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http://www.mdcourts.gov/opinions/coa/2014/80a12ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Petitioner, Attorney Grievance Commission of Maryland ("AGC"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("Petition") against Respondent, Glenn Charles Lewis. Bar Counsel alleged that Lewis, in connection with his representation of Lee-Ann Slosser, engaged in professional misconduct as defined by Maryland Rule 16-701(I) and violated the following Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), as adopted by Maryland Rule 16-812: (1) Rule 1.1 (Competence); (2) Rule 1.3 (Diligence); (3) Rule 1.4 (Communication); (4) Rule 1.5 (Fees); (5) Rule 1.15 (Safekeeping Property); (6) Rule 1.16 (Declining or Terminating Representation); (7) Rule 8.1 (Bar Admission and Disciplinary Matters); (8) Rule 8.4(a), (b), (c), and (d) (Misconduct); and (9) Maryland Rule 16-606.1 (Attorney trust account record-keeping).

The Court of Appeals referred the matter to the Circuit Court for Montgomery County for a hearing, after which the hearing judge issued written Findings of Fact and Conclusions of Law. The hearing judge found that Lewis did not attend scheduled settlement conferences, made misrepresentations to his client and ignored her requests for updates, ignored his client's attempts to get him to withdraw his representation, kept an unearned fee, charged an unreasonable fee, and did not deposit and maintain his client's funds in trust or create the required records of such funds. The hearing judge concluded that Lewis committed all the violations alleged by Petitioner, with the exception of Rule 8.4(b), which charge the AGC dropped after the hearing.

Held:

The Court of Appeals accepted the Findings of Fact and Conclusions of Law of the hearing judge and imposed disbarment as the sanction. The Court of Appeals held Lewis's conduct to be

particularly egregious and deleterious to not only his client, but to the public perception of lawyers at-large. The Court also explained that Lewis's multiple misrepresentations to his client evidence a lack of basic integrity that demonstrates a danger to any member of the public that would seek his services. The Court considered Respondent's actions and concluded that Lewis's actions warrant disbarment.

Attorney Grievance Commission of Maryland v. James Albert Frost, Misc. Docket AG No. 69, September Term 2012, filed February 26, 2014. Opinion by Greene, J.

Adkins, J., concurs.
McDonald, J., concurs and dissents.

http://www.mdcourts.gov/opinions/coa/2014/69a12ag.pdf

ATTORNEY DISCIPLINE – RULE 8.2(a) JUDICIAL AND LEGAL OFFICERS

Facts:

On April 23, 2012, Respondent sent an email message to his ex-wife that included the following statements:

> 1. That the Honorable Ann S. Harrington was a "lawless judge" who "arranged for deputy sheriffs of the Montgomery County, MD Sheriff's Office to illegally arrest [him];"
>
> 2. That the Honorable Stephen P. Johnson, Retired Judge for the District Court of Maryland for Montgomery County, was "a weak man and corrupt judge acting under improper and political influence;"
>
> 3. That the Honorable Catherine Curran O'Malley, Judge for the District Court of Maryland for Baltimore City, exerted "improper" influence over members of the Montgomery County Police Department;
>
> 4. That John J. McCarthy, State's Attorney for Montgomery County, was a "crooked" State's Attorney;
>
> 5. That Douglas F. Gansler, Attorney General of Maryland, was "corrupt;" and
>
> 6. That Governor O'Malley exerted "improper" influence over members of the Montgomery County Police Department.

Subsequently and without explanation, Respondent forwarded his April 23, 2012 email to several members of the bar. Despite inquiries from those recipients and from Bar Counsel, Respondent at all times failed or refused to explain his statements and the reason for his dissemination thereof.

Along with its Petition for Disciplinary or Remedial Action, Petitioner served Requests for Admissions asking Respondent to admit that at the time he made each of the above statements, he knew them to be false or made them with reckless disregard for their truth or falsity, and that he had no facts to support any of the statements. Because Respondent failed to answer the requests, they were deemed admitted. The hearing judge entered an order of default against Respondent, finding that Respondent violated Rules 8.1(b), 8.2(a), 8.4(a), (c) and (d).

Neither Respondent nor Petitioner filed exceptions to the findings of fact and conclusions of law of the hearing judge. On July 5, 2013, Petitioner filed its Recommendation for Sanction, recommending disbarment. On July 17, 2013, Respondent filed a motion with the Court of Appeals, alleging that there was insufficient service of process upon him, that he had committed no violation of any Rule of Professional Responsibility, and that the statements underlying the instant action against him were protected by the Free Speech Clause of the First Amendment to the United States Constitution. At oral argument, Respondent repeated those contentions.

Held:

First, the Court held that Respondent's statement regarding Governor O'Malley does not constitute a violation of MLRPC 8.2(a) because the governor is not a public legal officer. As to the remaining statements, the Court found that Respondent's knowingly false statements impugning the integrity and qualifications of several judges and public legal officers constitute a violation of MLRPC 8.2(a) and are not protected speech under the First Amendment to the United States Constitution. In addition, where Respondent made repeated false allegations about the qualifications or integrity of "a judge, adjudicatory officer or public legal officer," without any explanation or investigation into the substance of those allegations, he demonstrated a lack of fitness to practice law. Under the circumstances, the appropriate sanction for violations of MLRPC 8.1(b), 8.2(a), 8.4(a), (c) and (d) is disbarment.

Attorney Grievance Commission of Maryland v. Nikolaos Panagiotis Kourtesis, Misc. Docket AG No. 4, September Term 2013, filed March 24, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/4a13ag.pdf

ATTORNEY GRIEVANCE – RECIPROCAL ACTION – INCAPACITY – INACTIVE STATUS

ATTORNEY GRIEVANCE – RECIPROCAL ACTION – EXCEPTIONAL CIRCUMSTANCES EXCEPTIONS

Facts:

Nikolaus Panagiotis Kourtesis was admitted to the practice of law in the District of Columbia (D.C.) and Maryland. In 2012, Kourtesis claimed to be suffering from a mental illness that rendered him unable to defend himself in a disciplinary matter in D.C. On 14 February 2013, the D.C. Court of Appeals ordered that the attorney be placed on indefinite suspension due to his self-professed disability and its effect on his ability to defend himself (or assist his counsel) in the disciplinary case and additionally that the pending disciplinary matter be held in abeyance until further order by the D.C. Court of Appeals.

On 10 March 2013, Maryland Bar Counsel filed a Petition for Disciplinary or Remedial Action. On 20 March 2013, the Court of Appeals issued a Show Cause Order. Bar Counsel responded, asking that a reciprocal sanction (indefinite suspension) be imposed against Kourtesis in this State. In response, Kourtesis averred that reciprocal action was inappropriate because exceptional circumstances exist under Rule 16-773(e)(3) and (5) and urged the Court instead to refer the matter to a circuit court judge for an evidentiary hearing on his incapacity prior to acting on the request by Bar Counsel.

Held:

In keeping with the spirit of the comity principles expressed in the Maryland Rules, the Court of Appeals adopted the District of Columbia's judicial determination that Kourtesis was (and remains) incapacitated indefinitely. Because Maryland differentiates between sanctions and remedies, the Court concluded that this State's "indefinite suspension" sanction, and its concomitant condemning connotation, is inappropriate here; instead, placement on inactive status is commensurate with past Maryland cases involving incompetency where no final adjudication on the merits of the underlying misconduct charges has taken place as yet.

The Court held also that the exceptional circumstances exceptions were inapplicable in this case. In light of the pending disciplinary proceedings held in abeyance indefinitely in D.C., which was part of the sanction in that jurisdiction, the exceptional circumstances exception under Md. Rule 16-774(e)(5), which applies in cases where the reason for inactive status in the original jurisdiction no longer exists, does not apply here. Thus, a separate hearing to determine competency and fitness to practice law in Maryland is inappropriate at this time. Moreover, the Court held that neither financial difficulties to Respondent due to the inability to practice law while on inactive status nor "forum-shopping" for the quickest reinstatement creates a "grave injustice" warranting a finding that this reciprocal action is inappropriate under Rule 16-774(e)(3).

Kara A. Keller v. Charles J. Serio and GEICO Insurance Company, No. 48, September Term 2013, filed February 26, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/48a13.pdf

MARYLAND RULE 2-520 — INSTRUCTIONS TO THE JURY — REVERSIBLE ERROR

Facts:

This appeal arises out of a dispute between Kara A. Keller ("Petitioner"), who was injured in a motor vehicle accident, and her UM coverage provider GEICO and the at-fault driver Charles J. Serio (collectively "Respondents"). On April 21, 2006, Petitioner was rear-ended by Serio. Petitioner's car suffered superficial damage. After the accident, Petitioner and Serio exchanged insurance information. Keller subsequently drove home, called an attorney, and went to the emergency room. Her medical treatment, which lasted over five years, spanned multiple care-givers and addressed headaches, back pain, and overall chronic pain. Her medical bills totaled $27,355.69.

In April of 2009, Keller filed suit against Serio in the Circuit Court for Baltimore County. Keller later informed her motor vehicle insurer, GEICO, with whom she had UM coverage, of the potential for a UM claim. GEICO then successfully moved to intervene as a defendant to protect its possible interest in the litigation.

At the trial, the parties stipulated that Serio was at fault for the accident. The only issues before the jury were causation and damages. In her opening statement, Petitioner's counsel identified Serio as the at-fault driver, and identified GEICO as Keller's UM policy carrier. GEICO's counsel identified herself at trial. GEICO did not offer an opening statement, did not question witnesses, and did not present a closing argument. After Keller and Serio presented their cases, the trial court instructed the jury on the questions of causation and damages as they appeared on the verdict sheet. Keller's counsel offered a proposed jury instruction on the nature of UM coverage. The trial court refused to give this instruction, noting that insurance was not at issue at the trial. The jury returned a verdict in favor of Keller for $27,355.69, which was the amount of her medical bills. On the itemized verdict sheet, the jury entered $0 for both future medical expenses and non-economic damages.

Petitioner later filed a motion for a new trial claiming that the jury award was inconsistent by awarding damages for medical expenses related to alleviating pain, but no damages for pain and suffering, and that in not giving an instruction about the nature of UM coverage, the trial court confused the jury. The court denied this motion. Petitioner then appealed to the Court of Special Appeals. In an unreported opinion, the intermediate appellate court declined to find an abuse of discretion either in the trial court's declining to instruct the jury on the definition of UM coverage, or in its declining to order a new trial on the basis of a verdict that awarded damages for medical bills, but awarded no damages for pain and suffering.

Petitioner then filed a petition for a writ of certiorari. We granted the petition to address whether the failure to instruct the jury about the reason the plaintiff's underinsured motorist carrier is a party to a tort suit is reversible error.

Held: Affirmed.

