded.

Second, the jury instructions given by the trial court were not erroneously prejudicial and thereby do not warrant granting CSX a new trial. In the context of this trial, it was not error for the trial court to instruct the jury as to the history and purpose behind enacting FELA. And, although it was error in this case to instruct the jury that violation of a statute may be evidence of negligence, such error was not prejudicial because Pitts's counsel never mentioned the violation of a statute and there was ample evidence for the jury to find CSX negligent.

Third, although retirement eligibility information in a FELA case is barred by the collateral source rule, statistics about average retirement age for railroad workers is not. Use of industry statistics about average retirement age in this context is not evidence of other compensation the plaintiff would receive for the same damage, but rather, evidence that shows that the full amount of lost wages claimed by the plaintiff may not exist. In other words, the tables may cast doubt on a plaintiff's statement that he would work until a certain age, and thus suggest to the fact-finder that the lost wage claim was exaggerated. Nevertheless, the trial court did abuse its discretion in limiting the cross-examination because the specific questions were objectionable for assuming facts not in evidence and because it was likely to elicit an answer implicating the collateral source rule.

COURT OF SPECIAL APPEALS

YIM, LLC v. M. Hasip Tuzeer et al., No. 984, September Term 2011, filed February 28, 2013. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2013/0984s11.pdf

ALCOHOLIC BEVERAGES – LICENSE EXPIRATION – BALTIMORE CITY – VACATION OF PREMISES

ALCOHOLIC BEVERAGES – LICENSES – LATE FEES

ALCOHOLIC BEVERAGES – LICENSES – ABILITY TO AMEND APPLICATION

Facts:

YIM, LLC ("YIM") owns a property in Baltimore City that has been used as a restaurant for over fifty years. After the restaurant closed in 2008, YIM sought a replacement tenant to operate a new restaurant there. A group of neighboring homeowners oppose attempts by the new tenant, Richard D'Souza, to transfer and renew the liquor license that the previous restaurant had held. They argued that under Art. 2B, § 10-504(a), the liquor license automatically expired ten days after the restaurant tenant vacated the property and could not be renewed. They also asserted that the Board of Liquor License Commissioners could not accept the renewal application because it was filed more than thirty days after the license expired, in violation of § 10-301(j). The parties subsequently held three hearings before the Board on whether the license was still active, whether it could be transferred to D'Souza, and, after the transfer was denied, whether the Board would reconsider its denial. The Board ultimately approved the license transfer, granting D'Souza a liquor license for his restaurant. The Neighbors then sought judicial review in the Circuit Court for Baltimore City, which affirmed the Board's power to renew and transfer the license but concluded that D'Souza did not meet some of the statutory requirements of Art. 2B, § 9-101(c) for Baltimore City license applicants, *viz.* that he be a registered voter and a taxpayer in Baltimore City.

Held: Affirmed in part and remanded in part.

The Court of Special Appeals affirmed in part and remanded in part, sending the case back to the Board for further factfinding on D'Souza's compliance with Art. 2B, § 9-101(c). The Court first found that the liquor license did not automatically expire ten days after the restaurant tenant vacated the premises in 2008 because in Baltimore City, liquor license terms are governed by the

local provisions of Art. 2B, § 10-504(d) rather than the general terms of § 10-504(a). Because YIM and the original restaurant tenant filed hardship extension requests, under the terms of § 10-504(d), the license remained active and subject to transfer. The Court next determined that § 10-301(j), which authorizes the Board to impose a fine of $50 per day, up to $1,500, for late applications, does not prevent the Board from accepting an application that is more than thirty days late. The Court also found that the Board had the authority to accept amendments to applications, as well as renewal applications. It likewise found that the Board had the authority to grant a request for reconsideration and to reconsider its earlier decision. However, in examining the evidence before the Board, the Court found that there was not substantial evidence of D'Souza's compliance with a requirement that he be a Baltimore City taxpayer and remanded to the Board for further consideration of his taxpayer status. With regards to D'Souza's voter registration status, a new law enacted in 2012 may eliminate the requirement that a license applicant in D'Souza's situation be registered to vote in Baltimore. The Court remanded to the Board for consideration of the new law and its effect on D'Souza's application.

James Howard McCormick, III v. State of Maryland, No. 1855, September Term 2011, filed March 21, 2013. Opinion by Raker, J.

http://mdcourts.gov/opinions/cosa/2013/1855s11.pdf

CONSTITUTIONAL LAW – PROBABLE CAUSE TO ARREST-DWI

Facts:

Officer Davies stopped James Howard McCormick, III, for driving eighty-eight miles per hour in a fifty-five mile per hour zone. Upon approaching McCormick's vehicle, Officer Davies observed a strong odor of alcohol emanating from McCormick, his bloodshot eyes, and an alcohol restriction on his license. McCormick admitted to having a few alcoholic beverages earlier that evening. Officer Davies asked McCormick to submit to a field sobriety test, and, because McCormick refused to take the test, arrested him. At the police station after his arrest, McCormick submitted voluntarily to a blood alcohol concentration (BAC) test, which indicated that he had a BAC of 0.11.

McCormick was charged with driving while impaired in the Circuit Court for Anne Arundel County. McCormick moved to suppress the BAC as the fruit of an illegal arrest. The circuit court denied McCormick's motion and found him guilty of driving while impaired.

Held: Affirmed.

McCormick appealed the trial court's denial of his motion to suppress the BAC test in which he argued that the officer lacked probable cause to arrest. The Court of Special Appeals held that the officer had probable cause to arrest McCormick for driving with alcohol in his blood where the officer noted the alcohol restriction on McCormick's license, there was an odor of alcohol emanating from him, his bloodshot eyes, and his admission that he had a few alcoholic beverages. An officer's subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause, so long as the officer had probable cause to believe that the individual arrested committed or is committing a felony, or a misdemeanor in his presence.

Although the State argued that an individual's refusal to submit to a field sobriety test was admissible in evidence as consciousness of guilt, the Court declined to address the issue because probable cause existed for the arrest without considering the refusal.

Shih Ping Li v. Tzu Lee, No. 727, September Term 2010 and No. 2622, September Term 2011, filed March 4, 2013. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2013/0727s10.pdf

CONTRACT – SEPARATION AGREEMENT – CONFIDENTIAL RELATIONSHIP
CONTRACT – SEPARATION AGREEMENT – UNCONSCIONABILITY
CIVIL PROCEDURE – MOTION TO REVISE – EXTRINSIC FRAUD

Facts:

Appellant, Shih Ping Li ("Husband") and appellee, Tzu "Cindy" Lee ("Wife") retained attorney Yu Gu in connection with Wife's immigration petition in 2002. In 2005, Wife contacted Gu to prepare a separation agreement for her in anticipation of divorcing Husband. Gu did so, but Husband and Wife reconciled. In 2007, Gu again represented both parties in connection with Wife's immigration petition. Later that year, after discovering Husband had an affair, Wife retained Gu to draft a new separation agreement. The separation agreement was negotiated between the parties and Husband agreed to pay Wife $4000 per month as permanent, unmodifiable alimony. Husband never met Gu or had any contact with her during the immigration representation or during the drafting of the settlement agreements.

Both as part of his complaint for absolute divorce and as separate motions, Husband sought to set aside the settlement agreements. The Circuit Court of Montgomery County denied that relief. On April 19, 2010, the circuit court held a hearing on Husband's Motion to Set Aside the First and Second Agreements ("Motion to Set Aside"). The circuit court ruled that the agreements were valid because they were not unconscionable and no confidential relationship existed between Husband and Wife or between the parties and Gu. The agreements were subsequently incorporated but not merged into the parties' Judgment for Absolute Divorce. Husband filed a timely appeal from the circuit court's denial of his Motion to Set Aside. While that appeal was pending, he filed a Motion to Revise on October 14, 2011, seeking to have the agreements invalidated. The first appeal was stayed and the circuit court was instructed to consider Husband's Motion to Revise. On December 27, 2011, the circuit court denied Husband's Motion to Revise and on January 24, 2012, Husband noted an appeal from that denial. The appeals were consolidated.

Held: Affirmed.

No attorney-client relationship existed between the husband and the attorney who formerly represented both husband and wife in an immigration matter because the immigration and contract matters were not substantially related and no confidential information was used by the attorney when subsequently representing the wife in drafting the separation agreements. Absent the presumption of a confidential relationship created by an attorney-client relationship, the

husband failed to demonstrate that a confidential relationship existed when he never met or communicated in any way with the wife's attorney.

A separation agreement providing for $4000 per month indefinite and unmodifiable alimony payable to the wife was not unconscionable when no confidential relationship existed between the parties and the agreement was the result of lengthy negotiations, the husband negotiated particular terms in his favor, the husband had been advised to seek independent counsel but had declined to do so, and the husband had failed to investigate the wife's finances.

A witness who testified inaccurately before the trial court constitutes intrinsic, rather than extrinsic fraud. The witness was subject to extensive cross-examination and the fact-finder was not prevented from considering the issues. No hearing is required before a motion filed pursuant to Maryland Rule 2-535 is granted or denied.

Mark Aaron Snyder v. State of Maryland, No. 2225, Sept. Term 2010, filed March 20, 2013. Opinion by Raker, J.

http://mdcourts.gov/opinions/cosa/2013/2225s10.pdf

CRIMINAL LAW – ASSAULT – PRESENT APPARENT ABILITY

Facts:

On April 26, 2009, Mark Aaron Snyder shot at the home of Randy and Mary Ray. At the time of the assault, about 2 a.m., the Rays were not at home, but, in their absence, left the lights on in the living room and bedroom. Snyder was charged with first-degree assault in the Circuit Court for Harford County. The jury convicted appellant of two counts of first-degree assault. On appeal, appellant challenged his conviction for first-degree assault of Randy and Mary Ray and argued that, because the Rays were not home at the time of the alleged assault, he did not have the present apparent ability to commit an assault.

Held: Affirmed.

Maryland Code (2002, 2012 Repl. Vol.) § 3-203 of the Criminal Law Article prohibits assault. Assault retains its judicially determined meaning. There are three types of assault: (1) the "intent to frighten" assault, (2) attempted battery and (3) battery. For the attempted battery variety of assault, the type at issue in this case, the State must prove that (1) the defendant actually tried to cause physical harm to the victims, (2) that he intended to bring about physical harm to the victims, and (3) that his actions were not consented to by the victims.

The issue the court addressed was whether, for purposes of the attempted battery variety of assault, an individual actually tried to cause physical harm to the victims when he shoots at their home and believes incorrectly that they are at home. The Court held that the evidence was sufficient to support a conviction for assault, the attempted battery variety. In order to prove that the defendant actually tried to cause physical harm to the victims, the State must prove that the defendant believed he had the apparent present ability to consummate a battery. It is sufficient that there is an intention to inflict a battery and an apparent ability to carry out such intention. Though the attempted battery variety of assault requires that the accused has a specific intent to cause physical injury to the victim, there is no need for the victim to be aware of the impending battery.

Valencia Tubaya v. State of Maryland, No. 1914, September Term 2011, filed March 1, 2013. Opinion by Rodowsky, J.

http://mdcourts.gov/opinions/cosa/2013/1914s11.pdf

FIFTH AMENDMENT – DOUBLE JEOPARDY – COLLATERAL ESTOPPEL – MUTUALITY OF PARTIES – DOMESTIC VIOLENCE – PROTECTIVE ORDER – ASSAULT

Facts:

On June 27, 2011, Valencia Tubaya, the appellant, forced her way into her elderly parents' home and assaulted them. Later that day, the appellant's mother filed an application for a statement of charges and a petition for a protective order in the District Court of Maryland in Baltimore City. The District Court issued an interim protective order and five temporary protective orders against the appellant, but denied a final protective order for lack of clear and convincing evidence.

Meanwhile, the appellant's criminal case continued in the District Court based on the complaint her mother had filed. After the appellant prayed a jury trial, the case was transferred to the Circuit Court for Baltimore City. The appellant moved to dismiss the charges against her on the ground that the District Court's denial of a final protective order collaterally estopped the State from litigating whether the alleged assault had occurred. The court denied the motion on the ground that the State had not been a party to the protective order case. The appellant was convicted of two counts of second degree assault.

Held: Affirmed.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469, 475 (1970). A critical element of collateral estoppel is mutuality of parties, meaning that the parties in the earlier and later proceedings must be identical.

The State was not a party to the protective order case. Although the State may file a petition for a domestic violence protective order, it is undisputed that in this case the appellant's mother filed the petition on her own behalf. As the State was not a party to the protective order case, it had no prior opportunity to litigate whether the assault took place and thus could not be estopped from litigating that fact in the appellant's subsequent criminal trial. Accordingly, the circuit court did not err in denying the appellant's motion to dismiss the criminal case.

James Lambert, Jr. v. State of Maryland, No. 2542, September Term 2010, filed February 27, 2013. Opinion by Matricciani, J.

http://http://mdcourts.gov/opinions/cosa/2013/2542s10.pdf

ILLEGAL SENTENCE – CRIMINAL PROCEDURE ARTICLE § 6-221(a) – CONDITIONS OF PROBATION – "NO CONTACT" PROVISION

Facts:

During an argument on September 26, 2009, appellant pushed his wife, Mrs. Lambert, and she fell over a railing and down the stairs, injuring her head and abdomen. Appellant pleaded guilty to second degree assault on March 24, 2010, and he was sentenced on April 15, 2010. At sentencing, appellant admitted that he had assaulted Mrs. Lambert in the past. Although Mrs. Lambert did not appear, she explained in a letter to the court that she did not fear appellant and that she hoped to reconcile their marriage through counseling.

The court placed appellant on three years of supervised probation and imposed a special condition on appellant's probation that he "have no contact" with Mrs. Lambert during his probation period. On August 10, 2010, the court denied appellant's motion for reconsideration of his sentence.

