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Adkins, J., concurs and dissents.

http://www.mdcourts.gov/opinions/coa/2013/36a12ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – NINETY-DAY SUSPENSION

Facts:

The Attorney Grievance Commission of Maryland ("the Commission"), Petitioner, charged George Jacob Geesing ("Geesing"), Respondent, with violating multiple Maryland Lawyers' Rules of Professional Conduct ("MLRPC").

A hearing judge found the following facts. Members of Geesing's law firm other than Geesing prepared documents to be included in foreclosure filings. Routinely, Geesing authorized one of two non-lawyer members of his law firm's staff to sign his name on the documents, including affidavits. Geesing instructed the staff members (who were also notaries public) to notarize the affidavits, even though he had not signed them. Over the course of fifteen months, the two members of Geesing's law firm's staff signed Geesing's name on nearly every document in his law firm's foreclosure filings.

After learning of allegations that the affidavits had been falsely notarized, Geesing reported himself to the Commission. Since then, Geesing's law firm has banned "robo-signing." Geesing identified approximately 2,500 open foreclosure actions in which his law firm represented the mortgagees. Geesing contacted each mortgagee to recommend that the mortgagee allow his law firm–at its own expense–to file a "corrective affidavit" in which Geesing averred that he did not sign the documents in the foreclosure filing, but that the documents in the foreclosure filing were otherwise substantively accurate. The mortgagees consented to Geesing's plan, and his law firm filed corrective affidavits in all open foreclosure actions in which BWW Law represented the mortgagees.

Based on the above facts, the hearing judge concluded that Geesing had violated MLRPC: 3.3(a)(1) (Making or Failing to Correct a False Statement to a Tribunal); 5.3(a) (Responsibilities Regarding Nonlawyer Assistants); 8.4(d) (Conduct Prejudicial to the Administration of Justice); and 8.4(a) (Violating MLRPC).

Neither party excepted to the hearing judge's findings of fact. The Commission did not except to any of the hearing judge's conclusions of law. Geesing excepted solely to the hearing judge's conclusion that he had violated MLRPC 3.3(a)(1).

Held:

The Court of Appeals held that Geesing had violated MLRPC: 3.3(a)(1) by filing affidavits that Geesing knew to have been falsely notarized; 5.3(a) by instructing non-lawyer staff members to engage in conduct that was incompatible with Geesing's professional obligations; 8.4(d) by engaging in conduct that adversely affected the public's perception of the legal profession through a pattern of falsity and a cavalier attitude regarding the notary attestation's function and purpose; and 8.4(a) by violating MLRPC 3.3(a)(1), 5.3(a), and 8.4(d).

The Court of Appeals suspended Geesing from the practice of law in Maryland for ninety days because Geesing's robo-signing caused great injury to the public in general, both in terms of the negative image accorded the legal profession as a whole and the more tangible effect on the courts' day-to-day operations. There were two aggravating factors, as Geesing: (1) showed a pattern of misconduct by authorizing signatures in at least 2,500 foreclosure actions over the course of fifteen months; and (2) committed multiple offenses (at least 2,500 of them). However, there were seven mitigating factors: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) timely good faith efforts to make restitution or to rectify consequences of misconduct; (4) full and free disclosure to the Commission and cooperative attitude toward the attorney discipline proceeding; (5) good character; (6) imposition of other penalties or sanctions; and (7) remorse.

For two reasons, the Court of Appeals rejected Geesing's contention that his actions warranted only a reprimand because he reviewed for accuracy all documents in foreclosure filings. First, Geesing's robo-signing caused great injury to the public in general, both in terms of the negative image accorded the legal profession as a whole and the more tangible effect on the courts' day-to-day operations. Second, Geesing filed affidavits that he knew to have been falsely notarized.

Franklin Credit Management Corporation v. Fred Nefflen, No. 32, September Term 2013, filed December 20, 2013. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2013/32a13.pdf

CIVIL PROCEDURE – DEFAULT JUDGMENTS – RULE 2-534 POST-JUDGMENT CHALLENGE TO LIABILITY – APPEALABILITY

Facts:

The Respondent, Fred Nefflen, filed suit against Franklin Credit Management Corporation for defamation, breach of contract, and violations of the Maryland Consumer Debt Collection Act as well as the Maryland Consumer Protection Act. Franklin, however, failed to respond to the complaint in any way. Mr. Nefflen, then, filed a motion for an order of default, which was granted and notice was sent to Franklin. Franklin, however, never moved to vacate the order of default. The Circuit Court, thereafter, held a default judgment hearing to assess Mr. Nefflen's damages; Franklin failed to appear at the hearing. After hearing testimony and receiving evidence, the Circuit Court entered a default judgment against Franklin. Franklin, thereafter, filed a motion to alter or amend the judgment pursuant to Maryland Rule 2-534, alleging that Mr. Nefflen failed to prove legally viable causes of action for defamation and violations of the Maryland Consumer Debt Collection Act and the Maryland Consumer Protection Act. The Circuit Court denied the motion, and Franklin appealed to the Court of Special Appeals, asserting that the Circuit Court erred in entering the default judgments because the claims were legally insufficient, and for the same reasons, erred in denying the Rule 2-534 motion to alter or amend the judgment. The Court of Special Appeals affirmed the trial court's decisions, opining that there is no requirement in Maryland that the trial court make a determination as to liability before entering default judgment. It reasoned, moreover, that pursuant to Rule 2-613(g), which provides that "[a] default judgment entered in compliance with this Rule is not subject to the revisory power under Rule 2-535(a) except as to the relief granted," Franklin was precluded from contesting liability in its Rule 2-534 motion to alter or amend the judgment.

Held: Affirmed.

The court observed initially that Rule 2-613(g) does not expressly refer to Rule 2-534, but the Court opined that a Rule 2-534 "motion to alter or amend a judgment" cannot be used to contest liability under the default judgment procedure because, by its plain terms, it is applicable to a "judgment," and under the default judgment rule, liability is established by an order of default, which is not a judgment. Rule 1-202 defines a judgment as "any order of the court final in nature," which an order is not unless it is an "unqualified, final disposition of the matter in controversy," which an order of default is not. The Court noted also with respect to this issue, that to permit a defendant in default to contest its liability under Rule 2-534 would obviate the

default judgment procedure by giving the defendant two opportunities to set aside the order of default.

The court concluded, finally, that Franklin was barred from asserting its arguments with respect to liability on appeal because it failed to move to vacate the order of default. The court observed that, by moving to vacate an order of default, the issue of liability is preserved for appellate review, because the appellate court may consider whether the trial court judge abused her discretion in refusing to set aside the order of default establishing liability. In the instant case, however, Franklin failed to move to vacate the order, thereby failing to preserve any issue with respect to liability.

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American Bank Holdings, Inc. v. Brian Kavanagh and Jeffrey Weber, No. 21, September Term 2013, filed December 30, 2013. Opinion by Battaglia, J.

McDonald, J., dissents.

http://www.mdcourts.gov/opinions/coa/2013/21a13.pdf

APPEALS – PETITION TO COMPEL ARBITRATION – FINAL JUDGMENT RULE

Facts:

Brian Kavanagh and Jeffrey Weber, Respondents, filed an action in the circuit court demanding an accounting of a "loss reserve account," established pursuant to their employment agreements with their employer, American Bank Holdings, Inc., Petitioner, a portion of which allegedly was not paid to Respondents in breach of their agreements. American, in the same action, filed a "Petition to Compel Arbitration and Stay All Proceedings and Request for Hearing," which was denied by the circuit court. American noted an immediate appeal to the Court of Special Appeals, which dismissed the appeal, concluding, inter alia, that the order denying American's Motion to Compel Arbitration was not a final judgment.

Held: Affirmed.

The Court held that under the Maryland Uniform Arbitration Act as it was originally codified in 1965, an appeal from the denial of a petition to compel arbitration could only "be taken in the manner and to the same extent as from orders or judgments in a civil action," Article 7 of Section 18, Maryland Code (1957, 1968 Repl. Vol.), which anticipated, then, only final judgments, i.e., those that terminated judicial proceedings. The denial of American's Petition to Compel Arbitration, thus, was not immediately appealable as a final judgment because it did not terminate the proceedings and the parties remained in court.

Montgomery County, Maryland v. Khana Soleimanzadeh, et al., No. 25, September Term 2013 and *Montgomery County, Maryland v. Joseph Soleimanzadeh*, No. 27, September Term 2013, filed December 23, 2013. Opinion by Harrell, J.

Adkins and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2013/25a13.pdf

CONDEMNATION PROCEEDINGS – RULES OF PROCEDURE – SUMMARY JUDGMENT – JUST COMPENSATION

CONDEMNATION PROCEEDINGS – CONSTITUTIONAL LAW – RIGHT TO A JURY ASCERTAINMENT OF JUST COMPENSATION

Facts:

Because the proceedings were identical in the Circuit Court in these cases, we review in detail only the facts presented in No. 25 below and, to avoid repetition, simply note that the proceedings in the Circuit Court were identical or parallel for No. 27. Moreover, this Court answered in a consolidated opinion the questions presented.

In 2007, the County took a portion of the subject properties owned by the Respondents, pursuant to "quick take" eminent domain actions. After the parties were unable to agree upon the value to be paid for either of the takings, the County filed Complaints for Condemnation in the Circuit Court for Montgomery County. After the Soleimanzadehs refused to file any responses to the County's discovery requests, the County filed a Motion to Compel and/or for Sanctions. The Circuit Court granted the unopposed motions, entering an order in each case that directed the Soleimanzadehs to file responses to the requested discovery within ten days of the entry of the order. The orders directed further that, if the Soleimanzadehs did not do so within the ten days, they "shall not be permitted to introduce any evidence in support of their claims for just compensation and damages." The Soleimanzadehs failed to file any responses and, accordingly, the sanctions would become self-executing had the matters come to trial.

On 26 April 2010, the scheduled date of trial, the County filed a Motion for Summary Judgment or, in the Alternative, for Judgment by Default, on the issue of just compensation and damages on the grounds that the Soleimanzadehs were unable to present any evidence of value of the taken property greater than the appraisal value proposed by the County in each case. The Circuit Court granted the motions, entering Orders condemning the properties and awarding the Soleimanzadehs the amounts proffered by the County's expert witness in an affidavit filed with the County's motions, as just compensation for the takings of the real properties.

The Soleimanzadehs appealed to the Court of Special Appeals the grant of the County's motions for summary judgment. Notably, the Soleimanzadehs did not challenge in their appeals the

Circuit Court's imposition of discovery sanctions. In No. 25, the Court of Special Appeals, in a reported opinion, *Soleimanzadeh v. Montgomery County*, 208 Md. App. 107, 56 A.3d 349 (2012), reversed the Circuit Court's grant of summary judgment, holding that "the summary judgment rule, Rule 2-501, does not apply in [condemnation proceedings] to the issue of just compensation, because a landowner cannot be deprived of the constitutional right to have a jury award just compensation." *Id.*, 208 Md. at 134, 56 A.3d at 365. In No. 27, the Court of Special Appeals, in an unreported opinion, reversed the Circuit Court's grant of summary judgment, adopting the reasoning of *Soleimanzadeh v. Montgomery County*, 208 Md. App. 107, 56 A.3d 349 (2012).

The County petitioned us for writs of certiorari and we granted the petitions to consider the following questions:

> (1) Where there is no genuine dispute of material fact as to the valuation of a property taken in an eminent domain proceeding, may the trial court enter judgment pursuant to MD Rule 2-501 in favor of the condemnor as a matter of law?
>
> (2) Does a condemnee have a constitutionally protected right to have a jury determine just compensation even when sanctions against the condemnee prohibit the condemnee from introducing evidence in support of a claim for just compensation and the condemnee fails to show the existence of a dispute of material fact as to the compensation to be awarded?
>
> (3) Does a condemnee have a burden to produce evidence when it disputes a condemnor's estimate of fair market value?
>
> (4) Did the award of summary judgment in favor of the condemnor impair the condemnees' right to a jury trial?
>
> (5) Can the right to a jury trial in an eminent domain proceeding be waived by the landowner's failure to follow clearly proscribed rules?

Held: Reversed.

The Court determined first that the Circuit Court was permitted to grant summary judgment on the issue of just compensation in a condemnation proceeding. Although condemnation actions are special proceedings that lack the characteristics of ordinary trials, the Court found that, as a practical matter, the condemnee must bear the burden to produce some admissible information demonstrating his theory of the value of the property. Otherwise, with all other issues decided (as was the case here), the jury had no triable issue to decide and the right to jury consideration was foregone. This conclusion does not violate any right provided in the state Constitution or the Rules. Article III, § 40 and Rule 12-207(a) provide that the condemnee have the *opportunity*

to present evidence before a jury on the issue of just compensation in eminent domain proceedings. Therefore, the Court concluded that the general rules of civil procedure apply still and summary judgment is available in condemnation proceedings on the issue of just compensation where no genuine question or triable issue of value is generated for submission to a jury.