The Court of Appeals affirmed the Judgment of the Court of Special Appeals. The Court of Appeals held that Petitioner did not have a right to a jury instruction on a matter that was not before the jury. Because the question of UM coverage was not at issue in a case confined to the questions of causation and damages, the Circuit Court for Baltimore County did not err by declining to instruct the jury on the issue of UM coverage. The Court of Appeals recognized that the question of UM coverage could be confusing, and may require a jury instruction to ward off potential confusion. Yet, in this case, the issue was outside the scope of the issues properly before the jury. The Court also refused to infer jury confusion on the basis of a jury verdict that awarded damages for medical bills, but awarded no damages for pain and suffering. Therefore, the Circuit Court did not err when it denied Petitioner's request for a jury instruction on the issue of UM coverage.

Joseph Leon Hall, Jr. v. State of Maryland, No. 53, September Term 2013, filed March 25, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/53a13.pdf

"ANTI-CSI-EFFECT" JURY INSTRUCTION – HARMLESS ERROR

Facts:

The State, Respondent, charged Joseph Leon Hall, Jr. ("Hall"), Petitioner, with armed carjacking and other crimes. In the Circuit Court for Baltimore City ("the circuit court"), a jury tried Hall. The circuit court gave an "anti-CSI-effect" jury instruction. The jury convicted Hall of armed carjacking and other crimes. Hall appealed, and the Court of Special Appeals affirmed. Hall petitioned for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held and the parties conceded that the circuit court abused its discretion in giving the "anti-CSI effect" jury instruction, as Hall never misstated the State's burden of proof or the law.

Nonetheless, the Court of Appeals was satisfied beyond a reasonable doubt that the abuse of discretion was harmless, *i.e.*, the instruction was of no consequence to the verdict. It was undisputed that Hall drove the victim's car, and it did not matter whether the "anti-CSI effect" jury instruction caused the jury to overlook the lack of other evidence (including images from security cameras) that Hall drove the victim's car. The State's failure to offer a photograph of the injuries to the victim's wrists did not result from the State's failure to use an investigative technique, as it was undisputed that the victim did not tell law enforcement officers about the injuries to his wrists; thus, the "anti-CSI effect" jury instruction could not have caused the jury to overlook the lack of a photograph of the injuries to the victim's wrists. Although law enforcement officers did not record the victim's interview or his identification of Hall in a photographic array, the lack of such recordings was inconsequential in light of: (1) testimony about the victim's interview and his identification of Hall in a photographic array; (2) the circuit court's admission of the photographic array into evidence; and (3) the victim's in-court identification of Hall.

Kivi Kennedy v. State of Maryland, No. 51, September Term 2013, filed February 21, 2014. Opinion by Greene, J.

Harrell and Battaglia, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2014/51a13.pdf

CRIMINAL LAW – COMPETENCY TO STAND TRIAL

Facts:

Petitioner Kivi Kennedy ("Petitioner") was convicted of second degree murder, two counts of attempted second degree murder, three counts of use of a handgun in a crime of violence, and one count of wearing, carrying or transporting a handgun, and was sentenced to 65 years incarceration. During the course of the multi-day jury trial, defense counsel told the judge on a few occasions that he had trouble communicating with his client and that Petitioner showed a lack of understanding of things. Also during the course of the trial, Petitioner asked the trial judge several clarifying questions, expressed that he understood what the judge told him, and participated in a colloquy with the judge and defense counsel regarding his right to testify.

Ultimately, Petitioner decided to testify, and during cross-examination, the prosecutor engaged in a re-enactment with Petitioner that led to her being pushed into the courtroom easel by Petitioner. Following that incident, the following colloquy occurred:

> [Defense Counsel]: Your Honor, at this time I would ask the Court for a mistrial. I believe the jury has been prejudiced. They now have an impression of my client based on the State's Attorney requesting him to demonstrate.
>
> . . .
>
> [Defense Counsel]: Your Honor, I would express again that this is a continuous situation with myself and [Petitioner]. At several times I have problems communicating with him. I communicate directly with him and he seems not to understand what I'm saying to him. Your Honor, I don't–
>
> [Trial Judge]: Well, how is this incident the result of a communication problem?
>
> [Defense Counsel]: Well, it's, it's something consistent I've seen in [Petitioner] as far as a lack of understanding with things. If we attribute it to he used too much force and improper force, I would consistently say this is what I've experienced with him, a lack of

> understanding of things I say to him. I don't understand things that he says to me at times. **I haven't been able to talk to him about the case and I would just ask the Court for a mistrial –**
>
> **[Trial Judge]: All right. The motion is –**
>
> **[Defense Counsel]: – and have him evaluated.**
>
> [Trial Judge]: The motion is denied. As I've said in connection with this incident, I think it's a lack of judgment. (Emphasis added.)

Petitioner contends that the Court of Special Appeals erred when it held that defense counsel did not trigger the competency statute, requiring the trial court to order a competency evaluation and make a competency determination, when counsel informed the court that he had trouble communicating with his client and that his client was unable to assist in his defense, mentioned that there was "something wrong" with his client, and requested to "have him evaluated."

Held: Affirmed.

Under Md. Code (2001, 2008 Repl. Vol), § 3-104(a) of the Criminal Procedure Article (hereinafter § 3-104(a)), a trial judge "shall determine, on evidence presented on the record, whether the defendant is competent to stand trial" "(1) upon motion of the accused, (2) upon motion of defense counsel, or (3) upon a *sua sponte* determination by the court that the defendant may not be competent to stand trial." *Thanos v. State*, 330 Md. 77, 85, 622 A.2d 727, 730 (1993). The only issue before the Court was whether defense counsel made a motion for a competency evaluation that triggered § 3-104(a). Because defense counsel's request was embedded in a motion for mistrial, the request was not pursued despite ample opportunities to do so, and defense counsel's previous statements concerning his inability to communicate with his client were not sufficiently clear so as to rise to the level of a request for a competency determination, the Court held that § 3-104(a) was not triggered.

Delford Mitchell Barnes v. State of Maryland, No. 34, September Term 2013, filed March 5, 2014. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2014/34a13.pdf

APPELLATE PROCEDURE – WAIVER AND PRESERVATION

CRIMINAL PROCEDURE – EXECUTION OF WARRANT

CRIMINAL PROCEDURE – DE FACTO ARREST

Facts:

In January 2009, the police discovered the bodies of Seth Aidoo and Eunice Baah in the basement of Mr. Aidoo's home. Shortly thereafter, investigators pronounced both victims dead and a murder investigation ensued.

As part of their investigation, the police obtained warrants to collect the DNA and fingerprints of Petitioner Delford Mitchell Barnes and to search the residence of Mr. Aidoo's estranged wife, Sheila Aidoo. The next evening, at approximately 6:40 p.m., the police observed Petitioner leave Ms. Aidoo's residence in his vehicle and stopped the vehicle approximately one block from the residence. Petitioner agreed to go to the police station for the purpose of executing the warrant to collect his DNA and fingerprints, and he was subsequently transported to the station in a detective's vehicle. Upon arrival at the station, the police placed Petitioner in an interview room, where he remained for several hours.

Meanwhile, other aspects of the investigation were ongoing, including the search of Ms. Aidoo's residence, which concluded around 9:30 p.m. Between 10:15 and 10:47 p.m., two detectives, one of whom had been assisting in the search of the residence, collected Petitioner's fingerprints and DNA in the interview room in which Petitioner had been waiting. The detectives then escorted him to the restroom so he could wash his hands. At 10:53 p.m., the detectives returned Petitioner to the interview room, where they immediately questioned him about a storage locker the police had learned about during their search of Ms. Aidoo's residence. At 11:00 p.m., Petitioner consented to a search of the storage locker. During the search of the locker, the police recovered a candle containing a hand-etched message, apparently about Mr. Aidoo, which included several references to "Seth's" suffering injury or death. The police ultimately charged Petitioner with, among other things, two counts of premeditated murder.

Petitioner, through counsel, sought suppression of the candle, arguing that it was the tainted fruit of his consent obtained during an unlawful detention. The suppression court denied the motion to suppress, evidently reasoning that Petitioner was not under de facto arrest at any time before consenting to the search. At trial, the candle was admitted into evidence over Petitioner's objection and the jury ultimately found him guilty of two counts of first-degree, premeditated

murder. The Court of Special Appeals affirmed the judgments of conviction, reasoning that Petitioner's "detention up until the time that he was fingerprinted was a reasonable amount of time to comply with the warrant," and his subsequent detention was based on reasonable suspicion that he had committed the murders.

Held: Affirmed.

The Court of Appeals first held that Petitioner had preserved for the Court's consideration all the questions on which it granted the writ. The Court reasoned that Petitioner had articulated and adequately argued all the issues he desired the intermediate appellate court to consider in his initial brief submitted to that court, as required under Maryland Rule 8-504(a)(6). The Court then determined that Petitioner's petition for writ of certiorari to the Court of Appeals met the minimum requirements of Maryland Rule 8-303(b)(1) because it contained "concise arguments" in support of the questions presented in the petition.

The Court next held that Petitioner's consent was obtained while he was lawfully detained at the police station. Emphasizing that courts are not to assess the lawfulness of police officers' conduct by resort to whether the officers accomplished their goal in the "least intrusive" manner, the Court concluded that the approximately three-hour delay in executing the warrant for Petitioner's DNA and fingerprints was not unreasonably long as to constitute a de facto arrest. The Court noted that several detectives assigned to the murder investigation were busy with other aspects of the investigation during the hours leading up to the execution of the warrant.

The Court further concluded that Petitioner's continued detention after the police executed the warrant, and before he consented to a search of his storage locker, was not a de facto arrest. In conducting its analysis, the Court observed that it draws a bright line between a lawful detention of a person in order to execute a warrant to collect DNA and fingerprint evidence and the continued detention of that person following execution of the warrant. Noting that the detectives asked only "a moderate number of questions" in order to obtain information about the storage locker and concluded their interview approximately seven minutes after it started, the Court held that the police needed only reasonable suspicion to conduct the brief, investigatory detention of Petitioner. The Court determined that the police possessed the requisite reasonable suspicion that Petitioner was involved in the murders of Mr. Aidoo and Ms. Baah.

Dwayne Scriber v. State of Maryland, No. 35, September Term 2013, filed March 5, 2014. Opinion by Barbera, C.J.

http://mdcourts.gov/opinions/coa/2014/35a13.pdf

CRIMINAL LAW – DOUBLE JEOPARDY – "SAME ELEMENTS" TEST

CRIMINAL LAW – DOUBLE JEOPARDY – COLLATERAL ESTOPPEL

Facts:

An officer of the Charles County Sheriff's Office, on patrol in the evening hours, observed another vehicle operating without its headlights illuminated. The officer attempted to initiate a traffic stop; the other vehicle stopped briefly but then drove around the patrol car and continued down the street. The officer pursued the vehicle until it stopped outside an apartment complex, at which point the driver and passenger exited the vehicle and ran away. After investigating, the officer determined that Petitioner Dwayne Scriber had been driving the vehicle at the time of the attempted traffic stop.