At about that time, an anonymous tip led the State to discover that appellant and Mrs. Lambert had been communicating via telephone on a near-daily basis between May 17 and May 25, 2010. On September 8, 2010, appellant was charged with violating his probation.

On October 15, 2010, appellant moved under Rule 4-345 to correct his sentence as illegal. Appellant filed an affidavit from Mrs. Lambert in which she states that the no contact provision is against her wishes and "has grievously prejudiced and compromised" her marital relationship.

The court heard both the violation of probation and appellant's motion to correct his sentence on November 22, 2010. The court found appellant in violation of probation, denied his motion to correct the sentence, and reimposed his suspended sentence and probation, now set to end on November 22, 2013. Appellant then noted the present appeal.

Held: Affirmed.

Where appellant's wife was the victim of his repeated domestic abuse, a condition that appellant "have no contact" with her during his probation period had a rational basis in fact and did not violate his constitutional rights to marriage and to marital privacy. First, appellant's history of domestic violence provided a rational basis for the "no contact" provision. Additionally, the victim's lack of *subjective fear* did not compel the court to conclude that she was not, *in fact*, at

risk of further violence if appellant remained in contact with her. Second, the "no contact" provision did not violate appellant's constitutional rights to marriage and to marital privacy. By perpetrating an act of domestic violence against his wife, appellant subordinated his rights to the State's interests in punishment, deterrence, and rehabilitation. Even under the strict scrutiny test, the three-year prohibition on contact was not excessive, given the necessity to advance the State's compelling interest in securing the victim's safety from yet another incident of domestic violence at the hands of appellant.

Jamaal Garvin Alexis v. State of Maryland, Nos. 2786 & 2787, September Term 2010, filed February 27, 2013. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2013/2786s10.pdf

RIGHT TO COUNSEL OF CHOICE – CONFLICT OF INTEREST – DISQUALIFICATION OF COUNSEL – PRIOR TESTIMONY – HEARSAY; HEARSAY EXCEPTIONS – UNAVAILABILITY – MARYLAND RULE 5-804 – GRAND JURY TESTIMONY – COURTS & JUDICIAL PROCEEDINGS ARTICLE SECTION 10-901 – SENTENCING – SOLICITATION – CRIMINAL LAW ARTICLE SECTION 9-302 – CRIMINAL LAW ARTICLE SECTION 9-303 – MERGER FOR SENTENCING PURPOSES – REQUIRED EVIDENCE TEST – RULE OF LENITY – PRINCIPLE OF FUNDAMENTAL FAIRNESS

Facts:

Following a trial of consolidated cases, a jury in the Circuit Court for Prince George's County convicted Jamaal Garvin Alexis, appellant, in case number CT08-0504X, of second-degree murder and robbery with a dangerous weapon of Raymond Brown, use of a handgun in the commission of a crime of violence, common law conspiracy to commit theft over $500, and two counts of theft over $500. In case number CT09-1040B, the jury convicted appellant of solicitation to commit the murder of Bobby Ennels to prevent him from testifying in case number CT08-0504X, and solicitation to commit the murder in retaliation for testimony before the grand jury. The circuit court sentenced appellant to a total of one hundred forty years' incarceration, including twenty years' incarceration consecutive for solicitation to commit murder to prevent a witness from testifying and twenty years' incarceration consecutive for solicitation to commit murder in retaliation against a witness for testifying before the grand jury.

After his indictment, appellant's trial was scheduled to begin on April 13, 2009. On April 1, 2009, the State filed a Motion to Strike Appearance of Defense Counsel (the "Motion to Strike"), arguing that appellant's counsel had a conflict of interest under the Maryland Lawyers' Rules of Professional Conduct because he had previously represented a State's witness in a separate criminal case. The witness became a witness for the State, in appellant's case, when he contacted the State and advised that, while they were incarcerated together, appellant confessed to him that he had murdered Brown. In an affidavit accompanying the Motion to Strike, the witness attested that he had not waived the attorney-client privilege with appellant's counsel. Appellant opposed the Motion to Strike, arguing that his attorney's representation of the witness was for a brief and limited period of time in a separate criminal matter, and that his attorney could create a "Chinese wall" to screen himself from the conflict by not using any confidences he may have obtained and by having an attorney not affiliated with his firm cross-examine the witness at trial. The circuit court conducted a hearing and granted the Motion to Strike, finding that, although appellant was willing to waive any conflict, the witness was not.

On April 8, 2009, the State filed a motion to admit Ennels's grand jury testimony, contending that appellant engaged in, directed or conspired with his brother, and others, to murder Ennels so that Ennels could not testify against him at trial. The circuit court held a hearing and granted the motion to admit testimony, finding, by clear and convincing evidence, that appellant engaged in a calculated attempt to silence a witness that resulted in the witness's murder, as well as the murder and wounding of two other individuals.

Although the witness testified as a witness for the State at the hearing on the motion to admit testimony, he refused to testify for the State at trial. The witness repeatedly refused to testify at trial, and the circuit court found him in contempt of court. As such, the circuit court permitted the State to read, over objection, the transcript of the witness's prior testimony into the record in the presence of the jury.

Appellant was convicted of solicitation to commit the murder of Ennels to prevent him from testifying in case number CT08-0504X, and solicitation to commit the murder of Ennels in retaliation for testifying before the grand jury. At sentencing, as to the merger of the convictions for solicitation, appellant's counsel argued that merger was appropriate. The State responded that there were two separate solicitations with two separate intent elements. The circuit court denied the request for merger and imposed separate consecutive sentences of imprisonment for each conviction.

On appeal, appellant raised four issues: (1) Appellant contended that the circuit court erred in disqualifying his attorney where the attorney had arranged for co-counsel to cross-examine the witness. (2) Appellant argued that the circuit court erred in permitting the State to introduce the witness's prior testimony when the witness refused to testify at trial. (3) Appellant asserted that the circuit court erred in admitting Ennels's grand jury testimony and in finding that appellant procured Ennels's unavailability as a witness at trial. (4) Appellant maintained that the circuit court erred in sentencing him on two counts of solicitation, arguing that there was only one incitement.

Held: Affirmed.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantees criminal defendants the right to counsel. The right to counsel includes the right of a defendant, who does not require court-appointed counsel, to choose his or her counsel.

The right to counsel of choice is qualified and can be overcome where the defendant's attorney has a previous or ongoing relationship with an opposing party or where a party demonstrates an actual conflict or serious potential for conflict.

When determining whether to disqualify a defendant's counsel of choice based on a conflict of interest, a trial court must conduct a hearing on the matter and make evidence-based findings to

determine whether or not there is an actual or serious potential for conflict that overcomes the presumption the defendant has to his or her counsel of choice. Factors that the trial court may consider in this balancing test include: the likelihood that defense counsel will have divided loyalties; the State's right to a fair trial; the appearance of impropriety should the jury learn of the conflict; and the likelihood that defense counsel's continued representation will provide grounds for reversing the conviction.

Where defense counsel has previously represented a State's witness in a separate criminal proceeding and the State's witness refuses to waive any potential conflict of interest, despite the defendant's waiver of the conflict of interest, the circuit court properly disqualified defense counsel where it held a hearing on the matter and determined that the risk of conflict outweighed the defendant's right to counsel of choice.

A trial court is not required to adopt the use of co-counsel as a solution where the trial court finds that the risk of conflict would persist and the defendant does not waive an ineffective assistance of counsel claim against counsel concerning the use of co-counsel. The defendant's waiver of the conflict of interest alone does not resolve the issue.

Maryland Rule 5-804(a)(2) defines "unavailability as a witness" as including a situation where a witness "refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so[.]"

Maryland Rule 5-804(b)(1) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness: "Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Where the defendant fails to object to a trial court's finding of a witness's unavailability, the defendant fails to preserve the issue for appellate review.

Where a witness repeatedly refuses to testify, and the trial court finds the witness in contempt of court for refusing to testify, the trial court does not err in finding that the witness is unavailable under Maryland Rule 5-804(a)(2), and that the witness's prior testimony is admissible pursuant to Maryland Rule 5-804(b)(1).

Where a witness's testimony was offered for a similar purpose by the State at both a pretrial hearing and trial, defense counsel had an opportunity to fully cross-examine the witness at the pretrial hearing, and defense counsel had a similar motive and an interest of "substantially similar intensity" to discredit the witness at the pretrial hearing as at trial, the trial court does not err in admitting the witness's prior testimony pursuant to Maryland Rule 5-804(b)(1).

Maryland Rule 5-804(b)(5)(B) provides that, "[i]n criminal causes in which a witness is unavailable because of a party's wrongdoing, admission of the witness's statement under this exception is governed by [Md. Code Ann., Cts. & Jud. Proc. Art.] § 10-901." Md. Code Ann., Cts. & Jud. Proc. Art. §10-901, in turn, sets forth the procedures governing admission of such statements, which includes that the trial court find "by clear and convincing evidence that the party against whom the statement is offered engaged in, directed, or conspired to commit the wrongdoing that procured the unavailability of the declarant."

The trial court properly determined by clear and convincing evidence that the defendant engaged in, directed, and conspired to murder the victim, and procured the victim's unavailability at trial, such that the victim's grand jury testimony was admissible pursuant to Md. Code Ann., Cts. & Jud. Proc. Art. § 10-901, where evidence adduced at a hearing demonstrated the defendant's involvement in the victim's murder and his intent to have the victim killed.

Md. Code Ann., Crim. Law Art. § 9-302 prohibits individuals from soliciting a person to harm another, threaten to harm another, or damage or destroy property with the intent to: (1) influence a victim or witness to testify falsely or withhold testimony; or (2) induce a victim or witness to avoid the service of a subpoena or summons to testify or to be absent from an official proceeding to which the victim or witness has been subpoenaed or summoned.

Md. Code Ann., Crim. Law Art. § 9-303 prohibits individuals from soliciting a person to intentionally harm another, threaten to harm another, or damage or destroy property with the intent of retaliating against a victim or witness for: (1) giving testimony in an official proceeding; or (2) reporting a crime or delinquent act.

The required evidence test provides that if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.

The rule of lenity provides that, when two offenses do not merge under the required evidence test, they may still merge where there is doubt or ambiguity as to whether or not the legislature intended that there be multiple punishments for the same act or transaction.

Md. Code Ann., Crim. Law Art. § 9-302 and Md. Code Ann., Crim. Law Art. § 9-303 each require proof of a fact that the other does not–namely, the elements of intent set forth in the two statutes are separate, such that merger for sentencing purposes is not warranted under the required evidence test where a defendant is convicted under both statutes.

Under Md. Code Ann., Crim. Law Art. § 9-302 and Md. Code Ann., Crim. Law Art. § 9-303, there is no indication that the General Assembly intended to punish the crimes jointly, as the statutes set out separate penalties for each offense and do not direct the manner in which a trial court must sentence for a violation of both.

The trial court properly sentenced a defendant for both solicitation in retaliation for the victim's grand jury testimony under Md. Code Ann., Crim. Law Art. § 9-303 and solicitation to prevent the victim's appearance as a witness at trial under Md. Code Ann., Crim. Law Art. § 9-302–*i.e.* the trial court properly refrained from merging, for sentencing purposes, pursuant to the required evidence test, rule of lenity, or principle of fundamental fairness–where the defendant's conduct, although involving a single victim, was not predicated on a single act or harm, but rather involved two separate and distinct goals or harms, and conduct occurring over the course of one year.

Joseph William Payne & Jason Bond v. State of Maryland, No. 2156, September Term, 2009, filed February 27, 2013. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2013/2156s09.pdf

EVIDENCE – EXPERT TESTIMONY – MD. RULE 5-702 – SCOPE OF LAY WITNESS OPINION – MD. RULE 5-701 – *RAGLAND V. STATE*, 385 Md.706 (2005) – *WILDER V. STATE*, 191 Md. App. 319, *cert. denied*, 415 Md. 43 (2010) – *COLEMAN-FULLER V. STATE*, 192 Md. App. 577 (2010) – ADMISSIONS MADE BY PARTY-OPPONENT – MD. RULE 5-803(a)(1), *STATE V. RIVENBARK*, 311 Md. 147 (1987) – STATEMENT BY A CO-CONSPIRATOR OF THE PARTY DURING THE COURSE AND IN FURTHERANCE OF THE CONSPIRACY – MD. RULE 5-803(a)(5).

Facts:

Over objection of counsel for appellants, Detective Brian Edwards was permitted to offer lay testimony regarding the details of cellular telephone operations, usage, signals and positions. According to Detective Edwards, appellant Bond's cell phone registered off of a cellular tower at a latitude and longitude located approximately one and one-half to two miles away from the crime scene at approximately the time when the crime occurred and appellant Payne's cellular phone activated off one of the towers located in close proximity to the crime scene. Relying on *State v. Rivenbark, supra*, appellants, Payne and Bond, also contend that the trial court erred in admitting statements "made in connection with acts of concealment performed long after the conspirators have realized all benefits from the offense which they had agreed to commit."

Held:

Expert testimony is required to explain the functions of cell phone towers, derivative tracking, and the techniques of locating and/or plotting the origins of cell phone calls using cell phone records. The trial court erred in allowing the State to introduce cell phone tower evidence through lay testimony for the purpose of tracking of the location of appellants at the time of the murders. Because establishing that appellants were at or near the scene of the crime when it occurred was critical, the error in admitting the lay testimony was not harmless beyond a reasonable doubt.

Because the recordings admitted into evidence were neither hearsay statements of an agreement entered into at the outset of the substantive criminal event nor an express agreement to conceal in furtherance of attaining the chief objective, *i.e.*, to silence Stewart, the hearsay statements are inadmissible to establish an express conspiracy of concealment. The wiretap recordings, however, are admissible as to both Payne and Bond as statements of a party opponent. The only requirements for qualification of a statement under Md. Rule 5- 803(a)(1), Statements of a party-opponent, are that (1) the statement was made, adopted, or authorized by a party or that party's

agent or coconspirator; (2) the statement is offered in evidence against that party by an opposing party (it is not offered by the party who made the statement); and (3) as with all evidence, the statement must be relevant to a material fact. McLain, *Maryland Evidence*, § 801(4):1, at 96-97 (2001).