Next, the Court addressed whether summary judgment was appropriate in this case. The Court of Special Appeals found that, even though the Soleimanzadehs were precluded from introducing affirmative evidence, they might have been able to establish a value greater than the amount proffered by the County's expert witness through cross-examination of the County's appraiser or through the jury view of the property. This Court disagreed. With regard to the Soleimanzadehs cross-examining the County's expert witness, this Court doubted its efficacy at producing affirmative evidence of a higher value, even if it is capable of exposing doubts as to whether the County's valuation is just. Moreover, the jury view is not required in all cases. Because this case was a quick take case with a long time period between the condemnation and trial, the Court found a jury view was not required in this case. As such, the usual opportunity for a view was not an additional opportunity to develop material facts that would have established a triable dispute as to just compensation in these cases.

Because the jury was not required to view the properties in these cases and the landowners were precluded from presenting any evidence on value, no evidence existed upon which the jury could base an amount of damages that was greater than the amounts reflected in the appraisals by the County's expert. Thus, the Court concluded that the Circuit Court's exclusion of any evidence from the landowners regarding their view of just compensation, which was necessary to their claims being triable, rendered the granting of summary judgment a logical and necessary consequence. Accordingly, the Court reversed the Court of Special Appeals's judgments in both cases and remanded the cases with directions that the Circuit Court's grants of summary judgment be affirmed.

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Hubert Allen Wood v. State of Maryland, No. 28, September Term 2013, filed December 19, 2013. Opinion by Greene, J.

Harrell, J., dissents.

http://www.mdcourts.gov/opinions/coa/2013/28a13.pdf

CRIMINAL LAW – COMPETENCY TO STAND TRIAL

CRIMINAL LAW – JURY INSTRUCTION – LEGALLY ADEQUATE PROVOCATION

Facts:

On September 22, 2010, Petitioner was indicted in the stabbing death of Daniel Curran ("victim"). Prior to trial, defense counsel submitted a request for a competency evaluation based on Petitioner's previous admissions to psychiatric facilities and after a conversation with Petitioner's mother. Thereafter, Petitioner's competency was discussed at several pretrial hearings. Petitioner, however, refused to participate in the competency evaluation. On May 26, 2011 at another pretrial hearing, defense counsel stated to the court: "Your Honor, we are here for an issue of competency to stand trial. And after further discussions with Mr. Wood, both substantively and about this particular issue, I have come to the conclusion that I should withdraw my request. And that is with Mr. Wood's concurrence." After a brief colloquy between Petitioner, his counsel, and the trial judge, the judge found the issue of competency was moot, and the case proceeded to trial.

At trial, it was alleged that the victim made a derogatory comment to Petitioner about his mother, and that the victim and Petitioner got into an argument over pills, when Petitioner "snapped" and stabbed the victim. Testimony showed that the victim could be violent when he was intoxicated, and that he was intoxicated at the time of the offense. However, testimony also showed that the victim was in poor physical health at the time of his death, and was likely unable to participate in a physical affray. Additionally, Petitioner's mother testified that Petitioner told her he "hurt" the victim on the night it was alleged that the victim was killed.

Petitioner contends that the trial judge erred when he allowed Petitioner to withdraw his request for a competency evaluation, and afterwards did not make a competency determination on the record, and when he denied Petitioner's request for a jury instruction on legally adequate provocation.

Held: Affirmed.

In compliance with Md. Code (2001, 2008 Repl. Vol), § 3-104(a) of the Criminal Procedure Article, a criminal defendant may withdraw his request for a competency evaluation and the trial

judge may determine that the issue of competency is moot without making a determination of competency, so long as the trial judge does not have a bona fide doubt that the defendant is competent to stand trial based on evidence presented on the record. There is nothing in Maryland case law or statutes prohibiting withdrawal of a request for a competency determination, and therefore, defense counsel legally withdrew his request. Additionally, because there was not sufficient evidence of incompetence on the record, the trial judge did not have a bona fide doubt as to Petitioner's competence to stand trial. Therefore, his determination that the issue was moot complied with § 3-104(a).

Moreover, where there is no evidence on the record that defendant was adequately provoked into a sudden heat of passion that caused the death of the victim, the trial judge did not err in denying defendant's request for a jury instruction on legally adequate provocation. Words alone cannot amount to provocation, but adequate provocation can arise from words "if they are accompanied by conduct indicating a present intention and ability on the part of the victim to cause the [defendant] bodily harm." *Carter v. State*, 66 Md. App. 567, 572 n.3, 505 A.2d 545, 548 n.3 (1986). Here, there was a complete lack of evidence to establish either a mutual affray or words and conduct between Petitioner and victim sufficient to establish the defense. Therefore, the Court held that the intermediate appellate court properly affirmed the trial court's judgment denying the Petitioner's request for a jury instruction on provocation.

Stephen Simmons v. State of Maryland, No. 29, September Term 2013, filed December 18, 2013. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2013/29a13.pdf

CRIMINAL LAW – DOUBLE JEOPARDY – MANIFEST NECESSITY

Facts:

Petitioner Stephen Simmons was charged in the Circuit Court for Prince George's County with murder and other related offenses arising out of the shooting death of Christopher Wright on July 1, 2009. None of the witnesses saw the shooting of Wright or who shot him, but he was dead when the police arrived. Petitioner was arrested in connection with this incident and held for a nearly ten hour recorded interrogation. During the interrogation, Petitioner offered to take a lie detector test. No test was ever performed.

During opening statement at trial, defense counsel stated to the jury that "[y]ou will hear [Petitioner] protest his innocence through the long hours of questioning, tell the detectives over and over again the one thing that he knew to be true, 'I did not shoot that man. I did not shoot that man.' **Stephen Simmons offered to take a lie detector test.**" (Emphasis added).

The prosecutor objected and the trial judge issued a curative instruction *sua sponte*, telling the jurors that "the reference to a lie detector test. . . . [is] not something you can consider." The State made no further objection to defense counsel's reference to a lie detector test and did not protest the adequacy or effectiveness of the court's instruction. At the beginning of proceedings on the third day of trial and after the exclusion of the State's firearms expert, the State moved for a mistrial claiming that defense counsel's reference to the lie detector test had prejudiced the jury, such prejudice could not be overcome, and the State was deprived of a fair trial. After hearing argument from both counsel, the trial judge declared a mistrial, stating that "as a matter of manifest necessity, a mistrial must be declared to ensure that the State is not deprived of a fair trial, and to ensure that the jurors are not permitted to allow knowledge that there was an offer of a lie detector test to cause them to find that the State was not able to meet its burden."

Petitioner filed a "Motion to Dismiss," arguing that retrial was prohibited under double jeopardy principles, which was denied. The Court of Special Appeals affirmed. Petitioner thereafter filed a petition for certiorari with this Court, which was granted on April 22, 2013.

Held: Affirmed.

In a jury trial, the Double Jeopardy Clause generally bars the retrial of a criminal defendant for the same offense once a jury has been empaneled and sworn. Double jeopardy principles do not *per se* bar a retrial, however, when the case is terminated prematurely. When a mistrial is

granted over the objection of the defendant, double jeopardy principles will not bar a retrial if there exists "manifest necessity" for the mistrial. The question of whether manifest necessity exists for the purposes of double jeopardy in the case of a mistrial depends on the unique facts and circumstances of the case and, therefore, that determination is left to the sound discretion of the trial judge. To meet this "high degree" of necessity, the trial judge must determine that there is no reasonable alternative to the mistrial. Whether a curative instruction, such as the one given here, is a reasonable alternative to a mistrial depends on whether the prejudice was so substantial as to deprive a party of the right to a fair trial and therefore warrant a mistrial.

Reference to a defendant's willingness to take a lie detector test is inadmissible in criminal trials. In this case, the Court stated that defense counsel knew or should have known that it was improper to mention to the jury that Simmons requested to take a polygraph exam to prove his innocence. Upon the State's later request for a mistrial, the trial judge reviewed the efficacy of his earlier instruction and the prejudice caused by the "statement carefully made as part of a preview of the evidence to the jury" in the "powerful setting" of an opening statement. The trial judge determined that his earlier curative instruction was not enough to overcome the prejudice caused by the reference to Simmons's offer to take a lie detector test. Based on these findings by the trial court, the Court held that the trial judge did not abuse his discretion in determining that manifest necessity existed to warrant a mistrial and that the curative instruction was insufficient to cure the prejudice caused by the reference to Petitioner's willingness to take a lie detector test.

Wesley Torrance Kelly v. State of Maryland, No. 26, September Term 2013, filed December 23, 2013. Opinion by Barbera, C.J.

http://mdcourts.gov/opinions/coa/2013/26a13.pdf

CRIMINAL PROCEDURE – FOURTH AMENDMENT – GOOD-FAITH EXCEPTION – REASONABLE RELIANCE ON BINDING APPELLATE PRECEDENT

Facts:

Howard County Police Department detectives installed a global positioning system ("GPS") tracking device on the exterior of Petitioner Wesley Torrance Kelly's vehicle. As a result of this tracking, detectives made observations and collected information they used to obtain warrants to search various locations for evidence of Petitioner's participation in two commercial burglaries. The State sought to introduce evidence obtained during execution of those search warrants in separate prosecutions of Petitioner in the Circuit Courts for Anne Arundel and Howard Counties. Before trial, he moved to prevent the introduction into evidence of all items seized pursuant to the search warrants, as well as the officers' observations, arguing that the GPS tracking violated the Fourth Amendment and that the evidence was obtained, and observations were made, as a result of that illegal tracking. The State argued that the GPS tracking did not constitute a search. Both courts denied Petitioner's motions, and he was convicted of various charges arising from the burglaries.

He appealed his convictions to the Court of Special Appeals. During the pendency of the appeal, the Supreme Court of the United States decided the case of *United States v. Jones*, 132 S. Ct. 925 (2012), holding that law enforcement officers' installation of a GPS device on a vehicle, and use of that device to monitor the vehicle's movements, constituted a search under the Fourth Amendment. Petitioner argued again in the Court of Special Appeals—this time with the benefit of *Jones*—that the GPS tracking was an unlawful search, maintaining that he was entitled to the suppression of any evidence obtained as a result of the search. The State argued that the remedy of suppression was inappropriate, as officers had conducted the search in reliance on binding appellate precedent, namely *Stone v. State*, 178 Md. App. 428 (2008), and thus their actions fell under the good-faith exception to the exclusionary rule.

The Court of Special Appeals affirmed the judgments of conviction. Recognizing that the GPS tracking was a search under *Jones*, the Court concluded that Petitioner was not entitled to the suppression of the resulting evidence. The Court reasoned that officers had conducted the tracking in objectively reasonable reliance on then-applicable law governing surveillance of vehicles on the public streets, *United States v. Knotts*, 460 U.S. 276 (1983). Thus, under the Supreme Court case *Davis v. United States*, 131 S. Ct. 2419 (2011), the good-faith exception applied.

Held: Affirmed.

The Court of Appeals first addressed the parties' dispute over what may serve as binding appellate precedent under *Davis*, concluding, as did the Court of Special Appeals, that there need not be a prior case addressing police conduct factually identical to the conduct at issue for there to be binding appellate precedent. *Knotts*, the prevailing Fourth Amendment law at the time of the search, allowed the use of a technological device to track the movements of a vehicle on the public streets, and officers could reasonably rely on the holding in that case when installing the GPS device to Petitioner's car for the purpose of conducting surveillance. Thus, the *Davis* good-faith exception applied and Petitioner was not entitled to suppression of evidence stemming from the GPS tracking.

Terry Wayne Hammonds v. State of Maryland, No. 14, September Term 2013, filed December 3, 2013. Opinion by Greene, J.

Watts, J., concurs.

http://www.mdcourts.gov/opinions/coa/2013/14a13.pdf

CRIMINAL LAW – DIRECT CRIMINAL CONTEMPT

CRIMINAL LAW – RETALIATION AGAINST WITNESSES OR VICTIMS

REVOCATION OF PROBATION – IMPROPER GROUNDS

Facts:

Terry Wayne Hammonds ("Petitioner") was charged and convicted of second degree assault stemming from an incident involving his then-girlfriend Audrey Wilgis ("Ms. Wilgis"). He was sentenced by the trial judge to ten years in prison with all but 18 months suspended and three years probation. Shortly thereafter, the State petitioned the Court to revoke Petitioner's probation, asserting that Petitioner failed to abide by the special condition of his probation that he "obey all laws."

At the probation revocation hearing, courtroom security guard Deputy Wilson testified that following Petitioner's sentencing, Petitioner signed the probation papers, and while seated next to the exit door of the courtroom, tore up his copy of those papers. While the trial judge asserted that she witnessed this action by Petitioner, it was alleged that the court had already moved on to another matter and the courtroom proceedings were not interrupted. Next, Deputy Wilson testified that upon removing Petitioner from the courtroom and on the way to lockup, Petitioner made several comments in a loud tone: "She don't know it, but she just signed her death warrant," and "she's going to be one sorry bitch in a year and a half." He repeated these statements to other detainees, and Deputy Wilson reported this to the State's Attorney. The State asserts that Petitioner violated the condition of his probation that he "obey all laws" by committing direct criminal contempt of court for the paper tearing incident, and by violating Maryland Code § 9-303(a) (2002 Repl. Vol, 2005 Cum. Supp.) of the Criminal Law Article (hereinafter "§ 9-303(a)") when he threatened a victim or witness of a crime.