Petitioner was charged in the District Court of Maryland, sitting in Charles County, with various traffic offenses, including willfully disobeying a lawful order or direction of a police officer and four counts of fleeing and eluding police. At the conclusion of the State's case in the District Court, Petitioner moved for judgment of acquittal. The court granted the motion as to the charge of disobeying a lawful order. At the conclusion of trial, the court found Petitioner guilty of the fleeing and eluding counts, along with other traffic offenses.

Petitioner filed a notice of *de novo* appeal to the Circuit Court for Charles County. Prior to *de novo* trial in the Circuit Court, Petitioner filed a motion to dismiss the fleeing and eluding counts. He argued that the District Court judgment of acquittal as to the charge of disobeying a lawful order barred trial in the Circuit Court on the charges of fleeing and eluding. He asserted that disobeying a lawful order is the lesser-included offense of fleeing and eluding, rendering both offenses the "same" for double jeopardy purposes. After a hearing, the Circuit Court denied the motion to dismiss.

Held: Denial by the Circuit Court of Petitioner's motion to dismiss affirmed.

The Court of Appeals first addressed Petitioner's argument that trial in the Circuit Court on the fleeing and eluding counts would represent a second prosecution for the same offense after acquittal. Petitioner asserted that trial on those counts was barred by the protections against multiple trials for the same offense in the Double Jeopardy Clause of the United States Constitution and Maryland's common law.

The crux of Petitioner's argument to the Court was that fleeing and eluding and disobeying a lawful order are the "same offense" for double jeopardy purposes. The Supreme Court of the United States set forth in *Blockburger v. United States* the test to be applied in determining whether two offenses are the same: whether each offense requires proof of a fact which the other does not. 284 U.S. 299, 304 (1932). The parties disagreed over whether the offense of disobeying a lawful order requires proof of any element not shared by the offense of fleeing and eluding police.

Assuming, without deciding, that trial in the Circuit Court is a successive—not a continuing—prosecution, the Court held that fleeing and eluding and disobeying a lawful order are not the same offense. The Court found the plain language of the statutes to demonstrate that lawfulness is an element of the offense of disobeying a lawful order, but not of the offense of fleeing and eluding police.

The Court then addressed Petitioner's argument that the collateral estoppel form of double jeopardy barred trial in the Circuit Court on the fleeing and eluding counts. The doctrine of collateral estoppel provides that when an issue of ultimate fact has been determined in a defendant's favor, that issue may not be litigated again by the parties. *Odum v. State*, 412 Md. 593, 603 (2010). Determining that the District Court had made no finding of fact relevant to disposition of fleeing and eluding charges, the Court of Appeals held that Petitioner could not invoke the doctrine of collateral estoppel as a bar to prosecution in the Circuit Court.

Jamaal Garvin Alexis v. State of Maryland, No. 45, September Term 2013, filed March 24, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/45a13.pdf

CRIMINAL LAW – SIXTH AMENDMENT – RIGHT TO COUNSEL OF CHOICE – DISQUALIFICATION OF COUNSEL

CRIMINAL LAW – SENTENCING MERGER – RULE OF LENITY & FAIRNESS – SOLICITATIONS

Facts:

In 2006, Petitioner, Jamaal Garvin Alexis, and two other men, Bobby Ennels and Neiman Marcus Edmonds, set off with a tow truck to the Largo area of Prince George's County to steal a car. When Alexis connected Raymond Brown's car to the tow truck, the car alarm sounded and awakened Brown. While Edmonds was disabling the alarm of the stolen car, Brown approached the car and the tow truck. Alexis shot Brown and then the trio fled the scene. Brown died later as a result of a gunshot wound. In March of 2008, the State charged Petitioner with the murder of Brown and other related crimes.

Ennels testified before a grand jury about the series of events that led to Brown's murder and, according to the State, would testify against Alexis again at trial. On 3 October 2008, however, Ennels and his friend, Anthony Cash, III, were murdered. According to the State's evidence at trial, Jamaal Alexis, while incarcerated, solicited his brother, Rashadd Alexis, to murder Ennels. On 30 July 2009, the State charged Jamaal Alexis with the solicitation to obstruct justice by preventing a purported witness from testifying (Criminal Law Article § 9-302) and with solicitation to obstruct justice by retaliating against a witness for prior testimony (Criminal Law Article § 9-303).

The two cases were consolidated for trial. Prior to the date of the trial, the State moved to disqualify Alexis's retained counsel, Harry S. Tun, Esquire, in light of a conflict of interest Tun had with one of the State's material witnesses, Amadu Sulamon Jalloh. Tun represented Jalloh previously for a short period of time in unrelated criminal matters. Jalloh ended the representation and sought other counsel. Coincidentally, Jalloh and Alexis were inmates at the Prince George's County Detention Center. While inmates at the center, Jalloh overheard Alexis confess to the Brown murder and that his brother took care of a State's witness in that murder. Jalloh informed the county prosecutor of these overheard conversations and agreed to testify against Alexis at trial. Jalloh refused to waive the conflict of interest which arose from his previous attorney-client relationship with Tun, one of Alexis's attorneys.

The Circuit Court for Prince George's County, after holding a hearing on the Motion to Disqualify Defendant's Chosen Counsel, concluded that a serious conflict of interest existed and

struck Tun as counsel. In doing so, the Circuit Court rejected explicitly Tun's proffered "Chinese wall" cure in which an attorney other than Tun would cross-examine Jalloh.

Following a sixteen-day trial (at which Alexis was represented by privately-retained co-counsel other than Tun), the jury found Alexis guilty of several charges, including both solicitation charges. At the sentencing hearing, Alexis's counsel argued that the two solicitation convictions should merge. The Circuit Court disagreed and sentenced Alexis to two consecutive twenty-year terms for the solicitation convictions.

The cases were consolidated for appeal to the Court of Special Appeals, which affirmed the Circuit Court's judgment. *Alexis v. State*, 209 Md. App. 630, 61 A.3d 104 (2013). On 20 June 2013, this Court issued a writ of certiorari, in response to Alexis's petition, to consider the following questions:

> (1) Did the trial court err by disqualifying petitioner's attorney, who had previously represented a State's witness, when the witness refused to waive the conflict of interest and appellant's counsel had arranged for co-counsel to cross-examine the witness?
>
> (2) Are consecutive sentences appropriate where petitioner was convicted of two counts of solicitation where both counts were predicated on the same evidence?

Held: Affirmed.

(1) The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee that, in all criminal prosecutions, the accused has the right to assistance of counsel for his defense, which includes the *qualified* right to select and be represented by one's retained attorney of choice. Although a criminal defendant is afforded a presumption in favor of his or her counsel of choice under the Sixth Amendment, this right is qualified in many important respects. In deciding whether to disqualify a criminal defendant's selection of counsel due to a conflict of interest, a trial court is afforded wide discretion. In this case, the trial court conducted a hearing on the matter and made evidentiary-based findings that the interests of fairness and maintenance of ethical standards outweighed the defendant's right to this particular co-counsel of choice due to a conflict of interest arising from the counsel's prior representation of one of the State's material witnesses. Such an exercise of discretion was not so far beyond the fringe of the court's discretionary range as to require reversal.

(2) Petitioner was convicted of violating Criminal Law Article ("C.L.") § 9-302 (solicitation for the purpose of preventing future testimony) and § 9-303 (solicitation for the purpose of retaliating for prior testimony). Both statutes have a subsection that precludes merging the sentence for that offense with a contemporary other sentence for conviction of "any crime." *See* C.L. §§ 9-302(d) and 9-303(d). Thus, because the plain language of the statutes indicates explicitly that the General Assembly did not intend the sentences to merge, the rule of lenity was

inapplicable. Moreover, because the plain language of C.L. §§ 9-302(d) and 9-303(d) indicated that the General Assembly did not intend the sentences to merge with a contemporaneous conviction for any other crime, the principle of "fundamental fairness" that, at times, require merger of sentences in cases where the rule of lenity and the doctrine of merger are inapplicable, does not apply.

In re: Victoria C., No. 15, September Term 2013, filed March 27, 2014. Opinion by Battaglia J.

Greene and Adkins, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2014/15a13.pdf

FAMILY LAW – SIBLING VISITATION – FINDING OF PARENTAL UNFITNESS OR EXCEPTIONAL CIRCUMSTANCES MUST PRECEDE BEST INTERESTS INQUIRY

Facts:

Victoria C. was declared a Child in Need of Assistance after her father, George C., would not permit her to return to the home that he shared with his wife, Kieran C., and their two children, Lance and Evan, Victoria's half-siblings. During a review hearing, Victoria sought visitation with Lance and Evan, which George and Kieran C. opposed, and the master assigned the case recommended visitation, concluding that "exceptional circumstances" existed, because otherwise Victoria C. would suffer a "substantial deleterious effect." George and Kieran C. filed exceptions to the master's recommendation, which the Circuit Court denied. The Circuit Court agreed that exceptional circumstances existed based upon: Kieran C.'s testimony that Lance remembered Victoria, from which the judge inferred Lance desired visitation, its absence from which the judge inferred that Lance was harmed; that Victoria sought visitation shortly after returning to Maryland from Texas; that the benefits of visitation to Victoria would be great and the disruption to the lives of Lance and Evan would be minimal; that Victoria had a genuine desire to visit with her siblings; and that Victoria was in the situation as a result of George C.'s actions. The Court of Special Appeals reversed, applying the Court of Appeals's decision in *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2007), which held that before a court may grant a "third-party" visitation with a minor child, contrary to her parent's wishes, the third party must making a prima facie showing of parental unfitness or exceptional circumstances demonstrating a substantial deleterious effect on the child who is the subject of the visitation petition. The intermediate appellate court then concluded that the trial judge erred in finding exceptional circumstances, because of his focus on the harm to Victoria C., rather than Lance and Evan.

Held:

The Court of Appeals affirmed in part and vacated in part the judgment of the Court of Special Appeals. The Court began by raising the issue, *sua sponte*, of whether the Circuit Court sitting as a Juvenile Court had jurisdiction to order sibling visitation. The Circuit Court Judge had determined that no statutory basis existed to order visitation, and moreover, the statute upon which Victoria C. relied, Section 5–525.2 of the Family Law Article, permitting siblings "separated due to a foster care or adoptive placement" to seek visitation with each other, was

only applicable to siblings who are in out-of-home placements, which Lance and Evan were not. The Court of Appeals, therefore, determined that, on remand, after briefing and argument by the parties, the Circuit Court must first determine whether it has jurisdiction to order visitation.

Addressing the merits, the Court of Appeals determined that that the tenets of *Koshko* were applicable, rejecting Victoria C.'s argument that her CINA and sibling status rendered her without, rather than within, a "third-party" designation. After analyzing its prior third-party custody and visitation cases, the Court of Appeals determined that a "third party" is a person not a parent, and accordingly, a sibling, whether full, half or CINA, remains a third party. The Court opined, moreover, that, as to Kieran C., Victoria stands in a similar relationship to Lance and Evan as the grandparents seeking visitation did to the minors in *Koshko*.