William Claybourne v. State of Maryland, No. 443, September Term 2011, filed February 28, 2013. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2013/0443s11.pdf

CONSTITUTIONAL LAW – BILL OF RIGHTS – FUNDAMENTAL RIGHTS – CRIMINAL PROCESS – TRIALS – DEFENDANT'S RIGHTS – RIGHT TO JURY TRIAL – JURIES & JURORS – VERDICT – UNANIMITY – WAIVER

EVIDENCE – TESTIMONY – CREDIBILITY – IMPEACHMENT – PRIOR INCONSISTENT STATEMENTS – REHABILITATION

Facts:

Appellant, William Claybourne, was indicted for first degree murder of Zachary Thompson, and two related weapons offenses. A trial occurred between January 11 and January 19, 2011, where the State called several witnesses to establish its *prima facie* case.

On January 14, 2011, before 3:00 p.m., the jury began its deliberations. Later, after failing to reach a unanimous decision, and with agreement of the parties, the jury was released for the three-day weekend and resumed deliberations on the following Tuesday. On January 18, 2011, after several hours of deliberations, the trial judge received a note from the jury, informing the court that the panel could not reach a unanimous decision on all counts. After a discussion with the parties, the court issued the pattern "duty to deliberate" instruction to the jury.

When the proceedings resumed, appellant requested to waive his right to a unanimous verdict and accept the majority verdict of the jury. During a brief recess, the parties and the court researched the legality of such a waiver. The court announced that its research indicated that a defendant could, in fact, waive his or her right to a unanimous verdict when the parties and the court agreed to permit the waiver. Though appellant reiterated his request for waiver, the State was unwilling to acquiesce at that time, so the jury was released and set to reconvene the following day.

When the proceedings resumed on January 19, 2011, both parties informed the court that they would consent to a waiver of appellant's right to a unanimous verdict. Thereafter, the court conducted an extensive on-record inquiry to ensure that appellant's waiver was knowing, intelligent, and voluntary. Based on appellant's responses, the court found that appellant had freely and voluntarily waived his right to a unanimous verdict.

Appellant was subsequently convicted of first degree murder by an eleven-to-one vote and unanimously convicted of carrying a dangerous weapon openly with the intent to injure. *See* Md. Code (1957, Repl. Vol. 2012), § 2-201(a) of the Criminal Law Article ("C.L.") (first degree murder); C.L. §4-101(c)(2) (carrying a dangerous weapon openly with the intent to injure).

Held: Affirmed.

The Court of Special Appeals first recognized that Maryland generally adheres to the common law system of trial by jury of twelve persons who may unanimously agree on a verdict, noting that this practice comports with the Sixth Amendment to the United States Constitution and with Article 21 of the Maryland Declaration of Rights. The Court observed, however, that the United States Supreme Court has concluded that neither the Sixth Amendment nor the Fourteenth Amendment is offended by a state provision imposing less-than-unanimous verdicts in all but capital cases – notwithstanding a defendant's refusal to consent to a unanimous verdict. *See Apodaca v. Oregon*, 406 U.S. 404, 406, 410–12 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 368–69 (1972) (Powell, J., concurring); *State v. McKay*, 280 Md. 558, 565–66 (1977).

Relying on the Court of Appeals' conclusion in *State v. McKay*, 280 Md. 558, 569 (1977), the Court of Special Appeals further observed that there was no historical support for an interpretation of Article 21 that would make jury unanimity an imperative requirement as opposed to a right that may be waived. Like other constitutional rights, it exists for the primary benefit of the criminal defendant. Thus, the Court observed, a defendant's right to a unanimous verdict may be duly waived by the express consent of the defendant, the State and the presiding court. *State v. McKay*, 280 Md. 558, 567 (1977). *Accord Allen v. State*, 77 Md. App. 537, 544 (1989).

The Court nevertheless recognized that a defendant's waiver to a unanimous verdict is not without qualifications. Because the right to a unanimous verdict is a fundamental constitutional right guaranteed the defendant in a criminal case, a defendant may forgo this right only if, upon consideration of the particular facts and circumstances in each case, he competently and intelligently decides to waive the right. Following an examination of the circuit court's on-record inquiry and additionally noting that appellant chose to waive his right to a unanimous jury verdict against the advise of counsel and against the court's warning of the risks involved, the Court of Special Appeals concluded that appellant's waive was both competently and intelligently made, and, therefore, in accordance with the standard imparted by the United States Supreme Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938). *See also Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

Appellant additionally claimed that the circuit court abused its discretion when it permitted testimony that one of the State's key witnesses had expressed concerns about her safety, arguing that it was unduly prejudicial because it was unclear whether appellant was not, in fact, responsible for her fear. In addition, appellant contended that it was unduly prejudicial because the circuit court failed to instruct the jury that evidence of the key witness's fear was admissible only for the limited purpose of judging her credibility. The Court engaged in a discussion of the Court of Appeals' opinion in *Washington v. State*, and observed that notwithstanding the higher degree of prejudice to the accused when a threat has no obvious nexus to him or her, any unfair prejudice can be cured by requesting a cautionary jury instruction. 293 Md. 465, 470–71 (1982).

Thereafter, the Court concluded that, in the instant matter, evidence explaining the witness's inconsistencies was clearly admissible for the purpose of rehabilitating her credibility. The Court further clarified that even though no cautionary instruction was given to limit the jury's consideration of the witness's explanation, when a witness offers testimony of threats to rehabilitate a prior inconsistent statement, it is the defendant's burden to request the appropriate limiting instruction to cure any prejudice.

Jeffrey W. Reichert v. Sarah H. Hornbeck f/k/a Sarah H. Reichert, No. 213, September Term 2012, filed March 20, 2013. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2013/0213s12.pdf

FAMILY LAW – CHILD CUSTODY – AWARDS – LEGAL & PHYSICAL CUSTODY – STANDARDS – BEST INTEREST OF CHILD

FAMILY LAW – CHILD SUPPORT – OBLIGATIONS – COMPUTATION – GUIDELINES – STANDARD – INCOME SHARES MODEL – ACTUAL INCOME – INCOME DOCUMENTATION – SUITABLE DOCUMENTATION

TAX LAW – FEDERAL INCOME TAX COMPUTATION – INDIVIDUALS – DIVORCE & SEPARATION PAYMENTS (IRC sec. 62, 71, 215, 685, 1041) – DEPENDENT & PERSONAL EXEMPTIONS (IRC sec. 151–153) – QUALIFYING CHILD – CHILD SUPPORT – TAXATION – ALLOCATION

FAMILY LAW – MARITAL TERMINATION & SPOUSAL SUPPORT – DISSOLUTION & DIVORCE – PROPERTY DISTRIBUTION & CHARACTERIZATION – MARITAL PROPERTY – DISSIPATION

Facts:

Sarah Hornbeck ("Sarah") and Jeffrey Reichert ("Jeffrey") first met in April of 2000. The couple dated for a little over three years until their initial breakup in the spring of 2003. Both parties characterized their initial relationship as "rocky." The parties resumed their romance on April 8, 2008, and were engaged four months later in August and subsequently married on January 31, 2009. Sarah later delivered a son, Grant Lyle Reichert ("Grant"), on November 7, 2009.

Unfortunately, the conflict that Sarah and Jeffrey had experienced during their first relationship returned and remained until the dissolution of their marriage. On August 27, 2010, divorce and custody papers were delivered to Sarah. In response, Sarah filed a counter complaint for limited divorce, custody, child support and other relief. She subsequently filed a timely answer to Jeffrey's complaint on September 24, 2010.

The Circuit Court for Baltimore City granted a divorce on the grounds of a twelve-month separation, pursuant to Md. Code (1984, 2012 Repl. Vol.), § 7-103(a)(4) of the Family Law Article, and granted both parties joint physical and legal custody of the child with tie-breaking authority to Sarah. The court declined to make any award of rehabilitative alimony to Sarah.

The court, however, ordered Jeffrey to pay $1,651 per month in prospective and retroactive child support. Because Jeffrey had contributed $500 per month in *pendente lite* child support prior to

the absolute dissolution of the parties' marriage, the court credited him $4,806 in retroactive child support but, nevertheless, concluded he owed $15,006 in arrearages. As a consequence, the court ordered Jeffrey to pay an additional $500 per month in child support until the $15,006 in arrearages were satisfied. In addition, the court granted Jeffrey the right to claim the parties' minor child as a dependent for his 2011 taxes and every-other year thereafter.

After reviewing the property the parties amassed during their eighteen-month marriage, the court found that the 2009 joint tax refund should have been equally divided into both Jeffrey and Sarah's accounts. As a consequence, the court concluded that because Jeffrey had wrongfully dissipated the entire amount of the refund, it was extant property. Therefore, the court designated half the amount of the refund ($3,100) Jeffrey's extant property. As a result, the court granted Sarah a monetary award in the amount of $7,000 and further awarded her $60,000 in attorney's fees.

Held:

Judgment Affirmed in Part, Vacated in Part, and Remanded for Proceedings Consistent with the Court's Opinion. Preliminarily, the Court of Special Appeals concluded that the circuit court did not abuse its discretion in awarding joint legal and physical custody to the parties' minor child. The Court initially observed that fourteen suggested factors to be considered in determining the child's best interests, relying on the Court of Appeals' decision in *Taylor v. Taylor*, 306 Md. 290, 304–11 (1986). After comprehensively reviewing the suggested factors, the Court of Special Appeals affirmed the decision of the court's order of joint legal and physical custody because it was within the minor child's best interests and because the record contained evidence of the parties' ability to cooperate in matters relating to their minor child. As a consequence, the Court found that the circuit court's decision was not "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *In re Yve S.*, 373 Md. 551, 583–84 (2003).

The Court of Special Appeals next addressed Jeffrey's second assignment of error, in which he contended that the circuit court erred in its findings when it calculated the child support owed to the parties' minor child. Observing the purpose and spirit of Maryland's child support guidelines, the Court noted that "a child should review the same proportion of parental income, and thereby enjoy the same standard of living, he or she would have experienced had the child's parents remained together." *Voishan v. Palma*, 327 Md. 318, 322–33 (1992). Nonetheless, the Court recognized that the central issue to be considered in determining a child support award is the actual income of each party. After reviewing the meaning of "actual income," pursuant to Md. Code (1991, 2012 Repl. Vol.) §§ 12-201(b)(1)–(4) of the Family Law Article, the Court noted that none of the enumerated factors included unrealized gains or appreciate in asset value.

Thereafter, the Court considered what is required to very the a parent's actual income and what constitutes suitable documentation to very the income alleged by the parent and observed that Md. Code (1991, 2012 Repl. Vol.), § 12-203(b)(2)(i) of the Family Law Article provided the

answer. Further, the Court clarified its previous decision in *Walker v. Grow*, 170 Md. App. 255 (2006), and concluded that noting in the opinion requires a parent seeking to exclude pass-through or unrealized income from actual income in the calculation of the court's child support award to offer expert testimony supporting that parent's documentation used to verify his or her actual income– particularly when the parent offers a variety of "suitable documentation of actual income" into evidence. As a consequence, the Court vacated the circuit court's award of child support and remanded the matter for further consideration consistent with the Court's opinion.

Following the above-noted considerations, the Court of Special Appeals addressed Jeffrey's third assignment of error, in which he averred that the circuit court abused its discretion when it refused to modify its finding that the parties should alternate the tax dependency exemption for their minor child. The Court conducted an evaluation of Title 26, Section 152 of the United States Code, providing particularized provisions regarding the entitlement and allocation of a tax dependency award for a qualified minor child. Following a comprehensive evaluation of other courts' interpretations of 26 U.S.C. 152(e) *et seq*., the Court observed that any allocation of the tax dependency exemption pursuant to 26 U.S.C. § 152(e) is an element of the parties' child support obligations. As a consequence, the Court held that because the parents of a child are his or her natural guardians and, quite apart from the moral obligations of parenthood, owe the child a legal, statutory obligation of support, an allocation of the tax dependency exemption to the non-custodial parent requires the trial court to engage in an on record analysis of whether such allocation would be within the child's best interests. Thus, if the trial court determines that the non-custodial parent's income places him or her within a higher tax bracket, and unrealized or pass-through income is inconsequential, the court should allocate the exemption to the non-custodial parent and include the after-tax increased spendable income within its award of child support to further the best interest of the child.

The Court of Special Appeals observed, however, that in this case, the parents maintained shared physical custody of the minor child. The Court proceeded to conclude that the general principles regarding the exemption analysis remain constant whether the parents share joint physical custody "in theory" or one parent is specifically designated the primary custodial of the minor child. Nonetheless, the Court held that when the parents share joint physical custody of the child on an essentially 50/50 basis, Section 152(e) of the Internal Revenue Code does not apply because it presupposes that only one parent is the primary physical custodian of the minor child. Consequently, the Court ultimately conclude that in instances where Section 152(e) is inapplicable, allocation of the exemption returns to the parent within the highest adjusted gross income pursuant to 26 U.S.C. § 152(c)(4)(B)(ii). Therefore, the Court vacated the circuit court's order alternating the tax dependency exemption and remanded the matter for further proceedings consistent with the Court's opinion.

The Court of Special Appeals then addressed Jeffrey's fourth assignment of error, in which he asserted that the circuit court abused its discretion when it granted Sarah a monetary award in the amount of $7,000. The Court rejected Jeffrey's contention that the circuit court's finding of dissipation was erroneous, concluding that Sarah provided ample evidence to support the circuit court's conclusion. Nonetheless, the Court of Special Appeals vacated the monetary award and

remanded it for further proceedings consistent with the Court's opinion, holding that the circuit court abused its discretion in the valuation of one of the parties' motor vehicles, resulting in an inequitable monetary award.