Held: Affirmed in part and reversed in part.

Direct criminal contempt is a willful act committed in the presence of the trial judge or so near to him or her as to interrupt the court's proceedings. Here, the trial court erred when it determined Petitioner committed direct criminal contempt because his act of tearing up his copy of the

probation papers while seated next to the exit door of the courtroom and after the judge had moved on to other matters, did not demonstrate a deliberate effort to disrupt the proceedings.

Section 9-303(a), which provides criminal penalties for retaliation against witnesses or victims of crimes who testify about or report criminal activity, does not require that a threat be communicated to the witness or victim, or require the perpetrator to believe that the threat would be communicated to the witness or victim. The elements of the crime include only (1) the making of a threat, and (2) intent to retaliate against a witness or victim. Here, because Petitioner made a threat with the intent to retaliate against Ms. Wilgis, the victim of the crime, he was in violation of § 9-303(a), despite the fact that the threat was not made to Ms. Wilgis or with the intent that it be communicated to her.

When the judge clearly relies on two or more grounds to revoke probation, one or more of which this Court has concluded was not sufficiently supported by the record, the case must be remanded for further proceedings in order to determine if revocation is still appropriate. Because the trial judge revoked Petitioner's probation based on a finding of both direct criminal contempt of court and a violation of § 9-303(a), and the Court holds that the evidence does not support a finding that Petitioner acted contemptuously, the present case must be remanded.

Millicent Sumpter v. Sean Sumpter, No. 120, September Term 2011, filed December 9, 2013. Opinion by Adkins, J.

McDonald and Watts, JJ., concur and dissent.

http://www.mdcourts.gov/opinions/coa/2013/120a11.pdf

FAMILY LAW – CHILD CUSTODY INVESTIGATION REPORT – LITIGANT'S ACCESS – ABUSE OF DISCRETION

Facts:

Sean Sumpter ("Father") filed a complaint in the Circuit Court for Baltimore City for absolute divorce from Millicent Sumpter ("Mother") on March 24, 2010. Father also sought sole physical and legal custody of the couple's two children. Before the merits hearing on Father's petition for divorce, the court ordered that the Adoption and Custody Unit ("ACU") for the Circuit Court complete a custody investigation report ("the Report").

The Report summarizes interviews that ACU staff conducted with the parties, the parties' relatives and partners, and the children. The Report also describes the parties' personal, criminal, health, education, housing, child protective services, and employment histories. This information is presented as findings in the Report's first 17 pages. The findings are supplemented with 17 attachments. The Report does not make a recommendation concerning custody of the children.

The Report was due on November 1, 2010, in time for a scheduled pre-trial conference, but the ACU did not file the Report with the court until December 3, 2010. That day, the ACU sent counsel for both parties a letter indicating that the Report was complete and could be reviewed at the Family Division Clerk's Office. Counsel for Mother received this notification on December 6, 2010, and visited the Family Division Clerk's Office at 2:30 p.m. that day.

Counsel's access to the Report was limited by the Circuit Court for Baltimore City's application of its "Policy Regarding Distribution of Court Ordered Evaluative Reports" ("the Policy"). Under the Policy, Mother's counsel was unable to copy the Report or carry it out of the Clerk's office. Mother's counsel studied the 161-page Report and took notes for ninety minutes until the Family Division's Clerk's office closed to the public for the day. Mother's counsel were not able to return to the clerk's office before the merits hearing, and did not see the Report again until that time.

The two-day merits hearing began on December 13, 2010. Mother's counsel moved *in limine* to exclude the Report from evidence, or, in the alternative, to receive a copy of the Report. The trial court denied these motions, erroneously stating that the Policy "prevent[ed] copies from being out even in the control of counsel[.]"

The trial court granted Father's petition for divorce and awarded him sole legal and physical custody of the children. Mother appealed to the Court of Special Appeals, arguing that the Policy violated her due process rights. The Court of Special Appeals affirmed the Circuit Court.

Mother then petitioned the Court of Appeals for a writ of certiorari, which was granted. Neither Father nor the children's best-interest attorney opposed the petition, filed briefs or appeared at oral argument. *Sumpter v. Sumpter*, 427 Md. 668, 672, 50 A.3d 1098, 1100 (2012). In an opinion filed August 21, 2012, the Court of Appeals declined to reach the merits of Mother's appeal for two reasons. *Id*. First, the record did not contain the Policy or sufficient evidence to "elucidate the full contours of the policy or rule and how it is applied." *Id.* Second, Mother's appeal had been unopposed, and as a result, one-sided. *Id*. The Court of Appeals remanded the case for supplementation of the record and invited the Office of the Attorney General to participate, as *amicus curiae*, in light of the absence of Respondent. *Sumpter v. Sumpter*, 427 Md. at 672, 50 A.3d at 1101.

Held: Reversed and remanded.

The Court of Appeals reversed the Court of Special Appeals and remanded the case to the Circuit Court for Baltimore City for a new trial. The Court held that the trial court abused its discretion by applying its erroneous conception of the Policy, thereby applying a hard and fast rule to a matter that required the court to exercise its discretion. The Court held that the trial court's error so hamstrung the defense that every aspect of the trial was affected. Consequently, proving prejudice to Mother's case was practically impossible, and the Court presumed prejudice in this case. Finally, the Court referred the issue of litigants' access to court-ordered child custody investigation reports to the Rules Committee for its consideration and recommendation.

Noel Tshiani v. Marie-Louise Tshiani, No. 24, September Term 2013, filed December 19, 2013. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2013/24a13.pdf

FAMILY LAW – FOREIGN MARRIAGES – PROOF OF VALID MARRIAGE.

FAMILY LAW – FOREIGN MARRIAGES – COMITY.

Facts:

On 6 February 2009, Marie-Louise Tshiani ("Marie-Louise") filed a Complaint for Absolute Divorce, Or In The Alternative Limited Divorce, in the Circuit Court for Montgomery County. Her complaint alleged that the she and Noel Tshiani ("Noel") were married in a religious ceremony in Arlington, Virginia, on 16 April 1994. She filed later, however, an Amended Complaint in which she replaced her prior allegation of the Virginia wedding with an allegation that the parties were married on 23 December 1993 "in a Civil Ceremony in Kinshasa, Democratic Republic of the Congo."

A merits trial was held in the Circuit Court on 25-26 October 2010. At trial, Marie-Louise testified that she and Noel were married in a traditional Congolese marriage ceremony, and that Noel was not present physically at the ceremony, but participated by telephone. She explained that Noel responded affirmatively over the phone to three questions regarding his desire to marry her, Noel's family provided her family with a dowry, and, following a celebration, she stayed with a relative of Noel's who arranged for her to travel three days later to Virginia to reside with Noel. The evidence adduced at trial showed also that Marie-Louise lived with Noel until their separation, gave birth to three children, who the couple raised together, and was referred to by Noel as his "wife" or "spouse" on immigration documents, spousal benefits documentation through his employer, and federal and state tax returns. Additionally, the parties also owned a house in Maryland that was titled to both of them as "tenants by the entireties." Noel contested the divorce on the premise that he and Marie-Louise were never married legally, and denied any involvement in, or knowledge of, the Congolese ceremony alleged by Marie-Louise.

Following the trial, the Circuit Court issued a Memorandum Opinion in which it found that "it is undisputed that [Noel] was not physically present at the wedding ceremony," but "that a valid marriage existed between the parties and took place on 23 December 1993." The Circuit Court accepted Marie-Louise's testimony that Noel was not in the Congo at the time, but participated in the ceremony by telephone. The trial judge stated that Noel was not credible as a witness generally. On 7 January 2011, a Judgment of Absolute Divorce was issued in Marie-Louise's favor. Noel noted timely an appeal to the Court of Special Appeals. The intermediate appellate court, in a reported opinion, affirmed the Circuit Court's judgment that the parties' marriage in the Congo was valid, concluding that the marriage, where one party participated only via telephone, was not repugnant to the public policy of this State and should be recognized as valid

in Maryland under comity principles. *Tshiani v. Tshiani*, 208 Md. App. 43, 56 A.3d 311 (2012). On 22 March 2013, the Court of Appeals granted Noel's timely Petition for a Writ of Certiorari, which presented the following questions:

> Does Maryland recognize under the principles of comity foreign wedding ceremonies where the groom participated only by telephone?
>
> Does Maryland require the physical presence of both parties at a wedding ceremony in order for the marriage to be valid?

Held: Affirmed.

The Court of Appeals upheld the judgment of the Court of Special Appeals on the comity analysis, and declined to reach the second question because the facts of the case did not suggest that a wedding without the physical presence of both parties occurred in Maryland. Taking a two-step approach to analyzing the comity question, the Court of Appeals, like the intermediate appellate court, analyzed first whether there was sufficient evidence of a valid marriage in the Congo before analyzing whether Maryland courts should recognize, under the principles of comity, a "telephone marriage" performed in a foreign jurisdiction for the purposes of granting a domestic divorce in Maryland. As to proof of the validity of the marriage, the Court reasoned that the Court of Special Appeals applied properly the presumption of a legal marriage under *Redgrave v. Redgrave*, 38 Md. 93 (1873), which allows Maryland courts to presume that a foreign marriage was valid where performed when competent evidence that the foreign marriage occurred actually is adduced at trial. After reviewing *Redgrave* and its progeny, the Court held that Marie-Louise's testimony, coupled with the evidence that the parties cohabitated, raised children, and held themselves out as husband and wife in Virginia and Maryland, formed a sufficient evidentiary basis on which to establish the presumption that their Congolese marriage was binding legally. In the second step of its analysis, the Court reviewed the comity principles discussed recently in *Port v. Cowan*, 426 Md. 435, 44 A.3d 970 (2012), before concluding that the Congolese telephone marriage Marie-Louise proved at trial should be recognized by Maryland courts because it is not repugnant to the public policy of this State. The Court reasoned that, under its prior cases, "repugnancy" is a high threshold, and this case did not present the level of dissonance with Maryland law sufficient to meet that high mark. The Court reserved comment on the Court of Special Appeals's discussion of whether a proxy telephone ceremony held in Maryland would be valid.

Montgomery County, Maryland v. John Distel, No. 22, September Term 2013, filed December 19, 2013. Opinion by Watts, J.

Harrell, J., dissents.

http://www.mdcourts.gov/opinions/coa/2013/22a13.pdf

AUTOMOBILES – COMPULSORY INSURANCE – SELF-INSURANCE – GUARANTEE – DRUNK DRIVING EXCLUSION

Facts:

Montgomery County, Maryland ("the County"), Petitioner, is a self-insured entity approved by the Motor Vehicle Administration ("the MVA"), that agreed to provide coverage for the minimum mandatory limits for: (1) bodily injury liability; (2) uninsured motorist claims; and (3) property damage liability. The County submitted to the MVA a signed Guarantee ("the Guarantee"), which provided, in relevant part: "This guarantee is limited to payment of valid claims arising from motor vehicle accidents resulting from use or operation of covered vehicles by persons authorized to use such vehicles and occurring within the scope of such authorization. Where the use of a County vehicle is prohibited by any applicable vehicle-use policy, coverage is excluded under this Guarantee for damage of any kind."

he County and the Fraternal Order of Police, Montgomery County Lodge 35, Inc., had a Collective Bargaining Agreement ("the CBA") in effect during 2008. Article 35 of the CBA, entitled "Vehicles" set forth policies and regulations concerning personal patrol vehicles ("PPVs"). One such regulation provided: "PPVs will not be operated within four (4) hours after the officer has ingested any amount of alcohol."

On May 9, 2008, Officer John Distel, Respondent, was operating a PPV, while off-duty, and was involved in a single-vehicle collision, damaging the PPV. At the time of the collision, Respondent was under the influence of alcohol. As a result of the collision, the County had to pay a total of $8,797.05 to repair the PPV. Shortly after the collision, Respondent filed a grievance against the County, seeking a determination that the CBA precluded the County from obtaining damages against him for the cost of repairs to the PPV. The grievance arbitrator decided that the matter needed to be resolved through a civil action rather than an administrative one.

Accordingly, the County filed in the District Court of Maryland sitting in Montgomery County a complaint against Respondent seeking to recover the costs of repairs to the PPV. Following a one-day trial, the district court ruled that the County, as a self-insurer, was entitled to relief and could recover damages against Respondent based on the "exclusion/restriction" of coverage in the Guarantee. Respondent noted an appeal to the Circuit Court for Montgomery County. After

a hearing, the circuit court reversed the judgment of the district court and entered judgment in favor of Respondent.

The County filed a Petition for Writ of Certiorari, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that the exclusion–purportedly permitting the County to disclaim or exclude coverage where an employee causes a motor vehicle collision while under the influence of alcohol–is not enforceable because it: (1) was not effectively included in the Guarantee; (2) violates Maryland's compulsory motor vehicle insurance scheme by reducing benefits below minimum levels set by statute; (3) is not expressly authorized by the General Assembly; and (4) violates public policy.