After determining that *Koshko* was applicable, the Court of Appeals held that the Circuit Court Judge erred by focusing on the harm to Victoria instead of Lance and Evan. Instead of directing the Circuit Court to enter an order denying visitation, as the Court of Special Appeals had, the Court of Appeals remanded the case to the Circuit Court to determine: (1) whether jurisdiction exists to order sibling visitation and (2) if there is a substantial deleterious effect on Lance and Evan from a lack of visitation.

The Brethren Mutual Insurance Company v. Ember Louise Buckley, No. 10, September Term 2013, filed March 4, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/10a13.pdf

INSURANCE LAW – SCOPE OF RELEASE – GENERAL RELEASE – MARYLAND CODE (1997, 2011 REPLACEMENT VOLUME), § 19-511(e) OF THE INSURANCE ARTICLE – NO PREJUDICE TO UNINSURED/UNDERINSURED MOTORIST CLAIM

Facts:

Respondent, Ember L. Buckley, was involved in a single-vehicle accident on March 18, 2007. Buckley was the front-seat passenger in a motor vehicle driven by her boyfriend, Harvey Betts. Betts was covered by a liability insurance policy issued by GEICO, with policy limits of $100,000. GEICO offered to settle Buckley's claim against Betts for the full policy limits. Notwithstanding this settlement, Buckley had medical bills related to this accident in excess of $200,000. Because the settlement with Betts did not cover the full extent of her injuries, Buckley sought coverage under her uninsured/underinsured motorist ("UM") policy with Petitioner, The Brethren Mutual Insurance Company.

Buckley sent notice of the settlement offer from GEICO to Brethren via certified mail on August 29, 2007. In response, Brethren's claims adjuster stated in a letter dated October 30, 2007 that Brethren would waive any subrogation action against Betts. Having received this message, Buckley signed a full release of all claims against Harvey Betts and a hold harmless agreement in favor of Betts and GEICO on December 6, 2007.

After executing the Release with GEICO, Buckley attempted to recover for the remainder of her outstanding medical bills from Brethren under her UM policy. Brethren denied coverage and refused to pay.

Buckley filed suit against Brethren in the Circuit Court for Baltimore County, alleging breach of contract and seeking the policy limit of $300,000 in compensatory damages, attorney's fees and interest.

Both parties filed motions for summary judgment. Brethren argued that the release, as written, was a general release, and thus released all persons, firms, and corporations from future claims, regardless of whether they were parties to the release. Brethren further argued that Buckley's subjective intent in executing the release was irrelevant—the words on the page should be interpreted exactly as written. Responding, Buckley contended that the release only applied to Betts and his insurer, and that her execution of the release was clearly in accordance with Maryland Code (1997, 2011 Replacement Volume), § 19-511 of the Insurance Article.

The Circuit Court agreed with Brethren and entered summary judgment in its favor, dismissing Buckley's breach of contract claims.

Buckley appealed. The Court of Special Appeals held that "in the context of § 19-511(e), executing a boilerplate, general release in favor of the liability insurer does not relieve the UM carrier from its contractual duty to issue a UM payment to its insured." *Buckley v. Brethren Mut. Ins. Co.*, 207 Md. App. 574, 587, 53 A.3d 456, 463 (2012). The court based its decision on three considerations, "(1) the text of the statute; (2) the purpose of the statute; and (3) matters of public policy." *Buckley*, 207 Md. App. at 587, 53 A.3d at 463–64.

Thus, the Court of Special Appeals held that the general release executed between Buckley and GEICO did not prejudice Buckley's claim against Brethren. Consequently, Brethren could not use the Release to relieve itself of its duty to pay under the UM policy owned by Buckley. *Buckley*, 207 Md. App. at 598, 53 A.3d at 470.

Petitioner filed a petition for a writ of certiorari. The Court of Appeals granted this petition to consider whether the Court of Special Appeals erred in ruling that the general release that Buckley executed did not prejudice her breach of contract claim against Brethren for benefits under her UM policy.

Held: Affirmed.

The Court of Appeals affirmed the decision of the Court of Special Appeals, holding that under § 19-511(e) of the Insurance Article, a tort victim may execute a boilerplate, general release with a tortfeasor's liability insurer without prejudicing the tort victim's claim under her uninsured motorist policy. The Court reasoned that the broad, all-inclusive language of the release that Buckley executed must be read with an eye towards the parties' overall intent, which encompasses the legislative purposes embodied in Maryland Code (1997, 2011 Replacement Volume), § 19-511 of the Insurance Article.

Gore Enterprise Holdings, Inc. v. Comptroller of the Treasury and *Future Value, Inc. v. Comptroller of the Treasury*, No. 36, September Term 2013, filed March 24, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/36a13.pdf

TAX LAW – STATE INCOME TAXATION OF CORPORATIONS – AUTHORITY TO TAX OUT-OF-STATE SUBSIDIARIES WITH NO ECONOMIC SUBSTANCE AS SEPARATE BUSINESS ENTITIES

TAX LAW – APPORTIONMENT FORMULA

Facts:

W.L. Gore & Associates, Inc. ("Gore") is a specialty manufacturing company headquartered in Newark, Delaware. Incorporated in Delaware in 1959, Gore is known for its patented "ePTFE" material, which it uses to manufacture fabrics, medical devices, electronics, and industrial products. Gore operates factories in several states, including Maryland.

On July 13, 1983, Gore created Gore Enterprise Holdings, Inc. ("GEH") as a wholly- owned subsidiary to manage a portfolio of Gore patents. GEH was organized in Delaware as a holding company. Shortly after GEH's incorporation, Gore assigned GEH its entire patent portfolio, a nominal sum of cash, and 1,000 shares in a domestic international sales corporation ("DISC"), in exchange for all of GEH's stock. GEH then licensed back its patent portfolio to Gore in exchange for a 7.5% royalty of the sales price of all products that Gore sold in the United States.

In 1995, GEH executed a "Legal Services Consulting Agreement" with Gore. Under this agreement, GEH pays Gore attorneys to perform a variety of work for GEH. Gore employees generate research and ideas that are sent to GEH for patent application filing. Until GEH hired one employee and began to pay Gore rent for use of its office space in 1995, GEH had almost no substantial annual expenses. This employee was hired as a Patent Administrator to manage the patent portfolio, implement decisions of the GEH Board of Directors, and report on GEH activities to its Board of Directors. These activities include the licensing of GEH patents to Gore and to third parties, the acquisition of patents from third parties, and the enforcement of GEH's patent portfolio.

In January of 1996, Future Value, Inc. ("FVI") was incorporated in Delaware to manage Gore's excess capital. FVI was founded primarily to perform investment management functions, but has also extended Gore a line of credit when Gore experienced negative cash flow. As of 2008, FVI had three employees that handled, monitored, and recorded the various activities performed by FVI.

The Comptroller audited Gore, GEH and FVI in 2006. On July 3, 2006, the Comptroller issued the following assessments of tax, interest and penalties: $26,436,315 against GEH for tax years 1983 to 2003; $2,608,895 against FVI for tax years 1996 to 2003; and $193,178 against Gore for tax years 2001 to 2003. A hearing officer in the Comptroller's office upheld the assessments, plus interest for the time between the Comptroller's assessment and the hearing, in separate decisions entitled "Notice of Final Determination" filed on January 5, 2007. GEH and FVI (together, "Petitioners"), along with Gore, appealed to the Maryland Tax Court ("the Tax Court").

After hearings in October 2008 and May 2009, the Tax Court affirmed the assessments of tax and interest against GEH and FVI, but abated the penalties. Additionally, the Tax Court dismissed the alternative assessment against Gore. Petitioners appealed to the Circuit Court for Cecil County, arguing that Maryland's taxation of GEH and FVI violated the Due Process and Commerce Clauses of the U.S. Constitution. The Circuit Court agreed, reversing the Tax Court. The Comptroller appealed to the Court of Special Appeals, which reversed the Circuit Court, thereby upholding the Comptroller's assessments.

GEH and FVI then petitioned the Court of Appeals for a writ of certiorari, which was granted to determine whether the Tax Court erred in holding that the Comptroller had authority to tax GEH and FVI under this Court's holding in *Comptroller of the Treasury v. SYL, Inc.*, 375 Md. 78, 825 A.2d 399 (2003); and whether the Tax Court erred in upholding the apportionment formula used by the Comptroller in its assessment of GEH and FVI.

Held: Affirmed.

The Court of Appeals held that under *Comptroller of the Treasury v. SYL, Inc.*, the constitutional requirements for taxation were satisfied by virtue of the fact that GEH and FVI "had no real economic substance as separate business entities. 375 Md. 78, 106, 825 A.2d 399, 415 (2003). In applying *SYL*, the Court relied on the indisputable parallels between GEH, FVI, and the *SYL* subsidiaries, including the subsidiaries' dependence on Gore for their income, the circular flow of money between the subsidiaries and Gore, the subsidiaries' reliance on Gore for core functions and services, and the general absence of substantive activity from either subsidiary that was in any meaningful way separate from Gore.

Turning to the apportionment issue, the Court of Appeals upheld the Comptroller's use of an apportionment formula to calculate the subsidiaries' tax liability. The use of the apportionment formula was justified because Gore and its subsidiaries exhibited functional integration, centralized management, and economies of scale, and thus were found to be a unitary business. Finally, the Court upheld the apportionment formula used by the Comptroller, holding that the formula was internally and externally consistent, and consequently, was fair.

Victoria Falls Committee for Truth in Taxation, LLC et al. v. Prince George's County, Maryland, No. 59, September Term 2013, filed March 21, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/59a13.pdf

TAXATION – SPECIAL TAXING DISTRICTS – STATUTORY INTERPRETATION

Facts:

On 10 March 2005, a developer and four builders (collectively, the "Applicants") of a planned retirement community known as Central Parke at Victoria Falls ("Victoria Falls"), located in Laurel, Maryland, filed jointly a request (the "Request"), with the Prince George's County Executive and the Prince George's County Council (the "Council"), to create a voluntary special taxing district in the community (the "Special Taxing District" or "District"). At the time that the Applicants filed the Request, the Victoria Falls community was already under construction.

The purpose of the Special Taxing District was to transfer (or seek reimbursement of) the cost of public infrastructure improvements within or serving otherwise Victoria Falls, approximately seventy-five percent of which the Developer completed prior to the filing of the Request. The Applicants requested the issuance and sale by the County of special obligation bonds to finance the proposed District, which would be repaid by the ultimate owners of property within the District, through payment of the Special Taxes, over a 30-year term. The Applicants explained to the Council that although they were required to develop the improvements as part of the subdivision approval for the planned community, their initial bank loan was near its maximum loan limit and they were requesting the special obligation bonds to prevent the delay and reduction of the scope of certain amenities and landscaping within the District, as well as remaining offsite work and other improvements.