Lastly, the Court of Special Appeals addressed Jeffrey's final contention, in which he insisted that the trial court's award of attorney's fees to Sarah was unreasonable because it failed to properly analyze and explain the financial status and needs of each party. The Court observed that although the circuit court is vested with a high degree of discretion in making an award of attorney's fees, the trial judge must "consider and balance" the required considerations as articulated by the General Assembly in Sections 7-107(c) and 12-203(b) of the Family Law Article. The Court ultimately concluded that while there may be basis for an award of some counsel fees and costs, the circuit court's exorbitant award of attorney's fees is, in the instant case's record, arbitrary and clearly wrong. Thus, the Court of Special Appeals vacated the circuit courts award of attorney's fees and remanded for further proceedings consistent with the Court's opinion.

Mafalda Fusco, et al. v. Kevin J. Shannon, et al., No. 2819, September Term 2010, filed March 20, 2013. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2013/2819s10.pdf

HEALTHCARE LAW – TESTIMONY – EXPERT WITNESS – TREATMENT – PRESCRIPTION MEDICATIONS – EXPERT TESTIMONY – INFORMED CONSENT – MATERIAL RISKS

Facts:

In June 2001, Anthony Fusco, Sr. ("Mr. Fusco"), eighty-two years of age at the time, was diagnosed with prostate cancer. In March 2003, Mr. Fusco consulted Kevin Shannon, M.D. ("Dr. Shannon"), appellee, to discuss a radiation protectant regimen for his radiotherapy and hormone treatment. Between April 2003 and May 2003, Mr. Fusco underwent approximately twenty-three injections of 500 milligrams of Amifostine. Subsequently, Mr. Fusco was hospitalized for symptoms of Stevens-Johnson Syndrome, which advanced to Toxic Epidermal Necrolysis Syndrome.

In October 2003, Mr. Fusco was re-admitted to the hospital due to an onset of acute pneumonia and fever. Unfortunately, the hospital's treatments proved to be unsuccessful, and Mr. Fusco died in December 2003 from a stroke. No autopsy was performed, but the medical examiner listed arteriosclerotic cardiovascular disease, with a contributing factor of Toxic Epidermal Necrolysis Syndrome, as the cause of death.

In April 2007, appellants, Mafalda Fusco and the surviving children, filed a complaint in the circuit court. During discovery, appellants identified James Trovato, Pharm.D. ("Dr. Trovato"), a pharmacist, but not a medical doctor, as an expert witness to support their lack of informed consent claim. The event giving rise to this appeal occurred when appellees filed a joint motion *in limine* to preclude Dr. Trovato's *de bene esse* deposition. In pertinent part, Dr. Trovato opined that Amifostine was inappropriately used or should not have been used for Mr. Fusco, since he was undergoing radiation therapy for prostate cancer. Furthermore, Dr. Trovato would have testified regarding the lack of the Federal Drug Administration approval concerning Amifostine. Appellees argued that Dr. Trovato's testimony should have been excluded because (1) he was not a physician, and thereby not qualified to render opinions concerning a physician's advisement to obtain informed consent and (2) his testimony offered criticisms sounding in standard of care. Following a hearing, the circuit court granted the motion *in limine*. Pursuant to the court's order, appellants filed a proffer of Dr. Trovato's anticipated trial testimony. However, during the hearing in January 2011, the court disallowed Dr. Trovato's testimony. Following a jury trial, a verdict was returned in favor of appellee.

Held: Reversed and Remanded.

The Court of Special Appeals held that the trial court erred in excluding admissible portions of Dr. Trovato's *de bene esse* deposition and trial testimony because although Dr. Trovato was not a medical doctor, he was well qualified and familiar with oncology pharmacy practice, specifically Amifostine therapy. The jury was not presented with Dr. Trovato's testimony regarding the FDA approval and package insert, which may have been material to the jury's determination. Without this, the Court could neither decide whether the jury's verdict would have remained the same nor could it determine whether the jury would have concluded that a reasonable patient would have refused.

Return to ToC

Donald S. Dobkin v. The University of Baltimore School of Law, No. 2603, September Term 2011, filed March 22, 2013. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2013/2603s11.pdf

LABOR & EMPLOYMENT – DISCRIMINATION – AGE DISCRIMINATION – EMPLOYMENT PRACTICES – FAILURE TO HIRE

Facts:

In August 2009, the University of Baltimore School of Law ("U.B.") posted an advertisement, seeking applicants relating to a position for an immigration law professor. The advertisement desired candidates who had a distinguished academic background, a record of or the promise of both teaching excellence and scholarly distinctions, and a commitment to service in law school and the community. According to the Chairperson of the Faculty Appointments Committee (hereinafter "Committee"), U.B.'s criteria was a combination of academic training and success, publications, judicial clerkships, teaching experience, and a Juris Doctor from a top ten U.S. law school.

Appellant, a fifty-six year old male, submitted his application materials, but was neither interviewed nor hired for the position. Appellant learned that the successful applicant, Ms. A.G., was a thirty-two year old woman. The Committee was highly impressed with Ms. A.G's academic credentials, as she was a Yale University School of Law graduate and she clerked on the federal levels. Moreover, the Committee favored her significant experience and training in clinical teaching in the area of immigrant rights at a law school known for its expertise in this field.

According to the Committee, appellant was neither interviewed nor hired because he had no prior clinical nor law school teaching experience, and his academic credentials did not compare favorably to other applicants. He did not graduate from a prestigious law school, had neither state nor federal clerkship experience, and had no clinical teaching experience. Although appellant practiced law for countless years, he did not possess the additional qualifications that the Committee desired.

Appellant filed a complaint in the circuit court, alleging that appellee failed to hire him based on his age. Appellant claimed that (1) U.B.'s advertisement did not specifically request "clinical teaching" experience; (2) Ms. A.G. was less experienced and qualified; (3) U.B. presented inconsistent justifications for its failure to hire him; and (4) U.B.'s hiring practices demonstrated pretext and discriminatory intent. Following discovery, U.B. filed its motion for summary judgment. The circuit court granted U.B.'s motion for summary judgment.

Held: Affirmed.

The Court of Special Appeals held that although appellant possessed years of immigration law experience, U.B. desired a candidate who had teaching excellence and scholarly distinctions, and this was where Ms. A.G was highly favored. Furthermore, even though the advertisement did not specifically state "clinical law experience," it did allude to "teaching excellence," which appellant lacked. U.B.'s reasons for not hiring appellant were consistent, and appellant failed to offer adequate statistical evidence that established that U.B.'s hiring practices had a disparate impact on applicants over forty years old.

On the record before the Court, U.B. presented a legitimate, non-discriminatory reason for its refusal to hire appellant. Appellant failed to adduce sufficient evidence to meet his burden of establishing that U.B.'s reasons were pretextual, and its motive was discriminatory. For the foregoing reasons, the circuit court did not err in granting U.B.'s motion for summary judgment.

Bonita H. Marshall v. Safeway, Inc., No. 2271, September Term 2011, filed March 22, 2012. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2013/2271s11.pdf

CIVIL LAW – WAGE PAYMENT AND COLLECTION LAW – CLASS ACTIONS.

Facts:

Bonita H. Marshall, the appellant, was employed by Safeway, the appellee, in Prince George's County as a cashier. During her employment, the District Court of Maryland issued a writ of garnishment to Safeway directing it to withhold her "attachable wages" to satisfy a District Court judgment against her and remit the garnished wages to the judgment creditor. The instructions to Safeway on the writ of garnishment provided that Md. Code (2005 Repl. Vol.), sections 15-601 through 15-607 of the Commercial Law Article ("CL") governed "wage attachment procedures." For employees working in all but four Maryland counties, CL section 15-601.1(b)(1) exempts from garnishment the greater of: 1) weekly disposable wages of $145 or 2) 75% of disposable wages due. For employees working in Caroline, Kent, Queen Anne's, or Worcester Counties, however, CL section 15-601.1(b)(2) exempts the greater of 1) 75 percent of disposable wages or 2) 30 times the federal minimum wage. The latter formula comports with the federal exemption formula set forth under the Consumer Credit Protection Act, 15 U.S.C. section 1673(a).

The writ of garnishment also contained a separate section stating that only wages in excess of "30 times the federal minimum hourly wages under the Fair Labor Standards Act in effect at the time the wages are due" were subject to garnishment. Thus, this section directed Safeway to apply the federal exemption formula to all Maryland employees whose wages are being garnished, not just to employees in Caroline, Kent, Queen Anne's, and Worcester Counties as provided in CL section 15-601.1(b).

Safeway applied the exemption formula stated in CL section 15-601.1(b)(1), exempting from garnishment the greater of $145 or 75% of Marshall's disposable wages. As a result, in six pay periods between June of 2009 and July of 2010, Safeway garnished Marshall's wages consistent with Maryland law, but in excess of the amount permitted under the federal exemption formula. The total over-garnished amount was $ 45.25.

In the Circuit Court for Prince George's County, Marshall filed a class action suit against Safeway, asserting that its over-garnishment of her wages and the wages of a class of similarly situated employees violated section 3-502 of the Wage Payment and Collection Law. She sought reimbursement of the over-garnished amounts, treble damages, attorneys' fees and declaratory and injunctive relief. Safeway moved to dismiss. The court heard argument and dismissed the Payment Law claim on two alternative bases: that Marshall failed to state a claim for relief under the Payment Law and that the amount in controversy did not meet the circuit court's $5,000 jurisdictional threshold. The court denied the motion to dismiss the counts seeking declaratory

and injunctive relief. Marshall thereafter amended her complaint to substitute a contract claim in place of her Payment Law claim.

During the pendency of the litigation, Safeway tendered to Marshall the total amount of her claimed damages, plus interest, and also changed its garnishment policy for all Maryland employees to comply with the instructions on the writ of garnishment.

Marshall subsequently moved to certify a class. On the day of the scheduled trial, the court heard argument on the motion to certify and other pending motions. It ruled that Marshall's contract claim also was subject to dismissal because it failed to meet the jurisdictional threshold; that class certification was inappropriate because Marshall's claims failed to satisfy the commonality and typicality prongs of Rule 2-231(a) and failed to satisfy the predominance and superiority prongs of Rule 2-231(b)(3); and that a pending motion to compel discovery filed by Marshall was moot. Marshall's remaining individual claims for declaratory and injunctive relief were tried to the court on stipulated facts. The court granted judgment for Safeway, concluding that both claims were mooted by the tender of relief and Safeway's policy change.

Held: Affirmed.

The Payment Law authorizes a private cause of action only to redress a failure to pay wages in violation of two sections of that law: sections 3-502 and 3-505. Section 3-502 concerns the timing of paydays and the prohibition against social security numbers on pay documents. Section 3-505 addresses payment of wages upon termination. On its face, Marshall's claim that Safeway over-garnished her wages did not implicate either of these sections. Moreover, Rule 3-646 establishes the procedure to be followed by a judgment debtor who asserts any error by a garnishee in carrying out the instructions on a writ of garnishment. Under that rule, the judgment debtor may, at any time, challenge a writ of garnishment by filing an objection within his or her District Court case. Given this mechanism for redressing such errors and Safeway's status as a mere garnishee who did not benefit from any over-garnishment, Marshall failed to state a claim under the Payment Law.

On the issue of the denial of the motion to certify a class, the circuit court did not abuse its discretion in finding that Marshall failed to satisfy the commonality prong of Rule 2-231(a). In light of the fact that Safeway had since changed its garnishment policy for all Maryland employees, any common issues concerning the legality, *vel non*, of Safeway's garnishment procedures were no longer in controversy and the only remaining issues were individual in nature, *i.e.*, the amounts of any over-garnishments. Because of this holding, the Court did not need to reach the issue of whether the circuit court erred by failing to aggregate the damages claims of the putative class in determining if the $5,000 jurisdictional threshold had been met.

Finally, the circuit court did not err or abuse it discretion in determining that Marshall's claims for declaratory and injunctive relief were mooted by Safeway's change in policy and that her motion to compel discovery was mooted by the denial of the motion to certify a class.

Montgomery County Career Fire Fighters Association, et al. v. Montgomery County, Maryland, et al., No. 1933, September Term 2011, filed March 4, 2013. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2013/1933s11.pdf

LOCAL GOVERNMENT – COLLECTIVE BARGAINING

Facts:

Appellee, Montgomery County Executive Isiah Leggett ("County Executive"), failed to include sufficient funds to implement a collective bargaining agreement ("CBA") between Montgomery County and the appellant, Montgomery County Career Fire Fighters Association ("Fire Fighters"), in the proposed budget for Fiscal Year 2012 ("FY12"). The CBA resulted from the negotiation and impasse procedures set forth in §§ 33-147 to 33-157 of the Montgomery County Code ("MCC"). As part of those procedures, an impasse neutral determined the Fire Fighter's last, best, final offer to be the more reasonable offer. As such, that offer became the final agreement between the parties. When the County Executive failed to include the CBA in the FY12 budget submitted to the County Council, the Fire Fighters filed prohibited practice charges against the County Executive.

On May 17, 2011, the Montgomery County Labor Relations Administrator ("LRA") found that while the County Executive had violated the MCC labor relations provisions, those actions did not constitute prohibited practices under Montgomery County Circuit Court precedent. The Fire Fighters filed a petition for judicial review in the Circuit Court for Montgomery County which dismissed the petition as moot.

The County Executive argued that proposing a budget is a discretionary legislative function, delegated to the Executive by Montgomery County Charter § 303, that cannot be divested by any collective bargaining laws enacted by the County Council. The County also argued that a prohibited practice charge cannot arise out of the County Executive's failure to recommend funding a CBA and that based on legislative immunity, the County Executive cannot be subject to proceedings before an arbitrator.