The Court of Appeals determined that the County effectively failed to include the alcohol exclusion in the Guarantee. On their face and by their plain language, the County's self-insurance application and Guarantee contained nothing that purported to exclude coverage of an authorized individual who operated an insured vehicle after consuming alcohol or while under the influence of alcohol. The language "any applicable vehicle-use policy" included in the Guarantee was overly broad, and failed to identify with specificity the applicable vehicle use policies or where the vehicle use policies being referenced were located. In particular, neither the Guarantee nor the self-insurance application referenced or identified the CBA, Article 35 of the CBA, or the regulation prohibiting driving within four hours of consuming alcohol as the vehicle use policy pertaining to police officers. And, nothing in the CBA was termed a "vehicle-use policy."

The Court of Appeals held that the exclusion in the Guarantee violated Maryland's compulsory motor vehicle insurance scheme by reducing insurance coverage below the mandatory minimums (and, in fact, eliminating coverage) in the absence of express approval by the General Assembly. Nothing within the applicable titles of the Maryland Code indicated an intent on the part of the General Assembly to permit insurers to deny or disclaim insurance coverage to otherwise insured individuals based on their blood-alcohol concentration level at the time of a collision.

The Court of Appeals also held that the exclusion in the Guarantee violated public policy by conflicting with Maryland's compulsory motor vehicle insurance scheme and by undermining the spirit and purpose of the insurance scheme, namely, to provide third parties a source of funds from which to obtain compensation for injuries.

The Court of Appeals determined that the clause in the Guarantee is an "exclusion" rather than an omnibus clause or permissive use clause because the clause does not extend coverage to third parties, or otherwise evince an intent to extend coverage or to provide added protection for third parties, and does not purport to limit coverage to claims arising when a third party operated a vehicle within the "scope" of permission granted or authorized.

Hector Butler, Jr. v. S & S Partnership, et al., No. 1, September Term 2013, filed November 26, 2013. Opinion by Greene, J.

Harrell, J., concurs.

http://www.mdcourts.gov/opinions/coa/2013/1a13.pdf

TORTS – LEAD PAINT – SCHEDULING ORDER – SANCTIONS

DISCOVERY – EXPERT DISCLOSURES – SANCTIONS

MD CONSUMER PROTECTION ACT – LEAD PAINT – SUFFICIENCY OF THE EVIDENCE

Facts:

Petitioner Hector Butler, Jr., filed suit in the Circuit Court for Baltimore City on October 9, 2007 against multiple current and previous property owners and managers. He alleged negligence and violations of the Maryland Consumer Protection Act ("CPA") Maryland Code (1975, 2005 Repl. Vol.), § 13-301 of the Commercial Law Article, for injuries resulting from exposure to lead-based paint during his residence at two properties in Baltimore City while Petitioner was an infant. The Circuit Court for Baltimore City issued a "Lead Paint Scheduling Order," which provided that "Defendants who still own a subject property shall allow the Plaintiffs to perform a non-destructive lead test upon the premises . . . . The defendants shall be permitted to attend the lead test accompanied by a consultant(s) or expert(s)." Petitioner conducted lead testing of the exterior of both properties without providing notice of the testing to any party and no defendant was present during the test. The results of the testing led to a written report (the "Arc Report"). Also during discovery, Petitioner set forth a generic description of each expert whom he intended to call at trial, including Dr. Klein, an expert in pediatric lead poisoning. Pursuant to the scheduling order, the parties were required to "respond to all interrogatory requests concerning the findings and opinions of experts," as required under Md. Rule 2-402(g)(1)(A), by August 10, 2009. On October 27, 2009, Petitioner attached an affidavit by Dr. Klein to his response to a discovery motion filed by Respondents. This was the first instance that Respondents received Dr. Klein's affidavit, which elaborated on Dr. Klein's opinion as to the causation of Petitioner's condition. Lastly, Respondents also moved for summary judgment as to Petitioner's CPA cause of action, claiming that there was no genuine dispute of fact based upon testimony that the property had been freshly painted when Petitioner moved into the property, and chipping paint was not observed until well after the tenancy began.

At a pre-trial motions hearing on November 9, 2009, the trial judge excluded the Arc Report on the basis of a scheduling order violation, and excluded Dr. Klein's report based on a discovery rule violation, which the trial judge raised *sua sponte*, without any party first moving for discovery sanctions or other relief. The trial court also granted the Respondents' summary

judgment motion and dismissed Petitioner's alleged CPA claim. The Court of Special Appeals affirmed. Petitioner thereafter filed a petition for certiorari with this Court, which was granted on December 14, 2012.

Held: Affirmed in part, reversed in part.

A scheduling order "impacts on the discovery process but does not directly expand or restrict the scope of it." *Dorsey v. Nold*, 362 Md. 241, 255, 765 A.2d 79, 87 (2001). As such, a scheduling order cannot give rights to defendants who do not own or control the properties in question. Therefore, the scheduling order, as written in the present case, applied to tests of properties still owned by a named defendant, and that only the defendant with ownership of the property has a right to attend the testing, consistent with the terms of the scheduling order. In addition, the Court of Appeals held that absent a showing of an egregious violation or willful or contemptuous or otherwise opprobrious behavior, a court should not exclude fundamental and essential evidence that effectively dismisses a case for a violation of a scheduling order.

Similarly, the Court held that the exclusion of Dr. Klein's affidavit was also an excessive sanction, inconsistent with Maryland case law with regards to sanctions for non-egregious activity. In addition, a trial court may not, *sua sponte*, exclude an expert's report based on discovery violations found under Md. Rule 2-432, without a party first moving for an order to compel or filing a motion for discovery sanctions. Therefore, the Court reversed the judgment of the Court of Special Appeals both as to the Arc Report and Dr. Klein's affidavit, because the trial judge abused her discretion in raising the discovery rule violation *sua sponte* and issuing excessive sanctions for non-egregious activity.

A violation of the Baltimore City Housing Code may constitute the basis for a cause of action under the CPA. In order for a CPA violation to occur, the Housing Code violation must exist at the inception of the lease. In the context of lead-based paint, therefore, there must be loose or peeling paint at the inception of a lease for the hazard to qualify as a basis for a CPA violation. An assertion that Respondents actively concealed or disguised loose or flaking paint at the inception of the lease could potentially raise a question of material fact as to whether peeling or flaking paint existed at that time, because loose or peeling paint would still be present on the property. However, in this case, Petitioner presented no admissible factual evidence for a trier of fact to reasonably infer that Respondents concealed or disguised peeling or flaking paint that existed at the inception of the lease. Therefore, the Court of Appeals affirmed the grant of summary judgment as a matter of law.

COURT OF SPECIAL APPEALS

Aleksey Kulikov v. Kadija Baffoe-Harding, No. 1475, September Term 2012, filed November 21, 2013. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2013/1475s12.pdf

VENUE – INTERLOCUTORY APPEAL – DENIAL OF A MOTION TO TRANSFER FOR IMPROPER VENUE UNDER RULE 2-327(b) NOT IMMEDIATELY APPEALABLE

Facts:

Appellee filed suit in Circuit Court for Prince George's County against appellant for damages arising out of a motor vehicle–pedestrian collision that took place in Montgomery County. Appellant filed a motion to dismiss for improper venue under Rule 2-322(a), or in the alternative, a motion to transfer for improper venue under Rule 2-327(b). Notwithstanding appellee's failure to file an opposition, the trial court denied appellant's motion, as well as appellant's motion for reconsideration.

Held: Appeal dismissed.

The Court of Special Appeals held that the trial court's ruling was not an immediately appealable order. Appellant confined his appeal to the trial court's denial of his motion to transfer for improper venue under Rule 2-327(b), and argued that the statement in prior Maryland appellate opinions that the grant of a motion to transfer for improper venue is immediately appealable, while the denial of such motion is not, was dicta. Those cases, according to appellant, actually held that the grant of a motion to transfer for *forum non conveniens* under Rule 2-327(c) is immediately appealable while the denial of such motion is not. The Court of Special Appeals reviewed those cases and determined that the comments therein on motions to transfer for improper venue were indeed dicta, but were "well considered dicta" worthy of precedential weight. The Court observed that the rationale supporting the immediate appealability of the grant of a motion to transfer for *forum non conveniens* and the non-appealability at that time of the denial of such motion also supports the same result for the grant/denial of a motion to transfer for improper venue.

The thrust of appellant's argument was that the erroneous denial of a motion to transfer for improper venue had the "harsh result" of forcing him to defend in a county not required by

statute and to expend time and money that would have to be repeated later in the proper venue. Appellant also cited to the public costs needlessly expended in the improper venue. Consequently, appellant called on the Court to change the common law. The Court recognized that appellant's claim of adverse consequences flowing from the case law precedent was not insubstantial, but reaffirmed the principle that the declaration of the common law of Maryland is the primary function of the Court of Appeals. Accordingly, the appeal was dismissed.

Estela Jacome De Espina, et al. v. Prince George's County, Maryland, et al., No. 2044, September Term 2012, filed December 20, 2013. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2013/2044s12.pdf

CONSTITUTIONAL LAW – LOCAL GOVERNMENT TORTS CLAIMS ACT DAMAGES CAP

Facts:

Manuel Espina ("Espina") was shot and killed by off-duty Prince George's County police officer Steven Jackson on August 16, 2008. According to Jackson, he shot Espina in self-defense because he feared for his life when Espina resisted arrest and attempted to reach toward Jackson's service weapon. According to other witnesses, Espina did not attack Jackson and was defenseless when Jackson shot him.

Following Espina's death, Espina's wife, Estela Concepcion Jacome-Espina ("Estela"), Espina's son, Manuel de Jesus Espina-Jacome ("Manuel"), and Espina's estate (collectively, "the Espinas") filed suit against Jackson and Prince George's County in the Circuit Court for Prince George's County. After a twenty-three day trial and three days of deliberation, the jury returned a verdict in favor of the Espinas, finding that Jackson violated Espina's rights under Article 24 of the Maryland Declaration of Rights, assaulted and battered Espina, wrongfully caused Espina's death, and violated Manuel's rights under Article 24 of the Maryland Declaration of Rights. The jury found that Jackson acted with actual malice and did not act in self-defense, and awarded damages totaling $11,505,000. Applying the Local Government Tort Claims Act ("LGTCA") damage cap, Md. Code (1974, 2013 Repl. Vol.), § 5-303 of the Courts & Judicial Proceedings Article ("CJP"), the circuit court reduced the $11,505,000 million verdict against Prince George's County to $405,000. The original verdict against Jackson was not reduced. All parties appealed.

On appeal, the Espinas argued that the LGTCA damages cap did not apply to the constitutional claims, and alternatively, that the LGTCA damages cap is unconstitutional as applied to the constitutional claims. The Espinas also argued that the LGTCA damages cap was improperly applied.

Prince George's County and Jackson raised nine issues in their cross appeal, arguing that: (1) the circuit court erred in denying their motion to dismiss the unlawful pattern or practice claim; (2) if the LGTCA damages cap does not apply, the general damages cap found in CJP § 11-108 should be applied; (3) the circuit court erred in excluding evidence regarding Espina's immigration status and pocket knife; (4) the circuit court erred by admitting evidence of Jackson's involvement in two previous violent encounters with members of the public; (5) the excessive force claim was improperly brought as an Article 24 claim and should have been dismissed; (6) there was insufficient evidence to establish malice; (7) the jury's verdict with respect to Manuel's

claims was irreconcilably inconsistent; (8) the verdict sheet was incorrect as a matter of law; and (9) the damages were plainly excessive.

Held: Affirmed in part and reversed in part.

The Court of Special Appeals noted that the applicability and constitutionality of the LGTCA damages cap, as applied to state constitutional claims, is an issue that has been presented several times but never definitively addressed by either state appellate court. The Court of Special Appeals held that the LGTCA damages cap applies to damages awarded for state constitutional claims. The term "tortious acts or omissions" has previously been held to include constitutional torts. *Lee v. Cline*, 384 Md. 245, 266 (2004). The Court of Special Appeals also looked to the legislative history of the LGTCA and concluded that the legislature intended that the LGTCA limit the total liability of a local government in a broad range of cases, with no exceptions for constitutional violations. The Court found further support in prior applications of the LGTCA notice requirement to constitutional claims, and observed that it would be unreasonable to interpret the notice provision of the LGTCA as applicable to constitutional claims, while excluding constitutional claims from the applicability of the damage cap provision of the same statute. Accordingly, based upon the statutory language, case law, and legislative history, the Court concluded that the LGTCA damages cap applies to the claims for state constitutional violations.

The Court further concluded that the application of the LGTCA damages cap to damages awarded for constitutional violations is not an abridgment of the rights guaranteed under Article 19 of the Maryland Declaration of Rights. "Article 19 generally protects two interrelated rights: (1) a right to a remedy for an injury to one's person or property; (2) a right of access to the courts." *Jackson v. Dackman*, 422 Md. 357, 376 (2011). The Court of Special Appeals held that the LGTCA damages cap does not modify access to the courts, but instead modifies the law of damages applied in cases involving claims against local governments. Unlike the damages cap held to be unconstitutional in *Dackman*, the LGTCA damages cap does not confer immunity and does not leave an injured person without a remedy. The Court of Special Appeals also held that the LGTCA damages cap does not violate the separation of powers doctrine, determining that it is within the authority of the legislature to limit damages.