Of the 609 residential units planned to be in Victoria Falls, twenty-five dwellings and their lots, which were scattered throughout the community, were sold by the Applicants before the filing of the Request. Those twenty-five units (and the lots on which they were situated) were not included within the confines of the proposed District. As a result, the plat submitted with the Request describes the geographic region as excluding graphically the twenty-five units that were sold already, some of which shared property lines or common walls with one or more of the 584 units within the proposed District. Consequently, the owners of those twenty-five units or lots were not among the Applicants. Thus, the Applicants owned 100 percent of the property constituting the proposed District when they filed with the County the Request for its creation.

On 23 June 2005, the County Executive recommended to the Council the creation of the District. The Council introduced the County Executive's proposal as "CR-49-2005- A Resolution Concerning Victoria Falls Special Taxing District" (the "Resolution), which was referred to, and recommended favorably by, a Council committee. On 14 July 2005, the Council published, in

four local newspapers, identically-worded notices of a 26 July 2005 public hearing before the Council regarding the Resolution. At the hearing on 26 July 2005, no one spoke in opposition to the creation of the District, and the Council adopted the Resolution. On 29 July 2005, the County Executive approved the Resolution, and it became effective on that date. The Resolution authorized special obligation bonds in an aggregate principal amount not to exceed $12 million for the financing of the infrastructure improvements in the Victoria Falls community, and levied a special tax on the property owners within the District.

The Applicants continued to sell properties within the proposed District between the filing of the Request and the County's adoption of the Resolution. The County was aware of the ongoing sales, and in response to the County's expressed concerns about notice of the proposed District to potential homebuyers, the Applicants provided the County with details of their "program of disclosures." In particular, those parties who closed on the sale of property within the proposed District prior to the County's adoption of the Resolution all signed addendums to their land sale contracts. The addendums disclosed that the property they were purchasing was included in a proposed special taxing district that may be adopted by the county, estimated the approximate initial tax rates under the proposed district, provided for the purchasers' agreement to be liable for the full amount of the special taxes in the event that the County created the special taxing district, and included the name and phone number of a county employee who could be contacted if the purchasers had questions about the proposed special taxing district. The record contains no indication that any of the purchasers called the County employee.

After payment of the Special Taxes commenced, a group of individuals who bought property within the Victoria Falls Special Taxing District formed an umbrella organization, Victoria Falls Committee for Truth in Taxation, LLC (the "Taxpayers"), and decided to challenge the legality of the District. After some preliminary skirmishing in various courthouses, the Taxpayers acquiesced in the County's demand that they proceed via tax refund applications, rather than a pending lawsuit. Thus, the original action was dismissed.

On 31 December 2008, 279 Taxpayers within the District filed a tax refund application with the County. The County denied the application, and the Taxpayers filed timely a Petition of Appeal with the Maryland Tax Court on 15 September 2009. On 22 April 2010, 46 additional Taxpayers, whose refund claims the County denied also, filed a second Petition of Appeal. The Tax Court consolidated the two Petitions and, after briefing and oral argument, issued a Memorandum and Order denying Taxpayers' claims on 11 May 2011. The Taxpayers filed timely a Petition for Judicial Review in the Circuit Court for Prince George's County. Following briefing and argument, the hearing judge issued a Memorandum Opinion, on 1 March 2012, affirming the decision of the Tax Court.

The Taxpayers filed timely an appeal of the Circuit Court's judgment to the Court of Special Appeals. On 27 March 2013, the intermediate appellate court, in an unreported opinion, affirmed the judgment of the Circuit Court. The Taxpayers filed timely a Petition for Writ of Certiorari in the Court of Appeals, which was granted on 3 July 2013, *Victoria Falls Comm. for Truth in Taxation v. Prince George's Cnty.*, 432 Md. 467, 69 A.3d 474 (2013), to consider the following questions:

1. Did the Maryland Tax Court uphold properly the County's Resolution creating a Special Taxing District, where changes in land ownership within the District occurred after the filing of the voluntary request to be taxed, by a "super-majority" of the landowners under Md. Code, Art. 24, § 9-1301(d)(1), and before the County's subsequent approval?

2. Did the Maryland Tax Court rule properly that the County's approval of a voluntary Special Taxing District excluding 25 of the 609 properties in a planned development is lawful, in light of the condition that the Special Taxing District must fund infrastructure improvements for "any defined geographic region within the county," under Md. Code, Art. 24, § 9-1301(c)(2)(i)?

Held: Affirmed.

The Court of Appeals held that the General Assembly did not intend, by the plain meaning of subsection § 9-1301(h)(3)(ii), to require that the County determine whether any change in land ownership (occurring after the time of application for creation of the District, but before final action on the application) may have affected the super-majority landowner(s) requirement, expressed in subsection § 9-1301(d)(1) of the Act, for applying for the District. The Court reasoned that to adopt the Taxpayers' reading of the plain meaning of subsection (h)(3)(ii), which states a county's enactment of a resolution creating a special taxing district "shall be subject to the request of the landowners as specified under subsection (d)(1) of this section," would be to read the Legislature's choice of the word "request" as including "approval" as well, or to read additional requirements into the Act. The Court also rejected the Taxpayers' arguments that adopting the Court of Special Appeals's conclusion would "straight-jacket" the County, that their reading of the statute is consistent with the concept of petitioner withdrawal, and that the disclosures provided to purchasers of land within the District were irrelevant.

Furthermore, the Court held that the County's approval of the request to create a Special Taxing District that did not include 25 of the 609 lots within the planned Victoria Falls community was lawful under the Act's requirement that the District be used to finance infrastructure improvements in "any defined geographic region within the county." The Court reasoned that the language of § 9-1301(c)(2)(i) does not include any reference to a particular shape, level of inclusiveness, or contiguousness of properties within a proposed special taxing district.

Housing Authority of Baltimore City v. Amafica K. Woodland, No. 18, September Term 2013, filed March 26, 2014. Opinion by Adkins, J.

McDonald and Watts, JJ., concur and dissent.

http://www.mdcourts.gov/opinions/coa/2014/18a13.pdf

LOCAL GOVERNMENT TORT CLAIMS ACT ("LGTCA") – LGTCA NOTICE REQUIREMENT – SUBSTANTIAL COMPLIANCE WITH LGTCA NOTICE REQUIREMENT

LOCAL GOVERNMENT TORT CLAIMS ACT ("LGTCA") – LGTCA NOTICE REQUIREMENT – GOOD CAUSE TO WAIVE COMPLIANCE WITH LGTCA NOTICE REQUIREMENT

EVIDENCE – NEGLIGENCE – EVIDENCE OF COMPLIANCE WITH STATUTE

EVIDENCE – HEARSAY EXCEPTIONS – MD. RULE 5-803(b)(6) – BUSINESS RECORD EXCEPTION

Facts:

Appellee Amafica K. Woodland lived at 127 Albemarle Street from her birth in 1995 until she, along with her mother, Tanderlara Monterio, and grandmother, Dale Williams, vacated the residence in November of 1997. Appellant, the Housing Authority of Baltimore City ("HABC"), owned and managed the residence from its construction in 1957 to its demolition in 2001.

Woodland's blood-lead levels were tested twice during her tenancy at 127 Albemarle Street. On September 30, 1997, she demonstrated a blood-lead level of 13 micrograms per deciliter (µg/dL), and on October 8, 1997 she demonstrated a blood-lead level of 11 µg/dL. Following the second test, Monterio visited the management office of the residence and met with the property manager, Robin Mack, to discuss Woodland's recent blood test. After learning of Woodland's elevated level, Mack had Monterio complete a lead questionnaire and gave her copies of a lead information booklet. Following this meeting, Mack recorded the conversation in a "Summary of Interviews."

Following the meeting, Mack sent a message to William M. Peach, III ("Peach"), a Management and Maintenance Analyst in HABC's Central Office. This message requested a modified risk reduction and lead dust test for the residence, to be performed in an "expeditious manner." These tests were completed by Connor Environmental Services & Engineering Assessments ("Connor") on October 16, 1997. In its report, Connor explained that it found chipped stucco on the windowsills in the kitchen and living room, and chipped paint on all three bedroom windowsills and hallway doorframes. In summarizing its report, Connor recommended that HABC relocate the tenants. After Mack and an HABC safety officer visually inspected the

residence, HABC decided to relocate the family to a different unit. In November 1997, HABC moved Woodland and her family to a different HABC property.

Almost twelve years later, in April 2009, Woodland sued HABC in the Circuit Court for Baltimore City, claiming injury from her exposure to lead paint at the residence, and asserting, alternatively, compliance with the notice requirements of the Local Government Tort Claims Act ("LGTCA"), and good cause for failure to comply or substantially comply. Before trial, HABC moved for summary judgment, claiming that Woodland had failed to comply with the LGTCA notice requirement, could not establish good cause to waive the notice requirement, and that Woodland's failure to comply had prejudiced HABC's ability to put on an adequate defense. Woodland responded that she had substantially complied with the LGTCA, and that HABC was on actual notice, thus satisfying the statutory requirement. After a pretrial hearing, the motions judge denied HABC's motion, finding "a genuine issue of material fact as to good cause for lack of formal notice[.]" Upon HABC's renewed motion for judgment at the close of Appellee's case, the trial judge denied the motion and found that Woodland had substantially complied with the LGTCA, and that, alternatively, her conduct satisfied the good cause exception, and that HABC's defense was not prejudiced.

The jury found in favor of Woodland, and after HABC's successful motion to reduce the verdict in accordance with the relevant caps on non-economic damages, the judgment came to $690,000. HABC noted a timely appeal to the Court of Special Appeals, and we granted certiorari on our own initiative before resolution by that Court.

Held: Affirmed.

The Court of Appeals affirmed the trial court's finding of good cause. The trial court relied on Appellee's family's notification of HABC in person regarding the results of two blood-lead tests and that this notification allowed HABC to investigate its possible liability. The trial court thus concluded that Appellee's family's conduct was reasonable under the circumstances and met the requirements of good cause. The Court declined to hold that this determination constituted an abuse of discretion. Although the Court determined that the trial court erroneously concluded that Appellee had substantially complied with the LGTCA notice requirement, the Court held this to be moot, as the trial court did not err in its determination that Appellee had good cause for noncompliance.

The Court held that the trial court erred in referring to material not in evidence as part of its oral ruling on good cause. Yet the Court held this error to be harmless, because the trial court only relied on the material not in evidence as an alternative basis for its good cause determination. Because the Court of Appeals affirmed the trial court's primary basis for its good cause determination, any error in the alternative basis was not essential to the court's finding, and thus harmless.

Finally, the Court held that the trial court did not err by preventing HABC from characterizing its actions after being notified of Woodland's elevated blood-lead level as in compliance with statutory requirements. Because Appellee's action was in negligence, the trial court did not err when it ruled that evidence of subsequent remedial measures confused the issue of negligence. The Court also held that the trial court did not err by allowing into evidence an undisputed business record, despite HABC's claim that the scrivener of some marks on the document could not be determined. Because the evidence was clearly a business record, Appellant bore a heavy burden to rebut the presumption that the business record was trustworthy. The Court held that HABC did not meet this burden.