Held: Reversed

The Montgomery County Council has the authority under the Montgomery County Charter to limit the County Executive's discretion in proposing a budget by establishing statutory guidelines for the exercise of that discretion. Pursuant to Montgomery County Charter § 510A and the MCC, the Montgomery County Executive is required to include a collective bargaining agreement reached through binding arbitration in the annual budget submission to the County

Council. Failure to include the collective bargaining agreement in the budget is a prohibited labor practice and legislative immunity does not apply.

Return to ToC

Fraternal Order of Police, Montgomery County Lodge 35 v. Montgomery County Executive, No. 722, September Term 2011, filed March 4, 2013. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2013/0722s11.pdf

LOCAL GOVERNMENT – COLLECTIVE BARGAINING

Facts:

Appellee, Montgomery County Executive Isiah Leggett ("County Executive"), failed to include sufficient funds to implement a collective bargaining agreement ("CBA") between Montgomery County and the appellant, the Fraternal Order of Police, Montgomery County Lodge 35 ("FOP 35"), in the proposed budget for Fiscal Year 2012 ("FY12"). The CBA resulted from the negotiation and impasse procedures set forth in the Montgomery County Code ("MCC"). As part of those procedures, an impasse neutral determined that FOP 35's last, best, final offer was the more reasonable. As such, that offer became the final agreement between the parties. When the County Executive failed to include the CBA in the FY12 budget submitted to the County Council, FOP 35 filed a prohibited practice charge against the County Executive accusing him of violating MCC §§ 33-80(g) and 33-82(a)(8). The Permanent Umpire ("Umpire") held a hearing and found that the County Executive was required to include the CBA and sufficient funds to implement it in the proposed budget and that the County Executive's failure to do so constituted a prohibited practice. The County Executive filed a motion for a writ of mandamus in the Circuit Court for Montgomery County and FOP 35 filed a motion for summary judgment in response. The circuit court granted the County Executive's writ, denied FOP 35's motion, and reversed the decision of the Umpire

The County Executive argued that proposing a budget is a discretionary legislative function, delegated to the Executive by Montgomery County Charter § 303, that cannot be divested by any collective bargaining laws enacted by the County Council. The County also argued that a prohibited practice charge cannot arise out of the County Executive's failure to recommend funding a CBA and that based on legislative immunity, the County Executive cannot be subject to proceedings before an arbitrator.

Held: Reversed

The Montgomery County Council has the authority under the Montgomery County Charter to limit the County Executive's discretion in proposing a budget by establishing statutory guidelines for the exercise of that discretion. Pursuant to Montgomery County Charter § 510 and the MCC, the Montgomery County Executive is required to include a collective bargaining agreement reached through binding arbitration in the annual budget submission to the County

Council. Failure to include the collective bargaining agreement in the budget is a prohibited labor practice under Montgomery County Code § 33-80(g) and legislative immunity does not apply.

Municipal and County Government Employees Organization v. Montgomery County Executive, No. 825, September Term 2011, filed March 4, 2013. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2013/0825s11.pdf

LOCAL GOVERNMENT – COLLECTIVE BARGAINING

Facts:

Appellee, Montgomery County Executive Isiah Leggett ("County Executive"), failed to include sufficient funds to implement a collective bargaining agreement ("CBA") between Montgomery County and the appellant, United Food and Commercial Workers, Local 1994, Municipal and County Government Employees Organization (the "Union"), in the proposed budget for Fiscal Year 2012 ("FY12"). The CBA resulted from the negotiation and impasse procedures set forth in the Montgomery County Code ("MCC"). As part of those procedures, an impasse arbitrator determined after a hearing and briefing that the Union's last, best, final offer was the more reasonable. As such, that offer became the final agreement between the parties. When the County Executive failed to include the CBA in the FY12 budget submitted to the County Council, the Union filed a prohibited practice charge against the County Executive accusing him of violating MCC § 33-109(a)(8). On May 14, 2011, the Montgomery County Labor Relations Administrator ("LRA") issued a decision finding that the County Executive committed a prohibited practice. The County filed a writ of mandamus in the Circuit Court for Montgomery County seeking judicial review of the LRA's decision. The circuit court reversed the LRA.

The County Executive argued that proposing a budget is a discretionary legislative function, delegated to the Executive by Montgomery County Charter § 303, that cannot be divested by any collective bargaining laws enacted by the County Council. The County also argued that a prohibited practice charge cannot arise out of the County Executive's failure to recommend funding a CBA and that based on legislative immunity, the County Executive cannot be subject to proceedings before an arbitrator.

Held: Reversed

The Montgomery County Council has the authority under the Montgomery County Charter to limit the County Executive's discretion in proposing a budget by establishing statutory guidelines for the exercise of that discretion. Pursuant to Montgomery County Charter § 511 and the MCC, the Montgomery County Executive is required to include a collective bargaining agreement reached through binding arbitration in the annual budget submission to the County Council. Failure to include the collective bargaining agreement in the budget is a prohibited labor practice under Montgomery County Code § 33-109(a)(8) and legislative immunity does not apply.

Baltimore Police Department, et al. v. Joshua Tripp Ellsworth, No. 5, September Term 2012, filed March 25, 2013. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2013/0005s12.pdf

LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS – EVIDENCE – IMPEACHMENT

Facts:

The Baltimore City Police Department ("BPD"), appellant, charged appellee, Joshua Tripp Ellsworth, with seven violations of the Baltimore City Police Department Administrative Rules and Regulations based on incidents that occurred during a kidnaping investigation on August 7, 2009. At a hearing before a Baltimore City Police Department trial board (the "Board"), the BPD called Ofc. Daniel Redd as a fact witness. Ellsworth sought to impeach Redd's credibility based on an ongoing investigation of Redd's alleged drug dealing. Ellsworth was permitted to cross-examine Redd as to his alleged prior bad acts, but was limited to the answers Redd provided. Ellsworth was not provided with any evidence of Redd's alleged criminal activities prior to the hearing and was not permitted to introduce extrinsic evidence of Redd's activities before the Board. The Board found Ellsworth guilty of two of the seven violations.

On August 19, 2011, Ellsworth filed a Petition for Judicial Review of the Board's decision in the Circuit Court for Baltimore City, contending that the BPD was required to provide Ellsworth with evidence of Redd's activities under the "exculpatory evidence" provision of the Law Enforcement Officer's Bill of Rights ("LEOBR"), Md. Code (2003, 2011 Repl. Vol.) Public Safety Article § 3-104(n). The circuit court reversed the decision of the Board, finding that Ellworth's rights under the LEOBR had been violated and remanded the matter to the Board for further proceedings.

Held: Reversed

The circuit court erred in finding that a charged officer's rights were violated because the Law Enforcement Officers' Bill of Rights does not require, under the exculpatory evidence provision in § 3-104(n)(1), that a police department provide the defense with evidence of a fact witness's prior bad acts for impeachment purposes. A witness may be cross-examined regarding any prior bad acts, but extrinsic evidence may not be used to prove the prior bad acts under Maryland Rule 5-608(b).

Cuesport Properties, LLC v. Critical Developments, LLC, No. 2752, September Term 2010, filed February 27, 2013. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2013/2752s10.pdf

REAL PROPERTY – BREACH OF CONTRACT

Facts:

Cuesport Properties, LLC, owned a building, in Anne Arundel County, known as the Severn Commerce Center, which had been used as a pool hall. It subdivided that building into several condominiums, one of which ("Unit 4") it agreed to sell to Critical Developments, LLC. To subdivide the former pool hall, it was necessary to build what are known as "devising walls" between the adjacent units.

The agreement of sale, entered into by Cuesport Properties and Critical Developments, contained several provisions concerning construction of the demising wall to be built separating Critical Developments' unit from that portion of the Severn Commerce Center which was to be retained by Cuesport Properties. One provision, contained in the original agreement, stated that the property "shall not be in violation of any governmental laws, ordinances, rules, or regulations or the subject of any court action." Another provision, contained in a subsequent amendment to the original agreement, required that the demising wall be built "within 30 days from the date of closing of this sale, at [Cuesport's] sole cost and expense" and that the wall be "of the same type, materials, and specifications as the demising wall which [Cuesport Properties] recently installed in an adjoining unit previously owned or being sold by [Cuesport Properties]." Finally, the agreement, as amended, contained a "Late Performance" clause, providing that, if Cuesport Properties did "not accomplish and complete the above-described work relating to the installation of the demising wall within 30 days from the date of the completion of the closing, [Cuesport Properties] shall pay a penalty to [Critical Developments] of $126 per day for each day that this work is not completed," payable "within 10 days from the completion of such work." Moreover, Cuesport Properties was further obligated to provide a separate, 400-ampere electrical service for Unit 4, "within 60 days from the date of closing," but failure to perform that obligation was not covered by the "Late Performance" clause.

On June 20, 2008, the parties closed on the sale, and, thereafter, the demising wall was completed, by Cuesport's contractor, within the 30-day contractual deadline. But neither Cuesport Properties nor its contractor ever applied for a building permit, as required by the Anne Arundel County Code. Several months later, while Critical Developments was having other interior improvements done to its property, it discovered that the demising wall did not comply with county code, and it was subsequently required to have modifications done to the wall before county building inspectors would sign off on the required permits. Although Critical Developments first learned of the wall's non-compliance in November 2008 and applied for a permit shortly thereafter, the permit was not issued, by the county, until February 4, 2009, and

the required repairs to the wall were not completed until April 2009. Meanwhile, Cuesport Properties also failed to complete the electrical service within the 60-day contractual deadline. That work was not completed until late March 2009.

Dissatisfied with the delays and unable to use its property, Critical Developments filed a breach of contract action against Cuesport Properties in the Circuit Court for Anne Arundel County. After a bench trial, the circuit court held that Cuesport Properties had breached the agreement of sale and awarded damages, based upon the "Late Performance" clause, which it construed as a liquidated damages provision, for the entire 260-day period running from the expiration of the 30-day contractual deadline until the date when, as the court found, construction of the wall had been completed in a manner so as to comply with county code. The court declined to award lost rental damages for breach of the electrical service requirement, determining that such damages would be "speculative," since Critical Developments' expert was unable to state with reasonable certainty that the property would have been rented during the time between the expiration of the 60-day electrical deadline and the date that Cuesport Properties completed the electrical service; and that such damages would be "redundant" and, if awarded in addition to liquidated damages, would render the "Late Performance" clause an unlawful penalty.

Cuesport Properties appealed, contending that the "Late Performance" clause was an unenforceable penalty, not a valid liquidated damages provision; that it should be excused from its obligation to timely complete the demising wall because of mutual mistake; and that the circuit court erred in failing to take into account "equitable considerations" when it awarded damages for the entire 260-day period, without considering whether Critical Developments had taken reasonable measures to mitigate its damages.

Held: Affirmed.

The "Late Performance" clause, although it used the term "penalty," in referring to what must be paid to the nonbreaching party in the event of a specific breach, namely, the failure to timely complete the demising wall, was a valid and enforceable liquidated damages provision, because: it was a fair estimate, as of the time of contract formation, of the damages that would be incurred, in the event that Cuesport Properties failed to timely complete the demising wall; and those damages would have been very difficult to estimate, at the time of contracting. The reasonableness of the estimate was established by uncontroverted testimony that Critical Developments expected to incur financing costs, in purchasing Unit 4, of approximately $3,800 per month, or $126.67 per day, a figure which differed from the *per diem* "penalty" by less than a dollar. The difficulty in pre-estimating the damages was established by the near-impossibility of predicting, at the time of contract formation, whether Critical Developments would have succeeded in finding a suitable tenant and on what date that tenancy would have commenced or, in the alternative, whether Critical Developments itself would, in fact, have been able to use the property profitably, either of which would have been necessary to prove damages from loss of use of the premises.

The doctrine of mutual mistake did not apply in this case. If the parties' apparent mutual belief that the demising wall, built "of the same type, materials, and specifications as the demising wall which the Seller [had] recently installed" between Units 4 and 5, would satisfy code requirements and that there was no need to obtain a building permit prior to its construction, were construed as a mistake of law, then the breaching party could not be excused from its performance, under Maryland decisional law. And if that belief were construed as a mistake of fact, Cuesport Properties would still be liable for breach, because the agreement of sale allocated the risk of mistake to Cuesport Properties, the party solely responsible for the timely completion of the demising wall and ensuring that it was not in violation of "any governmental laws, ordinances, rules, or regulations." In any event, it was reasonable, under the circumstances, to allocate the risk of mistake to Cuesport Properties, the party solely responsible for building the demising wall and the party in the better position to avoid the ensuing problems, which could have been avoided if only Cuesport Properties had applied for the building permit, as required by county code.

The circuit court correctly took into account "equitable considerations" in awarding damages for the entire 260-day period running from the expiration of the 30-day contractual deadline until the wall was finally brought into compliance with the county code. Although, in applying a *per diem* liquidated damages clause to a situation where a contractor abandons a project prior to completion, a court may limit those damages to whatever time is reasonably necessary to comply with contractual demands or, as the case may be, to complete the work by a substitute contractor or by the nonbreaching party's own efforts, the circuit court, in this case, properly awarded damages for the entire 260-day period. That is because Cuesport Properties, during nearly the entire period, had also failed to timely provide electrical service, a breach for which the court declined to award any damages. Moreover, there was substantial evidence that Critical Developments did not cause undue delay in arranging for rebuilding the demising wall.

Marshall Thompkins et ux. v. Mortgage Lenders Network USA, et al., No. 98, September Term 2011, filed February 28, 2013. Opinion by Kehoe, J.

http://mdcourts.gov/opinions/cosa/2013/0098s11.pdf

MARYLAND SECONDARY MORTGAGE LOAN LAW (SMLL), COMMERCIAL LAW ARTICLE § 12-401 *ET SEQ.* – ASSIGNEE'S LIABILITY FOR A LENDER'S VIOLATIONS OF THE ACT

SMLL – RELATIONSHIP TO COMMERCIAL LAW ARTICLE § 3-306

SMLL – RELATIONSHIP TO COMMERCIAL LAW ARTICLE § 3-305

SMLL – ASSIGNEE'S LIABILITY UNDER MARYLAND COMMON LAW

Facts:

The Thompkinses obtained a second mortgage loan from Mortgage Lenders Network USA, Inc. ("MLN"). At closing, the Thompkinses paid to MLN certain additional fees, including a document preparation fee, a closing fee, a title insurance premium, and a mortgage broker's fee. MLN then transferred the loan to Master Financial, Inc., who subsequently transferred the loan to Mountaineer Investments, LLC ("Mountaineer").