Having held that the LGTCA damages cap applied and is constitutional, the Court of Special Appeals held that the circuit court properly reduced the judgment for Manuel's constitutional claims to $200,000. The Court further determined that the circuit court properly aggregated Estela and Manuel's wrongful death claims with the estate's survival action, and properly limited recovery to $200,000. The Court of Special Appeals held that the circuit court erred by awarding $5,000 for economic damages because the LGTCA damages cap does not differentiate between economic and noneconomic damages.

Turning to the issues raised in the cross-appeal, the Court of Special Appeals did not address the unlawful pattern and practice claim because it was not a final judgment from the circuit court. The Court also did not address the applicability of the general cap on noneconomic damages,

CJP § 11-108, because after applying the LGTCA damages cap, the award represented less than that amount allowable under the § 11-108 cap.

The Court of Special Appeals held that the circuit court did not err by excluding evidence regarding Espina's immigration status and pocket knife on the basis of relevance. The Court further held that the circuit court did not abuse its discretion by admitting evidence of Jackson's two previous, violent encounters with members of the public because the evidence was relevant to Jackson's motive and intent, as well as to rebut Jackson's testimony that, as a police officer, he followed the various levels of the continuum or force.

The Court of Special Appeals rejected Jackson and Prince George's County's assertion that the Espinas' excessive force claims were wrongly brought as Article 24 claims rather than as Article 26 claims, holding that an Article 24 claim is analyzed using the reasonableness standard set forth by the United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). The Court further held that there was sufficient evidence to support the jury's malice finding. The Court of Special Appeals held that the jury's verdict finding that Jackson did not assault or batter Manuel did not render inconsistent its verdict that Manuel's rights under Article 24 of the Maryland Declaration of Rights were violated. The Court of Special Appeals held that the verdict sheet used by the circuit court was legally correct and not confusing. Finally, the Court determined that appellee's contention regarding excessiveness of damages was moot in light of its conclusion that the LGTCA damages cap applied.

CCI Entertainment, LLC T/A Crooked I Sports Bar & Grill, et al. v. State of Maryland, et al., No. 766, September Term 2012, filed December 18, 2013. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2013/0766s12.pdf

UNCONSTITUTIONAL SPECIAL LAWS – ARTICLE III, § 33 OF THE MARYLAND CONSTITUTION – *CITIES SERVICE* FACTORS – PRESUMPTION OF VALIDITY – CHAPTER 603 OF THE ACTS OF 2012 – ELECTRONIC BINGO MACHINES

CHAPTER 603 OF THE ACTS OF 2012 – ELECTRONIC BINGO MACHINES – EQUAL PROTECTION

CHAPTER 603 OF THE ACTS OF 2012 – ELECTRONIC BINGO MACHINES – TAKING OF PROPERTY WITHOUT DUE PROCESS

Facts:

In May of 2009, CCI Entertainment began operating 105 "electronic bingo machines" at a sports bar located in Chesapeake Beach, Calvert County, Maryland. During the 2012 legislative session, the General Assembly passed chapter 603 of the Acts of 2012, which, among other things, amended the statutory definition of "slot machine" in ways that rendered unquestionably illegal CCI's gaming machines. In response, CCI filed suit challenging the constitutionality of chapter 603, contending that the law was a special law of the type prohibited by Article III, § 33 of the Maryland Constitution, that it violated CCI's right to equal protection of the law, and that it constituted an unconstitutional taking of property without due process. These claims were all premised on CCI's view that an uncodified section contained in chapter 603 was a "grandfather" provision that exempted a small number of existing entities—but not it—from the effect of the amendments. The circuit court denied CCI's claims, concluding that chapter 603 was not an unconstitutional special law, that it did not violate equal protection principles, and that it did not constitute a taking of property without due process.

Held: Affirmed.

In affirming the decision of the circuit court, the Court of Special Appeals first noted that, "A special law is one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class." *Cities Service v. Governor*, 290 Md. 553, 567 (1981). The appellate court then explained that, in determining whether a law is an unconstitutional special law, a court should consider the factors articulated in *Cities Service*, 290 Md. at 569-70, as well as a presumption that the legislative enactment in question is constitutional. *See, e.g., Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 46 (1933).

Applying the *Cities Service* factors to the facts before it, the appellate court concluded that chapter 603 of the Acts of 2012 did not violate Article III, § 33. Observing that the last *Cities Service* factor overlapped with an equal protection analysis in circumstances where, as at bar, the applicable equal protection test was one of rational basis, *see MDE v. Days Cove*, 200 Md. App. 256, 278 n. 13 (2011), the Court likewise concluded that chapter 603 did not violate equal protection principles. Lastly, the appellate court explained that in order to show that property has been improperly taken without due process, a party must first demonstrate that he or she had a protected property interest that was taken. *See Samuels v. Tschechtelin*, 135 Md. App. 483, 523 (2000). The Court concluded that CCI's operation of illegal electronic bingo machines did not constitute such a property interest.

In Re: Landon G., No. 2749, September Term 2009, filed October 30, 2013. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2013/2749s09.pdf

CRIMINAL LAW – THEFT – CRIMINAL POSSESSION OF STOLEN VEHICLE UNDER C.L. § 7-104(c) – SUFFICIENCY OF EVIDENCE WHERE DEFENDANT A MERE PASSENGER

CRIMINAL LAW – UNAUTHORIZED USE OF A MOTOR VEHICLE – VIOLATION OF C.L. §7-105

Facts:

Appellant, a juvenile, was a passenger in a late-model, stolen vehicle, which was driven by another juvenile named Patrick. Appellant knew Patrick, knew that he did not own a car, much less a late-model one, and was suspicious enough to ask Patrick whether the car had been stolen. Patrick denied that the car was stolen, and drove around with appellant for 45 minutes to an hour. During that time period, Patrick picked up three more individuals and stopped for a while at a friend's house. Eventually, Patrick noticed that he was being followed by a police car, and drove into a cul-de-sac. When the police car's emergency lights were activated, Patrick tried to evade the police by driving into the front yards of the houses on the cul-de-sac and then stopping the car. Patrick, appellant, and the three other passengers got out of the vehicle and fled on foot "through the yard, over the fence, into the next street." Within two to three minutes appellant was arrested. The juvenile court found appellant involved in, among other things, the crime of criminal possession of a stolen vehicle under Criminal Law ("C.L.") § 7-104(c).

The juvenile court also found appellant involved in the crimes of unauthorized use of a motor vehicle, in violation of C.L. §7-203, and "Motor vehicle theft," in violation of C.L. §7-105.

Held: Affirmed.

On appeal, appellant contended that there was insufficient evidence to find a violation of §7-104(c). The Court of Special Appeals disagreed. The Court recognized that under *In re Melvin M.*, 195 Md. App. 477 (2010), the mere presence in a stolen vehicle as a passenger, without "other incriminating evidence," was insufficient to constitute joint possession of the vehicle with the driver, as required by §7-104(c). The Court, however, held that there was such "other incriminating evidence" in the instant case, because (1) appellant, the driver, and three other passengers, all fled to avoid apprehension when the police stopped the stolen vehicle; (2) appellant and the driver used the stolen vehicle in the joint activity of driving to a friend's house, parking the car, going into the house, returning to the car after a short time, and driving off; and

(3) appellant knew the driver, because their respective families had been friends for "as long as we can remember."

In addition, although appellant did not admit that he knew that the vehicle was stolen, the Court determined that there was sufficient evidence of guilty knowledge on the part of appellant, because appellant knew Patrick, knew that Patrick did not own a car, was suspicious enough to ask Patrick whether the car was stolen, and fled with Patrick and the other occupants to avoid apprehension when they were confronted by a marked police car with the emergency lights on. Therefore, the Court held that there was sufficient evidence for the trial court to find that appellant was in criminal possession of a stolen vehicle, in violation of C.L. §7-104(c).

At oral argument before the Court of Special Appeals, both the State and appellant argued that, for there to be a violation of §7-105, there must be sufficient evidence that appellant participated in the original taking of the vehicle nine days before the vehicle was stopped by the police. The Court cited to the treatise, *Maryland's Consolidated Theft Law and Unauthorized Use*, authored by Judge Charles Moylan, Jr., in which the history, purpose, and scope of §7-105 was discussed in depth. Judge Moylan concluded that, despite its title and location in the statute, §7-105 simply proscribed the unauthorized use of a motor vehicle, and thus it was not necessary for the State to prove that a defendant participated in the original taking of the vehicle. The Court agreed with Judge Moylan's analysis and held that, because there was sufficient evidence to support appellant's violation of §7-203, the general unauthorized use statute, the same evidence would support the finding of a violation of §7-105.

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Matthew Derek Correll v. State of Maryland, No. 1358, September Term 2012, filed December 19, 2013. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2013/1358s12.pdf

EVIDENCE – RULE 5-609 – IMPEACHMENT WITH PRIOR CONVICTION

Facts:

The appellant was convicted of first-degree murder and other offenses in the shooting death of the victim in the course of an attempted robbery. At trial, two other men who were present when the shooting happened testified for the State. One of them, Shawn Myers, had been convicted of failure to register as a sex offender. On cross-examination, the defense attempted to impeach Myers with that conviction. The court ruled that the conviction was not an impeachable offense and, alternatively, that the defense had sufficient other evidence to impeach Myers.

Held: Affirmed.

A conviction for failure to register as a sex offender is not an impeachable offense under Rule 5-609. That rule allows a witness's credibility to be attacked with evidence that he or she has been convicted of a crime within the past 15 years if "the crime was an infamous crime or other crime relevant to the witness's credibility and . . . the court determines that the probative value of admitting the evidence outweighs the danger of unfair prejudice to the witness or the objecting party." A crime that bears on the witness's propensity to testify truthfully and shows that he or she is unworthy of belief is an impeachable offense.

In determining whether a particular crime is an impeachable offense, we look to its elements. As relevant to this case, section 11-721 of the Criminal Procedure Article makes it a crime for a person who is required to register as a sex offender to knowingly fail to do so. The elements of the crime of failing to register as a sex offender include knowledge, but do not include an intent to deceive. Thus, a person who is required to register as a sex offender can be convicted of the crime of failing to register even though his or her knowing failure to register was not done in order to deceive or to act in a manner inconsistent with truth telling. It is not sufficient that a person who is required to register as a sex offender could have failed to do so for a deceptive purpose; the elements of the crime do not require proof of any such purpose.

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Joseph A. Carlini v. State of Maryland, No. 1000, September Term 2012, filed December 18, 2013. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2013/1000s12.pdf

CRIMINAL PROCEDURE – MD RULE 4-345(a) – ILLEGAL SENTENCE – TERMS OF PROBATION – RESTITUTION

Facts:

In 2008, Carlini pled guilty to charges of a felony theft scheme, fraudulent practices in the sale of securities, and acting as a broker without being registered by the State. He was sentenced to ten years imprisonment, all but four years suspended, to be followed by five years of supervised probation. He also was ordered to pay restitution to 41 victims of his theft in amounts set forth in the State's "Memorandum Regarding Restitution." Carlini served the four years of un-suspended jail time and made some payments toward restitution. After being charged with violating his probation a second time, based on non-payment of restitution, the court ordered that he serve the remainder of his ten-year sentence.

In 2012, Carlini claimed for the first time that his sentence was illegal, because the order to pay restitution was in violation of his 2008 plea agreement. The court denied Carlini's motion to correct illegal sentence and Carlini appealed to the Court of Special Appeals.

Held: Denial of motion to correct illegal sentence affirmed.

Carlini's sentence is not illegal and, even if it were, it is not cognizable under Rule 4-345(a).

Rule 4-345(a) provides a narrow collateral exemption allowing a court to correct a sentence that is inherently illegal, "at any time." Rule 4-345(a) does not cover claims of trial court error in the sentencing procedure. A sentencing cap may be set either by the Legislature, in the form of a statutory maximum, or by the parties, in the form of a plea agreement by which the court has agreed to be bound.

In this case, restitution did not violate the sentencing cap imposed by Carlini's plea agreement. Carlini, his attorney, and the prosecutor had signed a thirteen-page written plea agreement, in which Carlini acknowledged that all victims of his theft were entitled to judgments of restitution. As Carlini, his attorney, and the prosecutor had all read and signed the written agreement, the sentencing judge had also read it, and it had been received in evidence, the judge did not require that the agreement be read aloud at the sentencing hearing. The judge's decision not to require that the agreement be read aloud is not error and, even if it were, it would not be cognizable under Rule 4-345(a).

In addition, during his allocution at the sentencing hearing, Carlini requested that the court not impose a jail sentence in order that he might earn money to pay restitution. The court also announced, on the record and in a written order that Carlini signed, that Carlini would be required to pay restitution in the amount of $2,000 per month for five years as a condition of probation.