COURT OF SPECIAL APPEALS

Allen R. Dyer v. Board of Education of Howard County, No. 2317, September Term 2012, filed March 26, 2014. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2014/2317s12.pdf

ADMINISTRATIVE LAW AND PROCEDURE – OPEN MEETINGS ACT – ADMINISTRATIVE FUNCTION

Facts:

Two complaints were filed against Allen R. Dyer ("Dyer") with the Howard County Board of Education's Ethics Panel ("Ethics Panel"). A hearing before the Ethics Panel was scheduled for Thursday, March 3, 2011. Dyer attended the March 3, 2011 Ethics Panel Hearing, which was not open to the public, and testified under oath.

On April 15, 2011, Dyer filed a complaint in the Circuit Court for Howard County alleging that the March 3, 2011 Ethics Panel hearing violated the Maryland Open Meetings Act. The circuit court held a hearing on November 13, 2012 and denied all relief requested by Dyer. The circuit court's oral ruling was memorialized in a written order dated November 15, 2012.

Held: Affirmed.

The Court of Special Appeals held that the Maryland Open Meetings Act ("OMA"), Md. Code (1984, 2009 Repl. Vol.) §§ 10-501 - 10-512 of the State Government Article ("SG"), did not apply to the March 3, 2011 Ethics Panel hearing. The Court of Special Appeals held that the OMA did not apply to the March 3, 2011 hearing because the Ethics Panel hearing constituted an administrative function which is exempt from the OMA under SG § 10-503(a)(1).

The Court noted that an "administrative function" is defined in the OMA as "the administration of: (i) a law of the State; (ii) a law of a political subdivision of the State; or (iii) a rule, regulation, or bylaw of a public body." SG § 10-502(b). The Court concluded that the March 3,

2011 Ethics Panel hearing involved the administration of existing ethics regulations and did not involve development of new policy. The Court of Special Appeals adopted the careful analysis set forth in a 2010 Opinion of the Attorney General in holding that administration of existing ethics regulations constitutes an administrative function. See 95 Md. Op. Att'y Gen. 152, 155-56 (2010). The Court noted that the same analysis had been previously adopted by the Open Meetings Compliance Board. See 1 OMCB Opinions 93-4 (1993); 5 OMCB Opinions 121 (1997). Accordingly, the Court of Special Appeals held that the March 3, 2011 Ethics Panel hearing was exempt from the OMA pursuant to SG § 10-503(a)(1). The Court of Special Appeals further held that the Board of Education did not impermissibly delegate responsibilities to the Ethics Panel.

Michael F. Dugan, et al. v. Prince George's County, Maryland et al., No. 821, September Term 2012, and *Michael F. Dugan, et al. v. Prince George's County, Maryland et al.*, No. 455, September Term 2013, filed March 27, 2014. Opinion by Matricciani, J.

http://www.mdcourts.gov/opinions/cosa/2014/0821s12.pdf

QUASI-JUDICIAL – QUASI-LEGISLATIVE – DECLARATORY JUDGMENT – ADMINISTRATIVE MANDAMUS – JUDICIAL REVIEW – SUBSTANTIAL EVIDENCE – LEGAL AUTHORITY

Facts:

In 2002, Reaching Hearts International ("RHI"), a Seventh Day Adventist affiliated congregation, purchased approximately 17 acres of unimproved property in Laurel, Maryland with the intent to construct a church and a school. Prior to purchase of this land, Prince George's County ("the County") had assigned approximately 13.6 acres of the property a water and sewer category 5, which prohibits development until adequate public facilities are available to serve the proposed development. Over the course of the next several years, RHI repeatedly applied for, and was denied, an amendment to the land's water and sewer category. In 2006, RHI filed suit in federal court alleging religious discrimination and Religious Land Use and Institutionalized Persons Act violations against the County and the Prince George's County Council ("the Council"). In 2008, a jury awarded damages for $3,714,822.36 to RHI, and the federal court ordered the Council to process any future water and sewer category change applications by RHI without further delay and without religious discrimination.

After the Council rejected RHI's application in 2010 for the same reasons it earlier denied the application, RHI filed a motion for contempt. After the U.S. District Court directed the Council to show cause why its members should not be held in contempt and sanctioned for violating its 2008 order, the Council reconsidered its denial of RHI's amendment to the water and sewer category, but only for 3.6 acres of RHI's property. The federal court then considered whether the Council's partial approval of RHI's application conformed with its earlier orders. After holding a hearing on the contempt motion, the U.S. District Court entered an order vacating the part of the Council's resolution that denied a portion of RHI's application. It remanded the matter to the Council to reconsider its partial denial, and to process the application without delay or religious discrimination. In January 2012, the Council approved RHI's water and sewer amendment for the remainder of the property. The Maryland Department of the Environment approved the amendments on August 17, 2012.

Appellants filed timely appeals challenging the Council's approval of amendments to the water and sewer category for 3.6 acres of RHI's land as well as the remaining 10 acres, and challenging MDE's approval of the amendments. The circuit court consolidated the cases, and affirmed the Council's and MDE's approval of amendments to the water and sewer category.

Appellants appealed the circuit court decision both to this court and the Court of Appeals. The Court of Appeals denied certiorari.

Held: Affirmed.

First, the trial court properly held that the Prince George's ("PG") County Council's ("the Council") amendments to the water and sewer plan for Reaching Hearts International's ("RHI") land were quasi-judicial, instead of quasi-legislative. Although amendments to a County's water and sewer plan are generally in the nature of a quasi-legislative action, this was a unique situation. RHI's application for a change in its water and sewer plan was not combined with any other water and sewer category change requests, but was reviewed separately. Moreover, the approval was not based on the overall community planning, but rather a specific federal court opinion and order concerning discrimination against RHI's application. Because the Council's approval of RHI's water and sewer amendment application was unique to that property and did not have a broader community planning basis in mind, it was a quasi-judicial action, reviewable only by administrative mandamus.

Second, it was permissible for the Council to rely on fact-finding from a related federal case to approve RHI's application, as long as it rendered an independent decision.

Third, there was substantial record evidence from a related federal court case, PG County agencies and PG's County Executive to support the Council's decision to approve the water and sewer plan amendments.

Finally, both the Council and the Maryland Department of the Environment had the statutory authority to approve amendments to PG County's Water and Sewer Plan, without the Council needing to certify that the amendments were consistent with PG County's Water and Sewer Plan.

American Asset Finance, LLC v. Trustees of the Client Protection Fund of the Bar of Maryland, No. 2344, September Term 2012, filed February 28, 2014. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2014/2344s12.pdf

STANDING TO MAKE CLAIM AGAINST CLIENT PROTECTION FUND – ATTORNEY-CLIENT OR FIDUCIARY RELATIONSHIP BETWEEN THE CLAIMANT AND THE DEFALCATING ATTORNEY – NO ATTORNEY-CLIENT OR FIDUCIARY RELATIONSHIP BETWEEN ENTITY THAT LENT MONEY TO ATTORNEY AND TOOK BACK AN ASSIGNMENT OF ATTORNEY'S INTEREST IN SETTLEMENT OR ESTATE MONIES NOT YET DISBURSED.

Facts:

American Asset Finance ("AAF"), the appellant, entered into several agreements with a lawyer who was later disbarred for misappropriating funds from his IOLTA account. Under these agreements, AAF paid the lawyer money and the lawyer assigned it a portion of the funds he expected to receive when settlement monies in cases in which a settlement had been reached were disbursed. The agreements required the lawyer to deposit the settlement monies in his IOLTA account and then pay AAF its share; and provided that the share would increase if the sums were not timely paid. AAF paid the lawyer the agreed sums; the settlement funds were paid to the lawyer, who deposited them in his IOLTA account; but the lawyer did not pay AAF as agreed. AAF made claims against the Client Protection Fund ("the Fund"), the appellee, seeking the sums the lawyer was supposed to have paid it under the assignment agreements. The Fund denied the claims, determining that AAF and the lawyer were in a lender-borrower relationship, not an attorney-client or fiduciary relationship.

In the Circuit Court for Baltimore County, AAF sought judicial review of the Fund's denial of its claims. The circuit court affirmed the Fund and AAF noted a timely appeal.

Held: Affirmed.

The purpose of the Fund is "to maintain the integrity of the legal profession by paying money to reimburse losses caused by defalcations of lawyers." For a claimant to be eligible for reimbursement of a loss by the Fund the loss must have been caused by the defalcation of a lawyer while the lawyer was acting for the claimant "as an attorney at law or a fiduciary." AAF argued that the lawyer was acting as its fiduciary, because he was to hold the settlement monies in his IOLTA account for the benefit of AAF, and then pay the portion of the settlement monies owed to AAF out of the IOLTA account. The Fund concluded that this relationship was not a fiduciary one that is traditional and customary in the practice of law; and in addition there was no

attorney-client relationship between the lawyer and AAF. These conclusions were legally correct. AAF was in the position of a lender and the lawyer was in the position of a borrower. Accordingly, AAF did not have standing to seek reimbursement for its losses from the Fund.

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Steven J. Ochse, et ux. v. William O. Henry, et ux., No. 1118, September Term 2012, filed February 25, 2014. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2014/1118s12.pdf

ATTORNEY'S FEES – CONTRACTUAL FEE-SHIFTING – MULTIPLE CLAIMS – COMMON CORE OF FACTS – ABUSE OF DISCRETION

Facts:

On remand from a previous decision of the Court of Special Appeals, *Ochse v. Henry*, 202 Md. App. 521, 33 A.3d 480 (2011), *cert. denied*, 425 Md. 396, 41 A.3d 571 (2012), the Circuit Court for Dorchester County entered an award of attorney's fees in favor of the appellants pursuant to a fee-shifting provision in a real estate contract. The award was substantially less than the total award the appellants had requested. The circuit court reasoned that, even though the appellants were the prevailing party, the appellants had devoted the majority of their efforts at trial to proving a claim that was rejected at trial and on appeal, and so a fully compensatory award was not reasonable. The appellants again appealed, arguing that they were entitled to fees expended on all four of their claims, because all four claims arose out of a common core of facts.

Held: Judgment vacated; case remanded for further proceedings.

The common core of facts doctrine allows a court to grant a fully compensatory fee to a prevailing party pursuant to a contractual fee-shifting provision where the party did not prevail on all claims or defenses but still achieved excellent results. The doctrine bundles together fees attributable to fee-shifting claims and non-fee-shifting claims that arise out of a common core of facts. Application of the common core of facts doctrine is discretionary, and the court did not abuse its discretion in deciding not to apply it in this case. Nevertheless, the case is remanded for the circuit court to take into account the appellants' supplemental motion for fees incurred successfully defending against the appellees' petition for a writ of certiorari in the Court of Appeals.