After paying the loan in full, the Thompkinses brought suit against Mountaineer, asserting that MLN had violated the SMLL by charging additional fees at closing, and that Mountaineer, as assignee of the loan, was liable for MLN's violations. The circuit court granted summary judgment in favor of Mountaineer, concluding that there was no statutory or common law basis to impose derivative liability on Mountaineer for any of MLN's alleged violations.

Held: Affirmed.

The appellate court held that the SMLL sets out a right of recovery on behalf of borrowers against lenders who violate it. An assignee of a note is not a lender, as that term is defined in the SMLL, thus the law does not establish a cause of action against the assignee for another person's violation of the act. In an action by a borrower for damages for a lender's violations of the SMLL, an assignee of the lender can be liable only if it has assumed liability for the lender's violations.

Commercial Law Article ("CL") § 3-306 applies to claims on the loan instrument or its proceeds against a person other than a holder in due course. Because the plaintiffs have not made a claim on the loan instrument or its proceeds, but instead seek statutory damages based on alleged

violations of the SMLL, their claims do not involve questions of who has the right to possess a note or to receive the note's proceeds, which is the purview of § 3-306.

By its plain meaning, CL § 3-305(a) applies only to actions to enforce the obligation of a party to pay an instrument. Because the loan at issue has already been paid in full and the assignee is not seeking to enforce the instrument, CL § 3-305 is inapplicable to these facts.

Where the plaintiffs have pled no facts indicating that the assignee expressly assumed the liabilities of the assignor, neither Maryland statutory or case law provides support for imposing liability on an assignee for a lender's violations of the SMLL. *See P/T Ltd. v. Friendly Mobile Manor*, 79 Md. App. 227 (1989).

State of Maryland v. Adrian Phillips, No. 457, September Term 2011, filed March 20, 2013. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2013/457s11.pdf

MOTION TO DISMISS – STANDING – MEANING OF THE TERM REGULATION – STATUTORY INTERPRETATION – VOID FOR VAGUENESS – EQUAL PROTECTION – SEPARATION OF POWERS – PREEMPTION

Facts:

Appellee was charged with failing to verify his registration pursuant to the Baltimore City Gun Offender Registration Act (the "Act" or "GORA"). Appellee initially registered as a convicted gun offender in December 2009, at which point he was advised that, as a Baltimore City resident, he was required to verify his registration in six months. Despite efforts by the Baltimore City Police Department to ensure that appellee complied with the re-registration requirement, appellee failed to do so, and, accordingly, he was charged with failure to register.

Appellee requested a jury trial, and his case was transferred to the Circuit Court for Baltimore City, where he filed a motion to dismiss. The circuit court granted appellee's motion, and the State timely noted an appeal.

Held: Reversed.

The circuit court erred in dismissing the charge against appellee on the grounds that the Act was invalid because the Police Commissioner failed to comply with the Act's requirement that all regulations must be filed with the Department of Legislative Reference ("DLR") and because it was unconstitutionally vague. The three additional grounds for affirmance asserted by appellee are without merit.

Appellee had standing to challenge the Baltimore City Police Commissioner's failure to file a registration form with the DLR because he was injured due to the form's failure to specify what "other information" was required.

The circuit court erred in finding that the registration form used by the Baltimore City Police Department to collect information from registrants constituted a regulation under the Act. The form did not constitute a statement, rule, or order, but rather, it was merely an internal document to assist the police in complying with the provisions of the Act. Though the form contained a field entitled "gang affiliation," there was no evidence in the record that this information was even asked of registrants. Further, even if the form could be considered a regulation, the failure to file the form did not invalidate the Act or appellee's duty to re-register pursuant to the Act.

The circuit court erred in finding that GORA was impermissibly vague. The application of the void-for-vagueness doctrine is based on the application of a statute to the facts at hand. GORA is not impermissibly vague as applied to appellee's conduct, nor is the Act impermissible vague on its face. The Act provides both fair notice of its requirements and provides adequate guidelines for its enforcement. Even if the section of the Act challenged by appellee was void for vagueness, dismissal of the charges against appellee still would not be warranted, as that subsection would be severed leaving the remainder of the Act in effect.

We apply the rational basis test to appellee's equal protection challenge to the distinctions in the Act based on the location of the conviction and the registrant's area of residence. Distinctions based on geography do not implicate a suspect classification, and the Act does not burden a fundamental right. It is well-established that crime prevention is a legitimate governmental interest, and because the geographic distinctions in the Act are rationally related to this purpose, appellee has not met his burden of establishing that the Act violates the guarantees of equal protection under the law.

The discretion given by the City Council to the Police Commissioner to determine what, if any, additional information a gun offender is required to provide when he or she registers does not violate separation of powers principles.

Although there is no dispute that the State has heavily regulated the field of use, ownership, and possession of firearms, the State has not so extensively regulated this field that all local laws relating to firearms are preempted. The Act is not preempted by State law.

Tori Toliver, et al. v. Gary Waicker, No. 2245, September Term 2011, filed March 1, 2013. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2013/2245s11.pdf

TORT LAW – LIABILITY OF CORPORATE OFFICER – MARYLAND RULE 1-341 – SANCTIONS

Facts:

Minor children Tori Toliver and Shana Parker, appellants, filed a suit against Gary Waicker, President of Investment Realty Specialists, Inc. ("IRS"), a corporation engaged in the management of residential properties for property owners. They alleged negligence due to their exposure to chipping, peeling and/or flaking lead paint from 1988-1995, when they lived in a residential property controlled and/or managed by Mr. Waicker, which resulted in permanent injury.

Appellants asserted that Article 13, § 310(a) of the Housing Code imposed statutory duties on both "owners" and "operators" of rental properties, and there was evidence from which a finder of fact could determine that Mr. Waicker was an "operator" of the Property, as that term is defined by Article 13, § 105(a) of the Housing Code. Specifically, appellants asserted that the "evidence in this case clearly shows that [Mr. Waicker] had 'charge, care or control' of the subject property," which rendered him an "operator," and therefore, he was "responsible for compliance with the [Housing] Code and is subject to personal liability for his failure to comply."

Mr. Waicker filed a Motion for Summary Judgment, asserting that he never owned or operated the Property. He further asserted that he could not be held personally liable for any torts of IRS because, even though he was a corporate officer of IRS, he had no "day-to-day operational duties with regard to rentals or maintenance," and he "did not actively participate in, specifically direct or cooperate in the rental or maintenance of" the Property. According to Mr. Waicker, the "operator" of the Property was IRS, and because there was no evidence that he "participated, inspired or committed the tort of failing to abate condition of loose, chipping or flaking lead paint" at the Property, and he did not specifically direct that any acts be done with respect to the Property, he was not liable, in his capacity as a corporate officer, for any torts committed by the corporation. Mr. Waicker also requested sanctions against appellants' counsel, on the ground that he was "being sued in this case for no other purpose but harassment." The circuit court granted Mr. Waicker's Motion for Summary Judgment and denied his Request for Sanctions.

Held: Affirmed.

The Baltimore City Housing Code requires an owner or operator of a property to keep all buildings in "good repair [and] safe condition." It defines an "operator" as any person who has "charge, care or control of a building" or otherwise "manage[es] or operate[s] such building." To be found to have "charge, care or control" over property, a person must have some involvement in the decision making regarding the operation of the property.

Even if a corporate officer qualifies as an "operator," he or she is not personally liable for an alleged violation of the Housing Code unless he or she personally committed, inspired, or participated in the alleged violations.

Maryland Rule 1-341, which allows for sanctions if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, is an extraordinary remedy. Where the attorney had a reasonable basis for believing that the complaint involved an unresolved issue, the circuit court did not err in denying the request for sanctions.

David A. Barnes, et al. v. Greater Baltimore Medical Center, Inc., et al., No. 789, September Term 2011, filed March 21, 2013. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2013/0789s11.pdf

TORTS – MALPRACTICE & PROFESSIONAL LIABILITY – HEALTHCARE PROVIDERS

CIVIL PROCEDURE – APPEALS – STANDARDS OF REVIEW

TORT – NEGLIGENCE – CAUSATION – PROXIMATE CAUSE – GENERAL OVERVIEW

Facts:

On January 26, 2005, David Barnes' primary care physician, Dr. Halle, sent him to Greater Baltimore Medical Center ("GBMC") because he was concerned that Mr. Barnes was having a transient ischemic attack (mini-stroke) or was in the beginning phases of a stroke. He sent Mr. Barnes and his wife to the hospital with a note that stated that Dr. Halle wanted Mr. Barnes to have a "stroke work up."

At GBMC, Barnes first saw the "quick look nurse," who circled that his condition was a priority number one. The nurse also wrote on the form that Mr. Barnes "had a weak right grip, tingling in the right hand, a numb right side, and that he had been seen by his primary care doctor and directed to the GBMC emergency room" and attached Dr. Halle's note to the front of the form.

Mr. Barnes then saw the triage nurse, Carol Stopa. Nurse Stopa testified that she did not see Dr. Halle's note. Nurse Stopa changed the priority from one to four on the form and sent Mr. Barnes to the urgent care department, not the emergency department.

Mr. Barnes then saw Dr. Rustia, in the urgent care center. Dr. Rustia testified that he did not see Dr. Halle's note, and if he had, he would have walked Mr. Barnes over to the main emergency department to have the stroke work up. Instead, Dr. Rustia diagnosed Mr. Barnes with carpel tunnel syndrome and told him to follow up with a hand surgeon.

As Mr. Barnes was leaving GBMC, the first nurse who had evaluated him saw him in the parking lot and felt that he had not been there long enough to have a stroke work up. The hospital called Mr. Barnes's home and left a message on the answering machine, asking that he return to the emergency room.

Upon returning later that night, Mr. Barnes received at least a partial stroke work up. Dr. Elias Abras, the emergency room physician who examined Mr. Barnes, concluded that Mr. Barnes needed to be admitted to the hospital because he "needed more evaluation." Dr. Abras testified that Mr. Barnes' medical insurance required that an affiliated doctor admit Barnes to the hospital. Although Dr. Abras called the doctor several times, he never arrived to admit Barnes.

After several hours, Mr. Barnes wanted to go home. Dr. Abras claimed to have told Mr. Barnes that "he had a mini-stroke and it was important for him to follow up with Dr. Halle in the morning to complete the evaluation." Although Mr. Barnes did not testify, Mrs. Barnes said "I was never told a diagnosis." Dr. Abras discharged Mr. Barnes around 1:00 a.m. on January 27.

The next day, Mr. Barnes called Dr. Halle and told him about the previous day's events. Dr. Halle planned for Mr. Barnes to receive additional tests within a week. When Mrs. Barnes came home from work, Mr. Barnes did not look well: "[h]is mouth was all crooked." Mr. Barnes returned to GBMC, where he was diagnosed with a stoke.

The Barneses waived arbitration and filed suit in the Circuit Court for Baltimore County against GBMC, Dr. Rustia, and Charles Emergency Physicians ("CEP"), Dr. Rustia's employer. The first trial in February 2010 resulted in an administrative mistrial he circuit court had to declare an administrative mistrial because of a snow storm.

The day before the second trial started in March 2011, GBMC moved to dismiss the case for failure to file a proper certificate of qualified expert. GBMC argued that although the Barneses did file a report, the report did not describe the standard of care, how the specific defendants violated the standard of care, and how the violation proximately caused the plaintiff's injuries. After a discussion of the case law, the circuit court denied the motion to dismiss, finding that it was too late to challenge the report.

At the conclusion of the second trial, the jury found in favor of the Barneses and against GBMC, Dr. Rustia, and CEP in the amount of $1,123,000. GBMC and Dr. Rustia moved for a post-trial JNOV. The circuit court granted the motion, finding insufficient evidence of causation. The Barneses appealed the grant of the JNOV, and GBMC appealed the denial of its motion to dismiss for failure to file a proper certificate of qualified expert.

Held: Affirmed in part and reversed in part. Case remanded for reinstatement of the jury verdict.

Report of Qualified Expert

For certain claims filed against a health care provider, Md. Code (1974, 2006 Rep. Vol., 2012 Supp.), Courts and Judicial Proceedings Article, § 3-2A-04(b)(1)(i)(1) requires the plaintiff to file a certificate of a qualified expert within 90 days from the date of the complaint. If the plaintiff fails to file such a certificate, the claim shall be dismissed, without prejudice. As part of this requirement, a report must also be submitted. The report, in part, must explain how or why the healthcare provider failed or did not fail to meet the standard of care and include some details supporting the certificate of qualified expert.

In this case, the Barneses' expert report did not explain how or why the healthcare providers failed to meet the standard of care. However, the author of the report testified at the first trial. Thus, dismissal at the beginning of the second trial was not proper because the expert's former

trial testimony served the purpose of the certificate requirement and therefore cured the report. The trial testimony provided all the information necessary to evaluate the Barneses' claims before the second trial, enabled GBMC and the court to evaluate the Barneses' claims before the second trial, and forced the Barneses to support his claims with expert testimony before the second trial.

JNOV

The circuit court granted the JNOV based on insufficient evidence of causation. The Court of Special Appeals found this to be error. The Barneses' causation expert testified, without objection, that any hospital would have admitted Mr. Barnes the first time he entered the hospital and that Dr. Rustia could have admitted Barnes the first time he went to the hospital. The expert further testified to the actions that would have been taken, according to the standard of care, to prevent Mr. Barnes' stroke if he would have been admitted during his first trip to the hospital. The expert ultimately concluded that the admittance and the subsequent actions would likely have prevented Mr. Barnes' stroke.