In any event, restitution is a standard condition of probation that need not be expressly announced as part of a plea agreement. Restitution is also required as a matter of law for theft of property with a value of between $10,000 and $100,000. See Md. Code, § 7-104(g)(1)(ii) of the Criminal Law Article.

Gregory James Graves v. State of Maryland, No. 2832, September Term 2011, filed December 18, 2013. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2013/2832s11.pdf

WAIVER OF RIGHT TO SEEK CORAM NOBIS RELIEF – CP § 8-401 – VOLUNTARINESS OF GUILTY PLEA

Facts:

On March 10, 1998, Gregory Graves, appellant, pleaded guilty to, among other charges, the use of a handgun in the commission of a felony or crime of violence. At his plea hearing, there was no on the record discussion of the nature or elements of the crime, and appellant did not state that he understood the nature or elements of that crime. On October 26, 2011, appellant filed a Petition for Writ of Error Coram Nobis, alleging that the conviction subjected him to a potentially greater sentence in pending federal court charges. The circuit court denied the petition.

Held: Reversed.

The circuit court erred in finding that appellant waived his right to seek coram nobis relief. In *Holmes v. State*, 401 Md. 429, 445-46 (2007), the Court of Appeals held that a defendant waives his right to seek coram nobis relief by failing to challenge his guilty plea in an application for leave to appeal. In 2012, however, the General Assembly enacted § 8-401 of the Criminal Procedure Article, which provides that "[t]he failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis." Although the statute went into effect after the circuit court issued its decision in this case, the statute is both procedural and remedial in nature, and therefore, it operates retroactively and applies to appellant's case. Thus, appellant did not waive his right to seek coram nobis relief based on his failure to file an application for leave to appeal his guilty plea.

The circuit court also erred in determining that appellant's plea was entered voluntarily. At appellant's plea hearing, neither the court, the prosecutor, nor his attorney stated on the record the nature or elements of the crime. The only portion of the plea colloquy that related to whether the plea was knowing and voluntary was appellant's statement that he had "talked this matter over with [his] attorney." The record was not sufficient to support a finding that the plea was entered knowingly and voluntarily. Accordingly, the circuit court erred in denying appellant's petition for writ of error coram nobis, and his plea must be vacated.

Demetrius D. Lovelace v. State of Maryland, No. 2842, September Term 2009, filed October 30, 2013. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2013/2842s09.pdf

CRIMINAL LAW – MIRANDA RIGHTS – RIGHT TO REMAIN SILENT – WAIVER OF RIGHT WHEN SUSPECT REINITIATES COMMUNICATION WITH POLICE

Facts:

Appellant was arrested for felony murder and related charges. He was taken to the police barracks where he was interviewed by two detectives. After he was read his *Miranda* rights, appellant advised the detectives that he did not want to speak with them. When one detective started writing "Declined to be interviewed" on the *Miranda* form, appellant continued to talk. The detective advised appellant that they could not talk to him until he waived his *Miranda* rights. At that point, appellant indicated that he wanted to talk to the detectives. Appellant was again advised of his *Miranda* rights, but this time he waived them. The second advice of rights was given ten minutes after the first, and there was never a break in the communication between appellant and the detectives. Appellant eventually told the detectives that he and Damon Jackson planned to rob Alan Zurita. When the robbery went bad, Jackson shot and killed Zurita.

At the suppression hearing, appellant claimed that his Fifth Amendment right to remain silent had been violated, because a reasonable period of time had not elapsed between his invocation of his right to remain silent and the execution of a waiver of his *Miranda* rights. The trial court disagreed, finding that appellant had reinitiated or continued the discussion with the police after he had invoked his right to remain silent, and as a result, the police could question him without regard to the lapse of time between the election to remain silent and the reinitiated interrogation.

Held: Affirmed.

On appeal, appellant contended that his statements to the police should have been suppressed, because under *Michigan v. Mosley*, 423 U.S. 96 (1975), the police did not immediately cease the interrogation upon appellant's invocation of his right to remain silent, did not wait at least two hours before resuming the interrogation, and did not limit the renewed interrogation to another crime. The State responded that Mosley was inapplicable, because appellant reinitiated contact with the police and thus waived his previously invoked right to silence.

The Court of Special Appeals agreed with the State that *Mosley* did not apply, because "it was appellant, not the police, who resumed the conversation following appellant's invocation of his right to remain silent." The Court went on to hold that "the police may question a suspect who reinitiates communication, exchanges, or conversation with the police following the invocation

of his or her right to remain silent." The Court reasoned that (1) a similar principle applied to the right to counsel under *Davis v. United States*, 512 U.S. 452 (1994), and its progeny; (2) there was no reason to distinguish between the right to counsel and the right to remain silent on this issue; and (3) courts in other jurisdictions had reached the same conclusion.

Melissa Coley v. State of Maryland, No. 2675, September Term 2012, filed December 20, 2013. Opinion by Rodowsky, J.

http://www.mdcourts.gov/opinions/cosa/2013/2675s12.pdf

CRIMINAL PROCEDURE – FOURTH AMENDMENT – SEARCH AND SEIZURE – WARRANTLESS SEARCH – CARROLL DOCTRINE – PROBABLE CAUSE

Facts:

A sheriff's deputy was investigating a female subject, Coley, on a business's complaint that she was engaging in prostitution. He came upon Coley in a nearby trailer park, sitting in the driver's seat of her car with the driver's side door open and her feet on the ground. The deputy observed, lying in plain view on the center console of the vehicle, one-inch Ziploc plastic baggies that had been torn open and any contents removed. Based on his training, knowledge and experience, the deputy knew that such one-inch plastic baggies are commonly used to package heroin. Several days before observing the suspected paraphernalia, the deputy had spoken with Coley while investigating an earlier complaint of prostitution. During that earlier conversation, Coley admitted to him that she was a prior heroin user, but claimed that she had been clean for approximately one year. The deputy placed Coley in handcuffs and searched the interior of the vehicle. He found syringes and suspected heroin in a hidden compartment.

Coley moved pretrial to suppress the syringes and suspected heroin as the fruits of an unconstitutional search. The Circuit Court for Caroline County denied the motion. Coley pled guilty on an agreed statement of facts to possession of a controlled dangerous substance and possession of drug paraphernalia.

Coley appealed the suppression decision to the Court of Special Appeals. On appeal, the State conceded error.

Held: Affirmed.

The Court of Special Appeals rejected the State's concession of error.

The deputy's observation of likely heroin paraphernalia in plain view in Coley's vehicle, coupled with Coley's prior admission to him that she had been a heroin user, constituted probable cause to search the interior of the vehicle pursuant to *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925). The search was reasonable under the Fourth Amendment and the circuit court correctly denied Coley's motion to suppress.

Irving Groat v. Kristin E. Sundberg, et al., No. 1907, September Term 2010, filed August 29, 2013. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2013/1907s10.pdf

ESTATES AND TRUSTS – TESTAMENTARY DOCUMENTS – DUE EXECUTION OF CODICIL

Facts:

Frank Halgas ("Mr. Halgas"), testator, executed a Last Will and Testament ("the Will") in 2006, appointing Melissa Halgas ("Ms. Halgas"), as executrix. Among other things, the Will provided that $500,000 in life insurance benefits be distributed to Mr. Halgas's estate—with the proceeds then being divided evenly between Kristin E. Sundberg and Michael Prendergast—in exchange for Mr. Halgas's interest in his former company.

Approximately three months after Mr. Halgas died on March 21, 2010, Irv Groat filed a one-page document ("the Document") with the Register of Wills for Anne Arundel County and requested that the Document be admitted to probate as a codicil to Mr. Halgas's will. The Document purported to transfer all of Mr. Halgas's stock to Groat in exchange for $10,000. The bottom of the Document contained signature lines for "Frank Halgas" and "Irv Groat," and both Mr. Halgas and Groat signed the Document. Ms. Halgas also signed the Document in the space below Groat's signature line, although there was no signature line accompanying her signature. The Document did not contain an attestation clause, nor did the words "Witness" or "Witnessed By" appear anywhere on the Document.

Sundberg and Prendergast challenged the admission of the Document to probate, and a hearing was held before the Orphans' Court for Anne Arundel County to determine the Document's validity. At the hearing, Groat testified that Mr. Halgas told him that the Document was a codicil and asked him to sign three copies of it, and that both Groat and Mr. Halgas each signed three copies of the Document in one another's presence. Ms. Halgas testified that Mr. Halgas told her one day during a conversation that she would need to come by his house to sign a document changing part of the Will. Ms. Halgas further testified that, by the time she signed the Document, she saw that Mr. Halgas and Groat had already both signed it. Ms. Halgas was unable to recall whether she signed the Document in Mr. Halgas's presence. Ms. Halgas noted that she either signed in the kitchen (in which case she did not sign in Mr. Halgas's presence) or in the den (in which case she did). At the conclusion of the hearing, the orphans' court determined that the Document was invalid as a codicil to Mr. Halgas's will, because it failed to satisfy the statutory requirements for the due execution of a testamentary document. Groat appealed.

Held: Affirmed.

Pursuant to Maryland Code (1974, 2011 Repl. Vol.), § 4-102 of the Estates and Trusts Article ("E.T."), a testamentary document is duly executed only where it is "(1) in writing, (2) signed by the testator, or by some other person for him, in his presence and by his express direction, and (3) *attested and signed* by two or more credible witnesses *in the presence of the testator*." (Emphasis added). The party seeking to introduce the document must prove all three elements by a preponderance of the evidence. If that party makes a prima facie case of due execution, the burden of proof shifts to the opposing party to demonstrate by clear and convincing evidence that the document is invalid.

Relying on *Slack v. Truitt*, 368 Md. 2 (2002), the Court of Special Appeals stated that, "in the absence of an attestation clause, if a proponent of a testamentary document can adduce sufficient evidence from the document and/or surrounding circumstances to make a *prima facie* case for the satisfaction of the statutory requirements for execution of a will, the presumption of due execution attaches." After examining the Document and the circumstances surrounding its signing, the Court concluded that Groat failed to make a *prima facie* case of due execution, for two reasons. First, there was no language in the Document (such as "witness," "witnessed by," or a variation of the same) to indicate that Groat and Ms. Halgas were attesting to the Document when they signed it, as required by E.T. § 4-102. Second, Ms. Halgas could not testify that the statutory requirement of her signing as a witness in the presence of Mr. Halgas had been done, and thus she could not attest to the due execution of the Document. Therefore, the presumption of due execution did not attach.

Without the presumption of due execution, the burden of proving the due execution of the Document remained on Groat. Because Ms. Halgas did not recall whether she signed the Document in the kitchen (outside of the testator's presence) or in the den (in the testator's presence) and did not place any greater likelihood on one location over the other, the Court concluded that the orphans' court did not err by relying on Ms. Halgas's testimony to hold that the testamentary requirements of E.T. § 4-102 had not been satisfied.

Finally, although Ms. Halgas's testimony proved that she signed the Document in the same house as the testator, the Court rejected Groat's argument that signing in the same house satisfies the "in the presence of the testator" requirement of E.T. § 4-102.

Gary Heit v. Kathryn Stansbury, No. 2494, September Term 2012, filed December 20, 2013. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2013/2494s12.pdf

RESTITUTION – *RES JUDICATA* – SPECIAL ASSIGNMENT

Facts:

Gary Heit, appellant, and Kathryn Stansbury, appellee, were divorced in the Circuit Court for Montgomery County. In the Judgment of Absolute Divorce, the court awarded a monetary award to Ms. Stansbury in the amount of $173,911.53, which included a transfer of 50% of the total value of Mr. Heit's Oracle 401(k) plan as of the date of divorce. The court found that the total value of the 401(k) was $132,741; thus, Ms. Stansbury was entitled to $66,370.50.

Mr. Heit did not file a supersedeas bond, and subsequently, Ms. Stansbury sought a writ of wage garnishment against Oracle, Mr. Heit's employer, and she moved for entry of the QDRO to obtain her 50% interest in Mr. Heit's 401(k). Mr. Heit opposed Ms. Stansbury's motion for entry of a QDRO, arguing that the court had erred in classifying the entire value of the Oracle 401(k) plan as marital property. The court denied the motion, and after further proceedings, we reversed the monetary award.

On remand, counsel for Mr. Heit informed the court that the 401(k) had been depleted and no longer existed. He advised that the parties had reached a stipulation, for purposes of recalculation of a monetary award, that the marital portion of the 401(k) was $58,382.34, and the non-marital portion was $93,297.06. He argued, however, that no monetary award should be granted because Ms. Stansbury had already received $88,217.32 as a result of the "erroneous QDRO," and she "succeeded in garnishing approximately $24,000" from his wages prior to the reversal of the money judgments.

Based on the parties' stipulation, the court found "that the marital portion of the plaintiff's Oracle 401(k) plan as of December 2008 [was] $58,382.34. It then turned to "the real issue . . . what's an equitable thing to do." The court stated that it had "to look to what's happened over the course of the whole proceedings," noting that "there was a QDRO that was executed" and a "garnishment that happened during the course of time between December 24th, 2008, and today." The court reiterated that Ms. Stansbury had received a total of $88,217.32 that represented her half of the Oracle plan valued on December 24th, 2008. Thus, the court declined to make a monetary award.