Azizollah Abrishamian v. Washington Medical Group, P.C., No. 49, September Term 2013, filed March 4, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/0049s13.pdf

MOTION FOR ENTRY OF DEFAULT – OPPOSITION

DISQUALIFICATION OF COUNSEL – SCOPE

EVIDENCE – EXCLUSION OF NON-PROBATIVE AND PREJUDICIAL EVIDENCE

INTEREST AND FEES – WAIVER

JUDICIAL NOTICE – PROPER SUBJECTS

Facts:

Washington Medical Group filed suit to recover unpaid medical bills from Mr. Abrishamian, who counterclaimed alleging that WMG was not entitled to payment and that it had committed fraud. Mr. Abrishamian had retained his treating physician at WMG, Dr. Pedro Macedo, to testify on his behalf at a prior personal injury trial; Mr. Abrishamian claimed that Dr. Macedo refused to testify in that trial, and that his refusal caused Mr. Abrishamian's damages claim to be reduced. The circuit court denied Mr. Abrishamian's Motion for Default on the Counterclaim, mistakenly believing it was a Motion for Default on WMG's underlying Complaint (which Mr. Abrishamian had answered). In the course of discovery, the trial court granted WMG's motion to disqualify counsel for Mr. Abrishamian, Edward Brown, because his conversations with Dr. Macedo went to the heart of the Counterclaim and made him an essential fact witness in the case.

Prior to trial, the court ruled on several motions that Mr. Abrishamian later contested on appeal. *First*, the trial court denied a Motion *in Limine* by WMG in which it asked that Mr. Abrishamian be prohibited from testifying at trial that (according to him) Dr. Macedo had offered to tamper with a brain imaging study in an effort to enhance Mr. Abrishamian's damages in the prior litigation. The trial court denied that Motion, but suggested that if the issue arose in the course of Mr. Abrishamian's testimony, he would address it again at that time. *Second*, at the suggestion of counsel for WMG (and with the consent of counsel for Mr. Abrishamian), the court did not include any claim for interest or attorney's fees on the verdict sheet, but waited to consider them in the event of a jury verdict. *Third*, Mr. Abrishamian asked that the court take judicial notice of several categories of documents prior to trial, including medical bills and information about certain pleadings in Mr. Abrishamian's underlying personal injury litigation. The court denied this request.

The jury awarded WMG damages in the amount of $2,900, and the court later granted WMG's petition for attorneys' fees and interest totalling slightly over an additional $3,000. The jury also

found in favor of WMG on the Counterclaim. Mr. Abrishamian appealed a number of the court's rulings.

Held: Affirmed.

Although the trial court committed a technical error in declining to order an enter of default against WMG on Mr. Abrishamian's Counterclaim—it had not filed an Answer within 30 days of the filing of the Counterclaim as required by the rules—the Court of Special Appeals held that it would be unjust to enter default against WMG retroactively when it ultimately would have moved to vacate any default, and likely would have prevailed given the successful defense it mounted to the Counterclaim on the merits. Given the policy of default judgment in Maryland—to do justice, rather than to punish parties that fail to answer—the Court affirmed the circuit court's denial of the entry of default.

The Court of Special Appeals affirmed the trial court's decision to disqualify Mr. Brown from participating in the case, whether in discovery or by sitting at the trial table. The Court explained that the case relied upon by Mr. Abrishamian, *Klupt v. Krongard*, 126 Md. App. 179 (1999), did not permit piecemeal disqualification as he claimed, and because Mr. Brown played an essential role as a fact witness, the circuit court appropriately barred him from participating in the case in any way at the trial level. (The Court did, however, permit him to argue the appeal).

With respect to the trial court's evidentiary rulings, the Court held that any discussion between Mr. Abrishamian and Dr. Macedo in which the latter allegedly offered to tamper with a brain study was properly prohibited as non-probative and prejudicial, and that Mr. Abrishamian waived the right to appeal because the trial court allowed him the chance to raise the discussion at trial, and he never did so. Moreover, he assented in the trial court's treatment of interest and attorney's fees and waived those issues as well.

Finally, the trial court properly declined to take judicial notice of subjects that did not fall within the scope of the rule. While the doctrine of judicial notice is intended to permit the trial court to notice certain facts as true, it covers *undisputed* facts. Mr. Abrishamian's request that the court take judicial notice of medical bills could have been properly considered as the subject of a stipulation (assuming WMG was willing to so stipulate, though it need not have done so). Mr. Abrishamian never introduced the actual pleadings from the prior litigation, and his request really asked the court to take judicial notice not just of the existence of those pleadings but the truth of his allegations within them—unquestionably an inappropriate subject for the doctrine to apply in the first instance.

Debra Cooch v. S&D River Island, LLC, et al., No. 1800, September Term 2012, filed February 27, 2014. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2014/1800s12.pdf

JURY VERDICTS IN CIVIL CASES – IMPEACHMENT OF VERDICT BY JUROR – LORD MANSFIELD'S RULE – MD RULE 5-606(b) – JUROR MISCONDUCT – NO PRESUMPTION OF PREJUDICE IN CIVIL CASES

Facts:

The appellant's apartment was infested by bedbugs. She eventually vacated the apartment and moved in with her daughter, discarding many of her furnishings and personal belongings in the process. She then brought suit against the appellee, her former landlord, in the Circuit Court for Howard County, seeking damages for personal injury and property damage. The case was tried to a jury, and the jury rendered a special verdict in favor of the appellee landlord, finding duty and breach but no causation. After the jury had been dismissed, an attorney for the appellant happened upon several of the jurors in the courthouse parking lot and asked if they were willing to discuss the case. One juror, known only as "A.B.," said that the appellant "shouldn't have discarded her property," and volunteered that he "did some online research" and "found out that there are companies that provide fumigation services." Based on the juror's admission of online research, the appellant moved for a new trial on damages. The motion was denied. The appellant appealed to the Court of Special Appeals.

Held: Judgment affirmed.

Lord Mansfield's 1785 rule that a juror may not be heard to impeach his own verdict has been recognized in Maryland since at least 1864. The rule is now codified as Maryland Rule 5-606(b), which provides, in part:

"a sworn juror may not testify as to (A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other sworn juror's mind or emotions as influencing the sworn juror to assent or dissent from the verdict, or (C) the sworn juror's mental processes in connection with the verdict."

Lord Mansfield's Rule applies only to evidence discovered after a verdict has been rendered. Before a verdict has been rendered, public policy in favor of verdict finality is not implicated, and the court may take steps to investigate and cure any potential juror misconduct.

In criminal cases, evidence of juror misconduct or extraneous influence on a juror gives rise to a presumption of prejudice. *Jenkins v. State*, 375 Md. 284, 825 A.2d 1008 (2003). There is no such presumption in civil cases. Even if a civil litigant can offer admissible proof of an

extraneous influence on the jury, she still must show that she was sufficiently prejudiced by the infraction so as to warrant a new trial.

Kathy J. Gordon v. Tammie L. Lewis, et al, No. 1505, September Term 2011, filed December 18, 2013. Opinion by Sharer, J.

http://www.mdcourts.gov/opinions/cosa/2013/1505s11.pdf

ARBITRATION – POWER OF ARBITRATION PANEL TO AWARD PUNITIVE DAMAGES – PANEL DID NOT EXCEED POWERS

Facts:

Tammie Lewis acted as a tax preparer, and later as a financial advisor to Kathy J. Gordon and her husband. Lewis also served as trustee of the Tammie L. Lewis Revocable Trust, which had been funded by a tort settlement in favor of Kathy Gordon.

Suspecting mismanagement, the Lewis's filed a complaint alleging, *inter alia*, fraud and mismanagement. Upon motion by the defendants, the issues were referred to arbitration before the Financial Industry Regulatory Authority. The arbitration panel awarded both compensatory and punitive damages.

None of the defendants moved to modify or correct the award, but moved to vacate the award. After a hearing, the Circuit Court for Worcester County denied the motion to vacate and affirmed the award, both as to compensatory and punitive damages.

Held:

Judicial review of arbitrator's decision is extremely limited. Upon arbitration panel's full consideration of claims for fraud, where arbitration panel issues an award for punitive damages upon finding that appellant's withholding of information about investment was willful and wanton, circuit court properly affirmed the award. Because punitive damages may be awarded by a court for fraudulent actions consisting of failure to disclose material facts, an arbitration panel may likewise issue such an award. Where arbitration panel found that appellant engaged in willful and wanton conduct by knowingly withholding relevant information about investment in claim, arbitrators did not exceed their powers by issuing award of punitive damages.

Havilah Real Property Services, LLC v. Ronald Early, et al., No. 51, September Term 2013, filed March 27, 2014. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2014/0051s13.pdf

MALICIOUS PROSECUTION – ACTIONS – NATURE AND FORM OF REMEDY

MALICIOUS PROSECUTION – PROBABLE CAUSE – MOTION FOR JUDGMENT

MALICIOUS PROSECUTION – MALICE

ATTORNEY AND CLIENT – PRIVILEGE – LIABILITY TO THIRD PARTY

Facts:

Appellant Havilah Real Property Services, LLC ("Havilah") is a Maryland limited liability company engaged in the business of buying, selling, and owning real estate. Attorney Ronald Early and his firm, Lerch, Early & Brewer, Chtd. ("the Attorneys") sued Havilah in 2007 on behalf of their clients, another real estate firm, for tortious interference with business relationships, fraud, and other counts. As part of the suit, the Attorneys filed 48 *lis pendens* on properties Havilah owned. Havilah moved for summary judgment and twice moved for judgment over the course of the case and was unsuccessful each time, though it was ultimately found not liable on any of the counts in the complaint.

In 2012, Havilah filed a complaint for malicious use of process against the Attorneys, on the grounds that the Attorneys knew there was no probable cause to support the filing of 31 of the 48 *lis pendens* filed in the original case against Havilah. The Attorneys argued that the denial of Havilah's motions for summary judgment and motions for judgment demonstrated that there was probable cause to bring the underlying case. After a hearing on the Attorneys' motion to dismiss, the circuit court agreed with the Attorneys that Havilah could not demonstrate the absence of probable cause, a required element of the tort of malicious use of process. The court also concluded that Havilah could not demonstrate that the Attorneys acted with actual malice.

Held: Affirmed.

The Court of Special Appeals affirmed the dismissal of the complaint, finding that Havilah had not alleged sufficient facts in support of its malicious use of process claim. Malicious use of process has five elements: (1) a prior civil proceeding must have been instituted by the defendant; (2) the proceeding must have been instituted without probable cause; (3) the prior civil proceeding must have been instituted by the defendant with malice; (4) the proceedings must have been terminated in favor of the plaintiff; and (5) the plaintiff must establish special injury. *See One Thousand Fleet Ltd. P'ship v. Guerriero*, 346 Md. 29, 37 (1997). After

reviewing Maryland and other states' case law, the Court determined that a prior ruling on a motion for judgment is relevant to the probable cause inquiry because the denial of that motion shows that reasonable jurors could differ as to whether the moving party should prevail. In other words, if reasonable jurors could find in a party's favor, it follows that there was probable cause for bringing the case. The Court thus held that the denial a motion for judgment is a sound indicator of probable cause that normally establishes there was probable cause to sue, thus barring a subsequent malicious use of process suit. Because Havilah's two motions for judgment were both denied, the Court concluded that the Havilah could not demonstrate that the underlying lawsuit lacked probable cause.