This testimony was sufficient to establish that the healthcare providers from Mr. Barnes' first hospital visit, Nurse Stopa and Dr. Rustia, were causes of Barnes' later stroke because both contributed to Mr. Barnes leaving the hospital without being admitted. As to Nurse Stopa, the jury could have reasonably found that had the nurse sent Mr. Barnes to the emergency department with the highest priority, he could have been admitted during his first visit to GBMC. As to Dr. Rustia, the jury could have reasonably found that he could have seen that Mr. Barnes was admitted to the hospital during Mr. Barnes' first visit.

Alicia Daley Paul v. Blackburn Limited Partnership d/b/a Country Place Apartments, et al., No. 2727, September Term 2011, filed March 25, 2013. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2013/2727s11.pdf

PUBLIC SWIMMING POOLS – POOL BARRIERS – CODE OF MARYLAND REGULATIONS ("COMAR") 10.17.01.00 *ET SEQ.* – MONTGOMERY COUNTY CODE § 51-15 – CODE OF MONTGOMERY COUNTY REGULATIONS ("COMCOR") 51.00.01.03 – STATUTORY AND REGULATORY DUTY – COMMON LAW DUTY – VIOLATION OF A STATUTE AS EVIDENCE OF NEGLIGENCE – CAUSATION – PROXIMATE CAUSE

Facts:

This case involves the Circuit Court for Montgomery County's grant of summary judgment in favor of appellees in a cause of action for negligence and recovery of medical expenses related to the near drowning of a then three-year-old child in a swimming pool at an apartment complex.

Blackburn owns the Country Place Apartments ("Country Place") complex, which includes an outdoor swimming pool ("the pool") as a community amenity. The pool and pool deck are surrounded by a metal fence approximately six feet high. The pool and fence were constructed in 1978 and, at the time of the incident, the fence had not undergone any replacements or renovations since its original construction. Two vertical gates controlled access to the pool area. When the pool was closed, pool staff would affix the padlock and chain to the upper half of the gate. There was no lock on the bottom portion of the gate.

In June 2010, the child resided at Country Place with his parents and ten-year-old half-brother. The child received his pool pass for the Summer 2010 swimming season. One day, the child's father took the child and his brother to the pool during operating hours. On the next day, the child asked appellant if he could go to the pool, but she told him the pool was not open. The child continued to ask appellant if he could go to the pool, and appellant told him that the pool was closed, that they could not go to the pool, and that they would go to the pool in the afternoon.

Later that morning, the child left the apartment to play at the playground. The child was later discovered unresponsive and submerged in water in the five foot section of the pool closest to the gate. As a result of the lack of oxygen during the near drowning, the child is now nonverbal, visually impaired, lacks purposeful movement of his extremities, requires a gastric feeding tube, and is dependent on constant care from others for activities of daily living.

Detective Paula Hamill conducted an investigation, taking notes on the condition of the pool, fence, and gate. According to Detective Hamill, there was "a lot of play" in the gate, such that

she was able to completely put her leg from the waist down into an opening created by pushing or pulling the gate. Detective Hamill reported that it did not take the force of an adult to open the gate. Detective Hamill observed that metal crossbars on the fence were missing in some areas and that, in those areas, she could grab the two bars and pull them open. Detective Hamill observed a pair of shoes and a T-shirt on the table right inside the front gate. Detective Hamill concluded, based on her investigation, that the child "gained entry to the pool through the front gate."

Following filing of the complaint, appellees filed motions for summary judgment arguing that they owed no duty to the child because he was a trespasser, and that no evidence demonstrated that they acted in a willful or wanton manner causing the child injury. Appellant filed a consolidated opposition to the motions, arguing that the child, as a tenant, was an invitee to whom appellees owed a duty of care, and arguing that appellees owed a regulatory duty to comply with statutory and regulatory provisions governing pool barriers, including a requirement that the barrier not allow passage of a sphere four inches in diameter. The circuit court held a hearing on the motions for summary judgment.

The circuit court issued an order and memorandum opinion granting appellees' motions for summary judgment, finding that the child was a trespasser to whom appellees owed only a duty to abstain from willful or wanton misconduct or entrapment. The circuit court found that there was no evidence of such misconduct. As to statutory code violations, the circuit court ruled that a potential violation of a statute or regulation was relevant only if appellees owed a duty to the child beyond that of a trespasser. The circuit court found that, even if the child was an invitee, the applicable Code of Maryland Regulations provisions did not apply. The circuit court also found that, "[w]ithout a scintilla of evidence demonstrating exactly how the child circumvented the fence, [it could not] consider a possible violation as *prima facie* evidence of negligence." Appellant thereafter noted an appeal.

Held: Reversed.

The Court of Special Appeals reversed and remanded the case for further proceedings. A statutory or regulatory duty is not dependent upon the existence of an underlying common law duty. Duties may arise from multiple sources. A plaintiff pursuing a negligence action alleging a violation of a statutory or regulatory duty need not first demonstrate the existence of a common law duty.

Owners of public swimming pools in Montgomery County are required to meet certain minimum standards as to the construction and maintenance of an adequate pool barrier pursuant to COMAR, COMCOR, and the Montgomery County Code.

COMAR 10.17.01.00 *et seq.*, concerning public swimming pools and spas, became effective on February 10, 1997. Pursuant to COMAR 10.17.01.03, a "grandfathering" provision, previously approved public pools are required to comply with COMAR 10.17.01.21, with respect to pool

barriers, and with COMAR regulations not specifically exempted by COMAR 10.17.01.03A, in circumstances where a condition exists that poses a danger that threatens the health and safety of pool users.

That COMAR 10.17.01.03 does not exempt previously approved public pools from compliance with COMAR 10.17.01.21 is evident from the legislative history of the regulations as well as the purpose and scope of the Chapter. The Model Barrier Code for Residential Swimming Pools, Spas and Hot Tubs, adopted and incorporated by reference into the COMAR chapter governing swimming pools, demonstrates the concern that pools be surrounded by an adequate barrier so as to prevent young children from accidental drownings and near drownings. The Notice of Proposed Action proposing adoption of the new COMAR regulations states that the purpose of the action was to enact regulations to "protect and promote the health and safety of individuals at public and semipublic swimming pools[.]" As adopted, the COMAR regulations demonstrate an intent to provide measures to increase public health and safety at public swimming pools in Maryland.

Where a plaintiff alleges that a defendant's duty is established by statute or regulation, the plaintiff must show (1) a violation of a statute or regulation designed to protect a specific class of persons which includes the plaintiff, and (2) that the violation proximately caused the injury complained of.

Montgomery Count Code § 51-15(b)(2), COMCOR 51.00.01.03(B), and COMAR 10.17.01.21, governing public swimming pool barriers in Montgomery County, meet the requirements for adoption by the Court as standards of care. The purpose of the statutes and regulations is to protect the public's health and safety at public swimming pools. The statutes and regulations create a civil tort action for the protection of the swimming public, and the violation of the statutes and regulations is evidence of negligence.

The violation of a statute as evidence of negligence is not dependent upon the existence of a common law duty. Accordingly, unless otherwise indicated by the relevant statute or regulation, the alleged violation of a statute or regulation may constitute evidence of negligence regardless of whether the person injured was a trespasser or not.

A trial court errs in finding that, because there was no direct proof of causation, the plaintiff failed to make out a *prima facie* case of negligence. Proximate cause need not be proven with direct evidence, but rather may be shown through either direct or circumstantial evidence.

Circumstantial evidence of proximate cause is sufficient to survive summary judgment where the circumstantial evidence leads to a reasonable inference that a defendant's conduct was a cause of the plaintiff's injury.

John J.Alban, Sr., et ux. v. Michael A. Fiels, No. 1038, September Term 2011, filed February 28, 2013. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2013/1038s11.pdf

EVIDENCE – RELEVANCE AND EXPERT TESTIMONY

Facts:

Ruth A. Alban and her husband John J. Alban, Sr., a passenger in her vehicle, appellants, were injured after their truck collided with another truck, operated by Michael A. Fiels, appellee. Liability for negligence was uncontested, and the case was tried on the issue of compensatory damages. A jury awarded non-economic damages in the amount of $5,000 to Ms. Alban, "zero" damages to Mr. Alban, and non-economic damages in the amount of $5,000 to both the Albans for their joint claim for loss of consortium. The trial court entered judgment for $10,000 plus costs.

According to Ms. Alban, she was unable to get out of the truck after the collision and remained there until firemen arrived, who assisted her. Mr. Fiels left the scene of the accident immediately after the collision. He drove into an area without an outlet, however. He turned around, drove by the accident scene without stopping, and continued on his way. A witness followed him, and Mr. Fiels was soon arrested at a nearby shopping mall.

At trial, Mr. Fiels's counsel moved to "exclude any testimony regarding [his] failure or alleged failure to immediately stop at the accident scene," arguing that because Mr. Fiels admitted liability as to negligence such testimony was no longer relevant. The trial court agreed and excluded evidence relating to Mr. Fiels's post-accident actions.

Following the trial court's ruling, the Albans' counsel proffered the testimony that his clients would elicit if permitted to do so. In essence, the proffer was that witnesses would testify that they told Ms. Alban, while she was still in her truck, that appellee laughed as he drove by the accident scene.

The Albans, in their 70s, were taken to the University of Maryland shock trauma center where they were evaluated and released. They complained of neck; back, and shoulder pain, and Ms. Alban complained of an injury to her knees. They received physical therapy and pain medication. The primary claim for damages, however, made clear at the time of trial, was Ms. Alban's claim for emotional distress, manifested primarily by crying, anxiety, and sleeplessness.

Ms. Alban was referred to Dr. Harvey Gewanter, an experienced clinical psychologist. Dr. Gewanter testified via video deposition. Dr. Gewanter diagnosed Ms. Alban with Post Traumatic Stress Disorder, but added that it was resolving somewhat. With respect to Mr. Fiels's post-accident conduct, Dr. Gewanterstated that it was very upsetting to Ms. Alban.

The Albans also saw Dr. Mark Reischer, who testified as an expert in a number of specialties, including internal medicine, physical medicine and rehabilitation, and pain medicine. With respect to Ms. Alban, based on the patient's history, Dr. Reischer testified that Ms. Alban had had significant post traumatic anxiety.

The Albans contended the trial court erred in excluding evidence of Mr. Fiels's post-accident conduct because it was relevant to the jury's understanding of the cause and extent of Ms. Alban's emotional and psychological injuries. They also maintained that the court's ruling was prejudicial because the jury did not receive evidence that was part of the factual basis for the opinions of their experts, Drs. Gewanter and Reischer.

Held:

The evidence was irrelevant, and assuming arguendo that the disputed evidence was relevant, the trial court acted within its discretion in excluding it on the basis that it would be unduly prejudicial. The Albans were permitted to introduce lay and expert testimony relating to Ms. Alban's claim for emotional injury to the extent that such injury was caused by the accident itself and to the extent it was related to the physical injuries sustained in the accident. There was no basis on which to justify the admission of further evidence of Mr. Fiels's post-accident conduct, whether labeled as inappropriate or reprehensible, in a negligence action brought to recover damages for physical injuries and other legally cognizable elements of damage caused by the accident.

Emotional distress that is not dependent upon a physical injury or impact or a legally cognizable fear of harm and that is based upon conduct other than that which caused the injury, impact, or fear is not compensable unless, standing alone, the conduct constituted a tort, e.g., a separate act of negligence. Ms. Alban sustained a physical injury and recovered damages for that and the attendant emotional distress. To the extent she suffered any additional emotional distress, it was not caused by the physical injury, the impact or any legally cognizable fear of harm.

With respect to expert opinion, the question was whether the evidence in question was admissible as non-substantive evidence as part of the foundation of an expert's opinion, with a curative instruction if requested, whenit was not admissible as substantive evidence. It was not because (1) Mr. Fiels's post-accident conduct was irrelevant and (2) any expert opinion that was based on a causal connection between that conduct and a portion of Ms. Alban's emotional distress was implicitly an opinion of law.

Rule 5-703(a) does not dispense with the need for relevancy of an expert's testimony, and in addition, it does not permit an expert to implicitly or explicitly opine on legal issues. An expert's opinion which is founded on a premise which is "unsound or faulty" is inadmissible. If the foundation for an expert's opinion is premised on an incorrect view of its legal relevance, it is inadmissible.

Consequently, the proffered testimony regarding Mr. Fiels's post-accident conduct, being irrelevant, could not serve as a basis for the Albans' expert witnesses' opinions. In addition, Ms. Alban's claim for emotional distress, to the extent it was caused by Mr. Fiels's post-accident conduct, was not legally cognizable. A conclusion of non-relevance, a conclusion of undue prejudice, a conclusion of no proximate causation as a matter of law, or a conclusion of non-recovery as a matter of law for any other reason are all legal questions. Because the evidence was not relevant, it could not serve as a foundation for the opinions of the Albans' experts and, more important, the experts could not make compensable any emotional distress suffered by Ms. Alban because of Mr. Fiels's post-accident conduct.

City Homes, Inc. v. Brittany Hazelwood, No. 2109, September Term 2011, filed March 22, 2013. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2013/2109s11.pdf

EXPERT TESTIMONY – MARYLAND RULE 5-702 – QUALIFICATIONS TO TESTIFY AS AN EXPERT – SUFFICIENT FACTUAL BASIS – SANCTIONS AGAINST A PARTY AND A PARTY'S ATTORNEY – DUE PROCESS – NOTICE – MARYLAND RULE 2-433 – NOTICE OF APPEAL

Facts:

This case involves an action for damages allegedly caused by exposure to lead paint at a residence owned and operated by appellant. Appellee resided at the residence from July 1993 through 2000, where she was allegedly exposed to lead paint. In an amended complaint, appellee also alleged lead exposure at two other properties.