Mr. Heit filed a Post-Judgment Motion for Order of Restitution and Other Relief. He argued that, what he "lost under the compulsion of judgments . . . should be restored to him by Ms. Stansbury . . . given that the judgments were reversed or vacated on appeal, and the [c]ourt on second remand adjudged that Ms. Stansbury was entitled to nothing."

Ms. Stansbury filed a motion to dismiss Mr. Heit's post-judgment motion. She argued that the circuit court had already considered the transfers to Ms. Stansbury in determining not to grant her a monetary award and in denying all other requests for relief. She asserted that Mr. Heit "cannot have it both ways," i.e., arguing at the remand hearing that Ms. Stansbury had already received a $112,000 "windfall," and therefore, the monetary and attorneys' fees award should be zero, and then after the remand order was entered, request that the $112,000 "windfall" be refunded as restitution. She asserted that the court's ruling on remand resolved all issues related to the parties' outstanding claims, including the monetary award, attorneys' fees award, and the prior QDRO and money transfers to Ms. Stansbury, and therefore, *res judicata* applied.

In addition to opposing the motion, Mr. Heit also filed a motion to specially assign the judge who heard the remand proceedings to the restitution case. In support, he cited that judge's knowledge of the "five-and [a] half year old case," and his knowledge of his own decision on remand. The Administrative Judge denied the motion for special assignment.

After a hearing, the court granted Ms. Stansbury's motion. The court concluded that the issue Mr. Heit sought to raise, specifically the money awarded to the Ms. Stansbury, was considered and adjudicated at the remand hearing; thus, *res judicata* barred relitigation of the same claim or any other claim arising from the same transaction.

Held: Affirmed.

When a party has paid monies to another person pursuant to a judgment that is later reversed and remanded for further proceedings, any request to recoup the money already paid must be made at the remand proceeding. If the party does not do so, a subsequent claim for restitution is barred by principles of *res judicata*.

A court has inherent authority to control its docket. Pursuant to Maryland Rules 16-101(d)(2) and 16-103, a County Administrative Judge is responsible for the administration of justice and for the administration of the court for that county, including the assignment of judges, the control of the trial calendar, and the supervision and disposition of cases. There was no abuse of discretion by the Administrative Judge in declining to specially assign a judge to hear a claim of restitution.

PNC Bank, National Association, et al. v. Braddock Properties, No. 2025, September Term 2011, filed December 19, 2013. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2013/2025s11.pdf

ACTIONS TO FORECLOSE THE EQUITY OF REDEMPTION AFTER TAX SALES – MORTGAGEES AND PARTIES SECURED BY DEEDS OF TRUST ARE TREATED DIFFERENTLY

Facts:

Braddock Properties filed an action to foreclose the equity of redemption on property it purchased at a tax sale. The circuit court initially granted the motion to foreclose the equity of redemption. PNC Bank ("PNC")—the beneficiary of a deed of trust encumbering the property—and the Substitute Trustees, who had been appointed to initiate foreclosure proceedings against the property on behalf of PNC, filed a motion to alter or amend, arguing that, under the tax sale statute, they should have been named as defendants in the action to foreclose the equity of redemption and that they were not so named. Upon further review, the circuit court vacated its prior judgment with respect to the Substitute Trustees but not PNC.

On appeal, PNC asserted that it was a mortgagee under the tax sale statute, and that, as such, it was entitled to be named as a defendant in the action to foreclose equity of redemption and to be served with a copy of the complaint and a summons.

Held: Affirmed.

The Court of Special Appeals held that a holder of a deed of trust note is not a mortgagee under the tax sale statute and is not solely in that capacity entitled to be named as a defendant and served with a copy of the complaint and a summons. The Court explained that, in the tax sale context, there remains at least one important distinction between mortgages and deeds of trust. A mortgagee is a required to be named as a defendant in the action and served accordingly because the identity of the mortgagee be ascertained by a title examination of the property in question. However, a holder of a deed of trust is not required to be named as a defendant because land records typically do not disclose whether a deed of trust note has been transferred and, if so, to whom.

Evergreen Associates, LLC v. Joseph Crawford, No. 1119, September Term 2012, filed September 10, 2013. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2013/1119s12.pdf

NEGLIGENCE – DUTY – LANDLORD AND TENANT – TENANT OWES NO DUTY TO LANDLORD TO PROTECT LEASED PREMISES AGAINST UNFORESEEABLE CRIMINAL ACTS OF THIRD PARTY

REAL PROPERTY ARTICLE – § 8-113 – "NEGLIGENCE OR FAULT" WITHIN § 8-113 IS NO BROADER THAN COMMON LAW NEGLIGENCE

Facts:

On May 26, 2009, a fire originated in the basement of a building located at 1 West Main Street, Frostburg, Maryland, resulting in substantial damage to the entire building. At the time of the fire, appellant, Evergreen Associates, LLC ("Evergreen"), was the owner and commercial landlord of the building, having leased the first floor and part of the basement of the building to appellee, Joseph Crawford, in connection with his operation of a pizza restaurant.

Evergreen filed suit against appellee in the Circuit Court for Allegany County, claiming, *inter alia*, negligence and breach of contract. In its complaint, Evergreen asserted that appellee was negligent by not securing the building, which allowed a third party to access the basement of the building through an unlocked door. As to the breach of contract count, Evergreen argued that appellee breached a provision of the lease by "failing to deliver the [b]uilding in the same good order and condition as it was at the beginning of the tenancy." In response, appellee filed a motion for summary judgment, and the circuit court granted appellee's motion on the ground that appellee owed no duty to Evergreen to secure the leased premises against unforeseeable criminal acts of a third party.

Held: Affirmed.

The first issue addressed by the Court of Special Appeals was whether appellee owed a duty to Evergreen to safeguard the leased premises against a criminal act by a third party. The Court noted that Maryland common law does not recognize a duty of a tenant to a landlord to protect leased property from criminal acts of third parties. The Court then declined to recognize a commensurate duty on behalf of a tenant for three reasons. First, as a general matter, the recognition of a common law tort duty is the province of the Court of Appeals. Second, Evergreen failed to articulate, with specificity, the circumstances of the instant case that would create a duty from appellee to Evergreen. Third, the facts of the instant case did not warrant the imposition of a duty on appellee, because there was a lack of criminal activity on the leased

premises and in the immediate neighborhood. Appellee had no knowledge of criminal activity, and therefore could not reasonably foresee potential harm to the leased building.

The second issue addressed by the Court of Special Appeals was whether appellee was in breach of contract due to an obligation to return the premises to Evergreen in the same condition as it was at the beginning of the tenancy. The Court construed "negligence or fault" within Md. Code (1974, 2010 Repl. Vol.), § 8-113 of the Real Property Article ("R.P.") to be no broader than common law negligence. Accordingly, because the Court previously decided that there was no duty owed by appellee to Evergreen under general principles of negligence, there could be no "negligence or fault" pursuant to R.P. § 8-113. Thus, the Court of Special Appeals held that Evergreen was precluded from recovering for the destruction of the building under breach of contract.

Colvin I. Bert v. Comptroller of the Treasury, No. 2560, September Term 2009, filed December 17, 2013. Opinion by Davis, J.

http://www.mdcourts.gov/opinions/cosa/2013/2560s09.pdf

MARYLAND TAX ASSESSMENTS – MD. CODE ANN., TAX-GEN. § 13-705.

Section 13-705, Frivolous Income Tax Return, provides:

> (a) Penalty. – The Comptroller shall assess a penalty not exceeding $500 if:
>
> (1) an individual, as defined under § 10-101 of this article, files what purports to be an income tax return, but which:
>
> (i) does not contain information on which the substantial correctness of the tax may be determined; or
>
> (ii) contains information that, on its face, indicates the tax reported on the return is substantially incorrect; and
>
> (2) the conduct of the individual is due to:
>
> (i) a desire, apparent on the face of the return, to delay or impede the administration of the provisions of Title 10 of this article; or
>
> (ii) a position that is frivolous because the position:
>
> 1. has no basis in law or fact;
>
> 2. is patently unlawful; and
>
> 3. does not involve a legitimate dispute or reflect an inadvertent mathematical or clerical error.
>
> (b) Additional to other penalty. – The penalty under subsection (a) of this section is in addition to any penalty assessed under § 13-701 of this subtitle.

Facts:

Appellant asserts, in this appeal, that the federal adjusted gross income is conclusive and binds the Comptroller and that the Comptroller employee who made the adjustment and issued the assessment acted beyond her authority. Appellant contends that he was forced to testify against his will in violation of his Fifth Amendment right to be free from self-incrimination. Appellant filed Maryland Tax Form 503 for the calendar years 1999, 2000, 2001, 2002 and 2004 in which he represented on Form 502X that the adjusted gross income from the federal tax return was "$0.00."

In 2006, the Comptroller acted on appellant's tax filings. On March 27, 2006, the Comptroller sent appellant a notice of income tax assessment with respect to the 2004 tax year, followed on March 31 by a similar assessment notice that addressed the tax years of 1999, 2000, 2001 and 2004. In these assessments, the Comptroller advised appellant that the tax returns in question were each incorrect and assessed a $500 frivolous return penalty for each tax year in question. The Comptroller also recomputed appellant's 2004 income.

Appellant objected to these assessments and the Comptroller convened an informal hearing on July 10, 2006. On July 23, 2007, the Comptroller issued a "Notice of Final Determination" with respect to the tax assessments for Tax Years 1999 through 2002. In this Notice, the Comptroller also upheld the adjustments to appellant's 2004 filing. The Notice of Final Determination relevantly provided:

> This is the Comptroller's final determination, on your request for revision of the income tax assessments, issued on March 31, 2006 for tax years 1999, 2000, 2001, and 2002, and on March 27, 2006 for tax year 2004, pursuant to Tax General Article, Section 13-508(c) of the Annotated Code of Maryland.

On April 25, 2008, the Tax Court issued an Order affirming the Comptroller's decision. The Order incorporated the reasons set forth by the opinion the Tax Court rendered from the bench at the conclusion of the hearing.

Held:

Citing *Winters v. State*, 301 Md. 214, 236 (1984),the Court held that the Comptroller is not required to accept the federal taxable income figure provided on a taxpayer's federal tax return merely because that figure was accepted by the IRS. The tax court neither erred nor abridged appellant's due process rights by conducting a *de novo* hearing and affirming the actions of the Comptroller with respect to the tax years at issue, neither did the tax court abridge appellant's Fifth Amendment rights. The Court also rejected various tax avoidance arguments that have been unsuccessfully advanced before federal courts and the Internal Revenue Service.

Mark T. Mixter v. James Farmer, et al., No. 1804, September Term 2012, filed December 19, 2013. Opinion by Matricciani, J.

http://www.mdcourts.gov/opinions/cosa/2013/1840s12.pdf

ABSOLUTE JUDICIAL PRIVILEGE – DEFAMATION – LIBEL – SLANDER – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS – TORTIOUS INTERFERENCE WITH EXISTING CONTRACTS – TORTIOUS INTERFERENCE WITH PROSPECTIVE ADVANTAGE

Facts:

Appellant, Mark T. Mixter, and appellee, James Farmer, represented opposite sides of a dispute in a tractor-trailer accident case. While the case ultimately settled for a small amount of money, Farmer was so infuriated by Mixter's behavior that he sought sanctions against him. The trial court initially denied the motion for sanctions, but later granted it, only to be reversed by this court. Thereafter, Farmer sent twenty letters to various Maryland attorneys discussing Mixter's "unprofessional behavior" in the case, and seeking information about other lawyers' negative experiences with Mixter for a potential complaint with the Attorney Grievance Commission of Maryland (AGC). Mixter retaliated by filing a defamation suit against Farmer.

Farmer then sent additional letters to other local attorneys and individuals, including to one of Mixter's clients, seeking more information for his complaint. Farmer filed a grievance against Mixter with the AGC. Mixter amended his complaint several times to add libel, slander, intentional infliction of emotional distress, tortious interference with existing contracts and tortious interference with prospective advantage. Mixter also added Charles Bowie to the complaint. Both Farmer and Bowie moved for summary judgment on the grounds that all claims were either protected by the absolute judicial privilege, or had no merit. After hearing arguments on the matter, the trial court granted summary judgment in favor of Farmer and Bowie on all claims, and appellant timely appealed.

Held: Affirmed.

First, letters complaining about an attorney's conduct sent to other attorneys and a client of the attorney in question, for the purpose of gathering information for filing an Attorney Grievance Commission (AGC) complaint were absolutely privileged. The letters were protected even though 16 months passed between the letters being sent out and the filing of the complaint.

Second, absolute privilege likely applies to other torts beyond defamation, including intentional infliction of emotional distress, tortious interference with existing contracts, and tortious interference with prospective advantage. Support for this broad application of the privilege can

be found in prior Maryland cases, courts from other states, and sound public policy. The purpose of the absolute privilege would be undercut if it did not apply to all torts arising out of the same act.

Third, even if absolute privilege did not apply to torts beyond defamation, making a complaint to the AGC does not give rise to intentional infliction of emotional distress.

Finally, claims for tortious interference with existing contracts and tortious interference with prospective advantage must be based on something more than mere speculation.

Celeste A. Puppolo, Personal Representative of the Estate of Nancy Puppolo v. Adventist Healthcare, Inc. et al., No. 1463, September Term 2012, filed December 19, 2013. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2013/1463s12.pdf

HEALTH CARE MALPRACTICE CLAIMS ACT – CERTIFICATE OF QUALIFIED EXPERT – DEFINCIENCY IN CERTIFICATE OR ATTACHED REPORT

HEALTH CARE MALPRACTICE CLAIMS ACT – LIMITATIONS

Facts:

In August 2006, Nancy Puppolo ("Mrs. Puppolo") came to Washington Adventist Hospital ("WAH") after having a stroke, where she was admitted by a hospitalist, Dr. Sabyasachi Kar. While hospitalized, Mrs. Puppolo suffered an intracranial hemorrhage and lapsed into a coma for six weeks. Over the next year, Mrs. Puppolo suffered from complications relating to her hemorrhage, coma, and extended hospitalization. She ultimately passed away in December 2008. Mrs. Puppolo's daughter and personal representative, Celeste Puppolo ("Puppolo") filed a claim in the Maryland Health Care Alternative Dispute Resolution Office ("HCADRO") against Adventist and Dr. Kar. Puppolo filed a certificate and report prepared by her expert witness, a neurologist. The parties waived arbitration and Puppolo filed a complaint in the Circuit Court for Montgomery County in May 2010. The court dismissed the complaint against Adventist without prejudice because Puppolo's certificate did not name the professionals at WAH whom she alleged breached the standard of care. In March 2011, Puppolo filed a second complaint against Adventist in circuit court. The court consolidated this new complaint against Adventist with the previous complaint against Dr. Kar. In August 2011, Adventist filed a motion to dismiss, arguing that the statute of limitations had run, and that Puppolo did not comply with the Maryland Health Care Malpractice Claims Act ("HCMCA") when she filed the second complaint in circuit court, instead of beginning again before the HCADRO. Adventist also filed a motion for summary judgment, arguing that Puppolo did not identify any expert witnesses to testify against Adventist. The court granted both of Adventist's motions. In March 2012, Dr. Kar filed a motion to dismiss and a motion for summary judgment, which the court granted because Puppolo conceded that her neurologist expert could not opine on the standard of care for a hospitalist. Puppolo filed a motion to alter or amend the court's judgment, which the court denied.

On appeal from the circuit court's decision, Puppolo argued that the court erred in granting Adventist's and Dr. Kar's motion to dismiss and motion for summary judgment. Puppolo asserted that Md. Code (2006, 2013 Repl. Vol), Courts & Judicial Proceedings Article ("CJP"), § 5-119 allowed her to re-file her claim in the circuit court without beginning again before the HCADRO. She also argued that the statute of limitations should be tolled.

Held: Affirmed.

The Court of Special Appeals held that though CJP § 5-119 does not specify where a "cured" civil action/claim is to be filed, under the HCMCA, CJP § 3-2A-04(b)(1), a plaintiff whose certificate or report is found deficient by a court must return to the HCADRO to file anew.

The Court of Special Appeals held that neither CJP § 5-119 or any other provision of law permits a plaintiff to re-file her claim in the circuit court without "in the first place" filing a proper certificate in the proceeding before the HCADRO.

The Court of Special Appeals held that HCADRO is the proper forum to determine whether limitations has expired, whether limitations has been tolled, or whether the failure to file a proper certificate is neither willful nor the result of gross negligence.

Finally, the Court of Special Appeals held that the court did not abuse its discretion in granting Dr. Kar's motion. Puppolo conceded that her expert was not qualified to establish the standard of care for Dr. Kar, and therefore she could not prove malpractice.

Rigoberto E. Domingos Ayala, et al. v. Robert Frederick Lee, et al., No. 1288, September Term 2012, filed December 18, 2013. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2013/1288s12.pdf

MOTOR VEHICLES – LANE CHANGES

MOTOR VEHICLES – DUTY TO KEEP A LOOKOUT

IMMIGRATION – EVIDENCE – RELEVANCE

IMMIGRATION – EVIDENCE – PREJUDICE

Facts:

Appellants Rigoberto E. Domingos Ayala and Jose R. Rodas Santacruz were working for Ebb Tide Tents and Party Rentals ("Ebb Tide") when they were involved in a motor vehicle accident. They were fixing the windshield wipers of an Ebb Tide truck while it was parked on the right hand shoulder of westbound Route 50. A truck driven by appellee Robert F. Lee, on behalf of his employer Bay State Pool Supplies of Baltimore, Inc. ("Bay State"), collided with the parked Ebb Tide truck, resulting in severe injuries to Ayala and Santacruz. Lee could explain neither the accident nor how he moved his truck from a travel lane to the shoulder, as he did not remember seeing the Ebb Tide truck or turning the steering wheel.

Ayala, Santacruz, and Ayala's wife sued Lee and Bay State for negligence and sought lost wages, medical expenses, and other damages. Appellees argued that Ayala and Santacruz could not seek lost wages because they are undocumented immigrants and introduced, over objection, extensive evidence of their immigration status at trial. The six-day jury trial resulted in a jury verdict for Lee and Bay State.

Held: Reversed and remanded.

The Court of Special Appeals reversed the judgment, finding that the Circuit Court for Anne Arundel County erred when it denied appellants' motion for judgment on the issue of liability. Lee's testimony showed that he violated Md. Code (1977, 2012 Repl. Vol.), Transportation Article, § 21-309(b), which prohibits a driver from moving a vehicle from a travel lane to the shoulder until it is safe to do so. He also violated his duty to keep a lookout by failing to see the Ebb Tide truck when it was plainly visible. The evidence thus showed that Lee was negligent as a matter of law and that his negligence was the cause of appellants' injuries.

The Court also addressed the propriety of evidence of appellants' immigration status, for the benefit of a future jury trial on damages. It first determined that federal law does not curtail

awards of lost wages or medical expenses to undocumented immigrant employees solely because of their immigration status. The Court then concluded that immigration status is relevant to a claim for lost wages because the legal ability to work affects the likelihood of future earnings in the United States. It recognized that such evidence is likely to be prejudicial, however, and may be excluded under Maryland Rule 5-403 if its probative value is substantially outweighed by the danger of unfair prejudice. Although other courts have typically excluded evidence of immigration status because of its low probative value and high risk of prejudice, the Court found that in this case appellants opened the door to questions about their status because their answers to interrogatories differed substantively from documents they later submitted as evidence. Given that the risk of prejudice remained high, the Court summarized the limitations of future inquiries into immigration status, as seen in other states' case law. The Court remanded the case for further proceedings on the damages to which appellants are entitled.

Steve Bell, et al. v. Anne Arundel County, Maryland, et al., No. 273, September Term 2012, filed November 20, 2013. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2013/0273s12.pdf

CHALLENGING THE LEGALITY OF COMPREHENSIVE REZONING LEGISLATION – *PRIMA FACIE* AGGRIEVEMENT

CHALLENGING THE LEGALITY OF COMPREHENSIVE REZONING LEGISLATION – ALMOST *PRIMA FACIE* AGGRIEVEMENT:

Facts:

As a charter county, Anne Arundel County is required to review and revise its comprehensive plan and its zoning ordinance on a periodic basis. In accordance with this requirement, the Anne Arundel County Council passed Bill No. 12-11, which repealed and reenacted the zoning classifications for 59,045 individual parcels of land and changed the zoning classifications of 264 of those parcels. Appellants, some of whom owned property near four of the parcels that were rezoned by the bill, filed suit challenging the legality of the bill's enactment. The circuit court dismissed the action on the grounds that appellants lacked standing to bring the suit, or, alternatively, because they had failed to join all necessary parties.

Held: Vacated and Remanded.

The Court of Special Appeals first determined that the standing principles articulated in *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137 (1967)—that a party is *prima facie* aggrieved if the party is an adjoining, confronting or nearby property owner—apply to a declaratory judgment action seeking to invalidate comprehensive rezoning legislation. Applying this rule, the court concluded that the appellants were *prima facie* aggrieved by the bill's rezoning of three of the four parcels at issue, and, therefore, had standing to challenge the enactment as it related to those parcels.

Turning to the remaining parcel, the Court determined that, in addition to *prima facie* aggrievement principles, a party has standing to challenge comprehensive rezoning legislation when that party has been almost *prima facie* aggrieved—i.e., when that party: 1) owns property located farther away than an adjoining, confronting, or nearby property owner, but still close enough to the site of the rezoning action to be have suffered sufficient injury, and 2) offers "plus factors" supporting injury. *See Ray v. Mayor and City Council of Baltimore*, 430 Md. 74, 85 (2013). The Court concluded that appellants owned land sufficiently close to the rezoning action and had alleged sufficient plus factors to be deemed almost *prima facie* aggrieved by the bill's rezoning of the parcel.

With respect to the joinder of necessary parties, the Court of Special Appeals determined that appellants had, indeed, failed to join all the parties required. The Court concluded, however, that the appropriate remedy was to permit an amendment joining the necessary parties.

Albert Arking, et al. v. Montgomery County Planning Board, et al., No. 2346, September Term 2011, filed November 20, 2013. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2013/2346s11.pdf

ZONING AND PLANNING – MONTGOMERY COUNTY CODE – PLANNING BOARD'S INTERPRETATION AND APPLICATION OF TERMS "EXISTING NEIGHBORHOOD" AND "SAME CHARACTER" UPHELD

Facts:

In 2011 a plan of resubdivision was submitted to appellee, Montgomery County Planning Board (the "Board"). The plan proposed a resubdivision of an undeveloped lot into two lots of roughly equal size in the Willerburn Acres Subdivision. Appellants, some of the homeowners in Willerburn Acres, objected. After a public hearing, the Board unanimously approved the plan. Upon judicial review, the Circuit Court for Montgomery County affirmed the Board's decision.

Held: Affirmed.

Section 50-29(b)(2) of the Montgomery County Code requires that a plan of resubdivision "shall be of the same character as to street frontage, alignment, size, shape, width, area and suitability for residential use as other lots within the existing block, neighborhood or subdivision." Appellants claimed that the Board's decision was erroneous for two reasons: (1) the Board did not appropriately select the "existing neighborhood," and (2) the Board improperly found that the proposed lots would be of the "same character" as the lots in the existing neighborhood. The Court of Special Appeals rejected both contentions.

The Court noted that there is no definition of "existing neighborhood" in the Montgomery County Code. The Court stated that the Board's interpretation of "existing neighborhood" must be reasonable, giving special weight to the Board's expertise. Because the Board determined the "existing neighborhood" by considering the abutting properties, the access points to and from the proposed lots, and the consistency of the zoning within the defined boundary, the Court concluded that the Board's standard was reasonable. The Court then held that there was substantial evidence to support the Board's delineation of the "existing neighborhood" under that standard in the instant case.

On the issue of "same character," the Court observed that under *Lee v. Maryland Nat'l Capital Park and Planning Comm'n*, 107 Md. App. 486 (1995), cert. denied, 343 Md. 333 (1996), there must be a "high correlation" between the proposed resubdivided lots and the existing lots in the neighborhood on the seven criteria set forth in Section 50-29(b)(2). Lee, however, did not further define "high correlation." Because appellants conceded such correlation for the

alignment, shape, and suitability for residential use, the Court focused on the four quantitative criteria – size, width, street frontage, and area. The Court agreed with the Board and held that "high correlation" exists when all four quantitative criteria of the lots in a proposed resubdivision plan fall *within the range established* by the respective quantitative criteria possessed by the lots within the existing neighborhood. The Court rejected appellants' contention that "high correlation" should be defined to mean "somewhere around the median, not near either end of the range." Finally, the Court held that there was substantial evidence to support the Board's findings that the proposed lots fit within the range of the size, width, street frontage, and area of all the lots in the existing neighborhood.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated December 4, 2013, the following attorney has been indefinitely suspended by consent:

MATTHEW EVAN FOX

*

This is to certify that

DANIEL QUINN MAHONE

has been replaced upon the register of attorneys in this state as of December 4, 2013.

*

By an Order of the Court of Appeals dated December 16, 2013, the following attorney has been disbarred by consent:

LATOSHA J. COOPER

*

By an Order of the Court of Appeals dated December 18, 2013, the following attorney has been placed on inactive status by consent:

ALISON VELEZ LANE

*

By an Order of the Court of Appeals dated December 19, 2013, the following attorney has been indefinitely suspended:

STEPHANIE YVONNE BRADLEY AKA STEPHANIE Y. BRADLEY

*

Return to ToC

This is to certify that

HAROLD LOCKWOOD BOYD, III

has been replaced upon the register of attorneys in this state as of December 19, 2013.

*

This is to certify that

THOMAS PATRICK DORE

has been replaced upon the register of attorneys in this state as of December 20, 2013.

*