Appellee designated a pediatrician as an expert witness, stating that the pediatrician would opine that exposure to lead paint at the properties caused injury to appellee, and that appellee suffered permanent brain damage and loss of IQ points as a result of lead exposure. Appellant filed a motion to exclude the pediatrician as an expert, arguing that he lacked qualifications and a sufficient factual basis for his testimony as required pursuant to Maryland Rule 5-702. The circuit court denied the motion to exclude.

Appellant next filed a motion *in limine* to exclude the pediatrician's testimony at trial, again arguing that he lacked the qualifications necessary to offer an opinion as to the source of appellee's lead exposure and the cause of appellee's alleged injuries. The circuit court conducted a pretrial motions hearing and held the matter *sub curia*.

At trial, the pediatrician was voir dired. After voir dire, the jury was excused, and appellant's counsel objected pursuant to Maryland Rule 5-702(1) and (3) to the pediatrician being accepted as an expert. The circuit court overruled the objection, ruling, in pertinent part: "I am recognizing [him] as an expert pediatrician, especially with the concentration or including the concentration on his research and experience in childhood lead paint because his testimony is reflective of his special knowledge[.]" Thereafter, the pediatrician opined to a reasonable degree of medical probability that the residence identified in the complaint was the location where appellee was exposed to flaking and chipping lead-based paint, that appellee sustained a loss of seven to ten IQ points as a result of her elevated blood lead levels, and that lead exposure at the residence was a substantial contributing factor to the injuries appellee sustained, which he described "brain impairment."

On the last day of trial testimony, a witness for appellant testified that, in preparing for the case, he reviewed a 1993 lead test report, which identified locations within the residence that tested

positive for the presence of lead. At a bench conference, appellee's counsel advised the circuit court that the 1993 lead test report had not been produced during discovery and that he was unaware of such a report. Appellant's counsel agreed to produce the report. After the jury had begun deliberating but before a verdict was returned, the circuit court received a letter from appellant's counsel, via facsimile, which included the 1993 report as an attachment.

Following the eight-day trial, a jury sitting in the Circuit Court for Baltimore City returned a verdict in favor of appellee for a total of $5,100,000, including $900,000 in economic damages for lost earning capacity and $4,200,000 in non-economic damages. On post-trial motion, the circuit court reduced the non-economic damages award to $350,000 in accordance with the cap on non-economic damages, thereby reducing the total award to $1,250,000.

After trial, appellee filed a Motion for Sanctions, requesting that the circuit court sanction appellant's counsel and arguing that appellant's counsel had engaged in repeated misconduct throughout the trial, including failing to timely disclose and produce the 1993 report. Appellee argued that, as a result of not having the report, she was required to hire and pay a company to conduct two separate lead tests of the residence and retain an expert from the company to testify at trial. Appellee attached, as exhibits to the motion for sanctions, invoices detailing fees and costs totaling $10,135.45. Appellee requested that appellant's counsel pay $10,135.45 as reimbursement for unnecessary expenses, that appellant's counsel pay $1,500 as attorney's fees for preparation of the motion for sanctions, that appellant's counsel's conduct be reported to bar counsel, and "such other relief" as deemed necessary. Following a post-trial motions hearing, the circuit court issued a Post Trial Sanctions opinion detailing appellant's counsel's trial tactics, but ordering appellant to pay appellee $10,135.45 as reimbursement for the lead testing expenses and ordering appellant's counsel to pay $10,000 payable to the circuit court's Alternative Dispute Resolution programs as his actions "seriously undermined the Court's attempts at efficient dispute resolution and to conduct a fair trial."

After the denial of other post-trial motions and imposition of the sanctions, appellant noted an appeal.

Held:

The Court of Special Appeals reversed the judgment of the circuit court, vacated the circuit court's imposition of sanctions against appellant in the amount of $10,135.45 and against appellant's counsel in the amount of $10,000, and remanded the case for further proceedings.

Maryland Rule 5-702, governing expert testimony, provides that expert testimony is permissible if the trial court "determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." In so determining, the trial court must determine "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony."

"It is a familiar rule of evidence that a witness, [] to qualify as an expert, should have such special knowledge of the subject on which he is to testify that he can give the jury assistance in solving a problem for which their equipment of average knowledge is inadequate."

"A witness is qualified to testify as an expert when he exhibits such a degree of knowledge as to make it appear that his opinion is of some value, whether such knowledge has been gained from observation or experience, standard books, maps of recognized authority, or any other reliable sources."

A medical expert "'need not be a specialist in order to be competent to testify on medical matters,' and to qualify under Rule 5-702."

A trial court abuses its discretion, however, in permitting a medical expert to testify where there is no basis on which to conclude that the expert had specialized knowledge in the field in which he or she was to testify.

The trial court abused its discretion in finding a witness qualified to testify as an expert with a concentration in "childhood lead paint" by virtue of his "special knowledge" where the expert had not received any specialized training, had no experience in diagnosing, treating, or monitoring the progress of children with lead poisoning, identifying the source of a child's lead exposure, and had not published any articles related to lead poisoning, been involved in any studies related to lead, or delivered lectures on the topic of lead poisoning, but testified that he kept current on lead paint from reading articles–the names of which he could not recall.

"An expert's opinion testimony must be based on a[n] adequate factual basis so that it does not amount to 'conjecture, speculation, or incompetent evidence.'"

An adequate factual basis may be formed upon "facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions."

An expert lacked an adequate factual basis for the opinion that a property was a source of lead exposure where no information was provided to the expert about the existence of lead at the property, and the plaintiff had lived in or visited other residences during the relevant time.

A trial court abuses its discretion in permitting a medical expert to testify where the expert's opinions amount to pure speculation based upon general literature.

A trial court abuses its discretion in imposing sanctions against a party where the opposing party never requested sanctions against the party, and the party had no notice that it would be subject to the imposition of sanctions.

Maryland appellate courts have generally been quite liberal in construing timely filed notices of appeal, such that a notice of appeal may include the party's attorney even where the attorney is not listed as a party noting an appeal.

Maryland Rule 2-433 permits sanctions for failure of discovery in the form of reasonable expenses and attorney's fees. The trial court may "require the party or deponent whose conduct necessitated the motion [for sanctions] or the party or the attorney advising the conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

Where a notice of appeal filed by the defendant failed to indicate that defense counsel appealed the imposition of sanctions against him individually, the appellate court will, nonetheless, construe the notice of appeal broadly and not interpret the notice of appeal to operate to exclude defense counsel.

Monetary sanctions in the form of expenses and attorney's fees for an attorney's alleged discovery violations may properly be resolved under Maryland Rule 2-433, which provides for expenses and attorney's fees as sanctions in circumstances involving the failure to disclose discoverable evidence, without resort to the trial court's inherent authority to sanction.

Washington Metropolitan Area Transit Authority v. Robert M. Washington, No. 769, September Term 2011, filed March 21, 2013. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2013/0769s11.pdf

WORKERS' COMPENSATION – IMPACT OF EMPLOYEE'S TERMINATION

WORKERS' COMPENSATION – IMPACT OF EMPLOYEE'S INCOME FROM PRIVATE BUSINESS

Facts:

Robert Washington was working as a train operator for the Washington Metropolitan Area Transit Authority ("WMATA") when he slipped and fell at a train station in August 2005, injuring the right side of his lower back. Washington filed a workers' compensation claim, which eventually resulted in the Workers' Compensation Commission ("Commission") ordering that he receive temporary-total-disability benefits. Washington stopped receiving temporary-total-disability benefits in June 2007, which he protested. At a hearing held by the Commission, Washington testified that he did not work two days prior to the hearing. WMATA then presented video surveillance footage that showed Washington working as a limousine driver for Tilly's Limousine Incorporated ("Tilly's") during the time he had denied working. The Commission ruled against Washington, resulting in the termination of temporary-total-disability payments. Washington was also terminated from his employment with WMATA.

Washington later sought permanent disability benefits from WMATA. The Commission held a hearing on his claim and found that Washington suffered a permanent partial disability from his back injury, amounting to a 22 percent industrial loss of use. Dissatisfied with the size of the award, Washington filed a petition for judicial review in the Circuit Court for Prince George's County. Prior to trial, WMATA moved unsuccessfully to exclude all evidence Washington planned to present concerning his past and current income as the owner of Tilly's and his past or present loss of income resulting from his termination of employment with WMATA. WMATA argued that Washington's wage loss was due to his fraudulent statements before the Commission, not as a result of his back injury.

During opening statements for the jury trial, Washington asked the jury for an award of 75 percent industrial loss of use, based on the fact that his weekly income from Tilly's was about 25 percent of his weekly income from WMATA. The jury ultimately returned a verdict in favor of Washington and found that he had sustained a 64 percent disability and industrial loss of use. WMATA's motions for remittur and a new trial were denied, and the circuit court entered an order vacating the Commission's award of 22 percent industrial loss of use and remanded the case for issuance of an award of 64 percent permanent partial disability.

Held: Affirmed in part and reversed in part.

The Court of Special Appeals affirmed in part and reversed in part. The court first determined, after surveying the law in other states, that an employee's termination for misconduct does not preclude him from receiving disability benefits. Relying on *Victor v. Proctor & Gamble*, 318 Md. 624 (1990), and *Bowen v. Smith*, 342 Md. 449 (1996), the court concluded that Maryland law points in the same direction, as the Court of Appeals determined in those cases that neither voluntary retirement nor incarceration, respectively, affected the award of disability benefits. The court thus rejected WMATA's claim that the circuit court erred in declining to exclude evidence of Washington's pre-injury earnings with WMATA solely because he had been terminated from his position.

However, the court determined that profits derived from a business are not to be considered as earnings and cannot be accepted as a measure of loss of earning power unless they are almost entirely the direct result of the claimant's personal management and endeavors. Because Washington employed other drivers at Tilly's, any profits were not "almost entirely" the result of his "personal endeavors." The circuit court's admission of Washington's earnings from Tilly's, over WMATA's objection, prejudiced WMATA because the jury clearly considered those earnings in reaching its decision that he sustained a 64 percent disability and industrial loss of use. The court concluded that the circuit court erred in not granting WMATA's motion to exclude evidence of Washington's business income and remanded for a new trial.

Covered Bridge Farms II, LLC, et al. v. State of Maryland, et al., No. 1920, September Term 2011, filed March 22, 2013. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2013/1920s11.pdf

ZONING AND PLANNING – EASEMENTS

Facts:

Charles and Elizabeth Grey owned around 131.347 acres in Howard County, consisting of three contiguous parcels. The Greys entered into a district agreement and then in 1984, sold an easement on the land to the Maryland Agricultural Land Preservation Foundation ("MALPF") in 1984, making their land part of the Maryland's agricultural land preservation program. Based on the easement, the Greys could not subdivide the land for any purpose except upon written approval of the MALPF. The easement also was binding on subsequent purchasers because it ran with the land.

The land as a whole was sold several times, eventually ending up in the hands of Covered Bridge Farms, LLC. Covered Bridge Farms then reconfigured the three parcels. This changed the parcel lines, the acreage of two of the parcels, and the numbering of the parcels. Covered Bridge Farms did not obtain approval from MALPF for this action. In 2007, Covered Bridge Farms was liquidated and, without requesting MALPF's approval, it conveyed the three reconfigured parcels to three separate entities, namely Covered Bridge Farms II, III, and IV (the "CBF entities").

MALPF filed a complaint against the CBF entities and others in 2011. MALPF alleged that the three conveyances constituted a subdivision of the land in violation of the deed of easement, the district agreement, and Maryland regulations. The circuit court agreed and declared the transfer null and void; required the land to be transferred to a common owner; and ordered the lot lines eliminated or restored to their original configuration. The CBF entities appealed, asking the Court of Special Appeals to find that they had not subdivided the land in violation of the agreement or regulations.

Held: Affirmed

The appellate court held that the conveyances were subdivisions even though the land was divided into three separate parcels before becoming part of the Maryland land preservation program. The district agreement the Greys entered into placed the three parcels into one agricultural district. The easement stated that the grantors of the easement relinquished "the right to subdivide the [] land for any purpose except upon written approval of the Agricultural Land Preservation Foundation[.]"

To define subdivision, the Court looked to the COMAR regulations, but not land preservation regulations that were revised in 2011, which did not apply retroactively to the case. However, under former regulations, subdivision was defined as "the division of land into two or more parts or parcels." COMAR 15.15.01.01-2B(7) (2001).

The Court found that Covered Bridge Farms' conveyances were divisions of the land into two or more parts or parcels. In so doing, the Court rejected the notion that the parcel could not be subdivided because it was already divided into three separate parcels before the Greys sold MALPF the easement. First, Covered Bridge had reconfigured the parcels. Thus, the three parcels it sold were not the three separate parcels that existed before the Greys sold the MALPF an easement. Second, even if it were the original three parcels, the district agreement and the easement treated the three parcels as one. A MALPF representative stated that the Foundation accepted individual farms into the State agricultural land preservation program that are composed of separately described parcels of land. However, the State considers the entirety of the multiple parcels to be one "land" subject to the subdivision prohibition that "prevents any landowner from chopping up the farm and conveying its pieces or parcels to other owners, thereby destroying the farm's potential as a profitable agricultural unit." Thus, Cover Bridge Farms' conveyances were invalid because the property was subdivided without prior approval in violation of the district agreement, the easement, and State regulations.

Return to ToC

ATTORNEY DISCIPLINE

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By an Opinion and Order of the Court of Appeals dated March 5, 2013, the following attorney has been disbarred:

ALFRED AMOS PAGE, JR.

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RULES ORDERS AND REPORTS

A Rules Order pertaining to the One Hundred Seventy-Fifth Report of the Standing Committee on Rules of Practice and Procedure was filed on March 11 2013:

http://mdcourts.gov/rules/rodocs/ro175.pdf