The Court also found that Havilah failed to allege sufficient facts to demonstrate malice. In malicious use of process, malice means that the party instituting proceedings was actuated by an improper motive and may be inferred from a lack of probable cause. *See One Thousand Fleet Ltd. P'ship*, 346 Md. at 47. Havilah argued that a client's malice could be imputed to his or her attorney. The Court rejected this interpretation for two reasons: (1) attorneys have a qualified privilege that protects them from potential civil liability to their clients' litigation adversaries, except where the attorneys act with actual malice, bad intent, or for the attorneys' personal benefit, *see Fraidin v. Weitzman*, 93 Md. App. 168, 236-37 (1992); and (2) in malicious use of process, where probable cause exists, malice, however strong, will not constitute a cause of action, *see Walker v. American Sec. & Trust. Co. of Washington, D.C.*, 237 Md. 80, 89 (1964).

Sierra Club, et al., v. Dominion Cove Point LNG, L.P., No. 2429, September Term 2012, filed February 28, 2014. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2014/2429s12.pdf

CONTRACTS – CONSTRUCTION AND OPERATION – GENERAL RULES OF CONSTRUCTION – INTENTION OF PARTIES – LANGUAGE OF CONTRACT

Facts:

Dominion Cove Point LLC ("Dominion") owns a liquid natural gas ("LNG") plant referred to as Cove Point. In 1972, Columbia Gas (Dominion's predecessor) constructed an import terminal to import LNG. In 1978, Columbia Gas and the Sierra Club entered into an agreement regarding the use of Cove Point. The agreement was rewritten in 1978 and in 1994, after Columbia Gas received permission to conduct new services on the facilities. Between 1994 and 2005, Cove Point was used only to import natural gas and for peaking services. However, in 2005, Dominion sought to expand its Cove Point operations and as a result, the three parties entered into the 2005 Agreement.

Since 2005, the domestic natural gas market has changed dramatically as a result of new technological applications. A process known as hydraulic fracturing ("fracking") created new supplies of natural gas in the United States. In response, in 2011, Dominion announced plans to expand its Cove Point operations in order to add new export capabilities. Sierra Club opposed the new plans, asserting the 2005 Agreement does not authorize exportation. Dominion thereafter filed an action for declaratory judgment against Sierra Club and MCC in the Circuit Court for Calvert County.

In the circuit court, the parties filed cross motions for summary judgment. Dominion sought judgment confirming its right to construct new liquefaction facilities and its right to transfer LNG from Cove Point to the offshore pier to export. The Sierra Club argued that the 2005 Agreement does not authorize Dominion to export LNG from the Cove Point facility because the Agreement "limits Dominion to an exclusive list of enumerated activities at Cove Point, and export of LNG is not authorized by that list."

The circuit court granted Dominion's motion, reasoning that all of the new processes Dominion sought to perform were authorized under the 2005 Agreement. Sierra Club appealed.

Held: Affirmed.

The Court of Special Appeals held that the 2005 Agreement was unambiguous and therefore, the language of the contract controlled. The Court determined that although export was not explicitly permitted in the 2005 Agreement, the substantive provisions of the Agreement permit

Dominion to perform the functions necessary to export. As such, the intent of the parties at the time the contract was entered into was not relevant.

Alexander Eugene Malaska v. State of Maryland, No. 2407, September Term 2012, filed February 28, 2014. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2014/2407s12.pdf

CRIMINAL LAW – CONFRONTATION CLAUSE

CRIMINAL LAW – JURY INSTRUCTIONS

Facts:

After a trial by jury, the defendant was convicted of voluntary manslaughter for fatally shooting a neighbor during a neighborhood brawl involving the defendant's son. (The defendant contended at trial that he shot the wrong neighbor—i.e., that he intended to shoot someone else who was also involved in the fight, but missed and killed the victim instead). The victim's body was subsequently transported to Baltimore for an autopsy. At trial, the State called the supervising medical examiner to testify about the autopsy and autopsy report, but did not call the forensic pathology fellow who performed the physical dissection of the victim. At the close of evidence, the defendant requested that the trial court instruct the jury as to complete and partial self-defense, as well as transferred intent self-defense and defense of others. The trial court gave the two former, but not the two latter, jury instructions.

On appeal, the defendant asserted, among other claims, that his right to confront the witnesses against him, as guaranteed by the Sixth Amendment and Article 21 of the Maryland Declaration of Rights, had been violated because the forensic pathology fellow was unavailable for cross-examination at trial. The defendant also contended that the trial court erred by failing to instruct the jury as to transferred intent self-defense and defense of others.

Held: Affirmed.

The Court of Special Appeals explained that the confrontation rights set forth in the Sixth Amendment and Article 21 act to "protect[] the defendant from the government's use of statements made outside the courtroom as evidence in trial without calling the witness to testify," *Green v. State*, 199 Md. App. 386, 399 (2011), and that they apply where: 1) the challenged out-of-court statement or evidence is presented for its truth, and 2) the challenged out-of-court statement or evidence is testimonial—i.e., bears indicia of solemnity. *Derr v. State*, 434 Md. 88, 106-07 (2013). Applying this rule, the court held that the autopsy report at issue was testimonial in nature because it contained sufficient formalities, including the signatures of the assistant and chief medical examiners, and the signatures of those who participated in the autopsy and formulated its results, which, although the words "attest" or "certify" did not appear on the report, clearly implied that the signatories agreed with and approved the contents of the report.

The Court also observed that the conclusions stated in the report were created pursuant to detailed formalities required by statute.

The Court next turned to the question of whether the defendant's rights had been violated by the failure of the forensic pathology fellow to testify at trial. The Court answered this question in the negative, holding that, where, as in that case, a supervisor and assistant were both involved in conducting the autopsy in their respective roles, and the supervisor made the ultimate determinations as to the conclusions set forth in the autopsy report, and edited, signed, and approved the report, the confrontation clause was satisfied where the supervisor, but not the assistant, testified about the report's conclusions at trial.

With respect to jury instructions, the Court observed that the problem with the transferred intent self-defense jury instruction requested by the defendant was that it placed too much emphasis on the *actus reas*, the results of his actions—i.e., that he allegedly shot and killed the wrong person—rather than on his *mens rea* at the time he pulled the trigger. Maryland law, the Court explained, no longer assesses responsibility for the unintended consequences of criminal acts in terms of whether criminal intent follows the corresponding criminal act to its unintended consequences. Thus, the relevant inquiry was whether, at the time the fatal shot was fired, the defendant had the requisite *mens rea* for self-defense. The instructions provided to the jury correctly, and fully, addressed this requirement. As for defense of others, the Court determined that the defendant's request was not properly preserved for appellate review, and that plain error review was inappropriate in light of the theories of the case and the arguments presented by the parties at trial.

William Jackson v. State of Maryland, No. 2614, September Term 2012, filed February 28, 2014. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2014/2614s12.pdf

C.P. § 8-301 – MERITS OF PETITION FOR WRIT OF ACTUAL INNOCENCE – NEWLY DISCOVERED EVIDENCE–DUE DILIGENCE – NEWLY DISCOVERED EVIDENCE–IMPACT OF EVIDENCE

Facts:

In 1987, a jury sitting in the Circuit Court for Baltimore City convicted William Jackson, appellant, of first-degree murder, first-degree sexual offense, and use of a handgun in the commission of a crime of violence. On December 12, 2011, appellant filed a Petition for Writ of Actual Innocence based on evidence that the State's ballistics expert, Joseph Kopera, lied about his qualifications during appellant's trial. After holding a hearing on the merits of appellant's petition, the circuit court denied it.

Held: Affirmed.

The circuit court did not abuse its discretion in denying appellant's Petition for Writ of Actual Innocence, which was based on evidence that Mr. Kopera lied about his academic credentials during his testimony. Md. Code (2011 Supp.) § 8-301(a) of the Criminal Procedure Article ("C.P.") requires a defendant to show two things to prevail on a Petition for Writ of Actual Innocence: (1) newly discovered evidence that "could not have been discovered in time to move for a new trial under Maryland Rule 4-331"; and (2) that the evidence "creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined."

In finding that appellant failed to meet his burden of proof with respect to the first required showing under C.P. § 8-301, the circuit court noted that another attorney had uncovered Mr. Kopera's falsification of his credentials subsequent to appellant's trial, and that evidence was thus readily discoverable by appellant. Although there may have been reasons that appellant's counsel did not pursue an investigation into Mr. Kopera's credentials, the circuit court did not abuse its discretion in finding that appellant failed to show that the evidence could not have been discovered in the exercise of due diligence.

The second required showing under C.P. § 8-301 is a two-part inquiry: first, the court should assess whether the evidence is material to the result of the trial, and second, if the first question is answered in the affirmative, the court should inquire as to whether the evidence created "a substantial or significant possibility that the result may have been different." Here, the circuit

court properly determined that the evidence of Mr. Kopera's perjury was not material, but mere impeachment evidence. Moreover, the evidence did not create "a substantial or significant possibility that the result may have been different." Mr. Kopera's testimony was limited, and the evidence of appellant's guilt without Mr. Kopera's testimony was compelling.

Frank Theodore Williams v. State of Maryland, No. 1782, September Term 2012, filed February 26, 2014. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2014/1782s12.pdf

FOURTH AMENDMENT – SEARCH AND SEIZURE – WARRANTLESS SEARCH AND SEIZURE – SEARCH AND SEIZURE OF CELL PHONE – INDEPENDENT SOURCE – TELEPHONE RECORDS

Facts:

The appellant was convicted by a jury in the Circuit Court for Baltimore County of first-degree murder and other charges arising out of a gang-related shooting in a parking garage at the Towson Town Mall. Shortly after the shooting, police detained the appellant, placed him in handcuffs, and seized his cellphone. While still at the mall, a witness negatively identified the appellant as the shooter and the handcuffs were removed. Nevertheless, police transported him to the station house for questioning. At the end of the police interview, which was given without *Miranda* warnings, the appellant was released. During the interview, however, a detective retained possession of the appellant's cellphone and wrote down the telephone numbers associated with incoming calls. Before trial, the appellant moved to suppress his cellphone number, the telephone numbers associated with incoming calls, and the identities of incoming callers, all of which, he argued, were illegally obtained from his cellphone during the police interview. The appellant also moved to suppress statements he made during the interview with police. The court denied the motions.

Held: Affirmed.

The appellant voluntarily provided his cellphone number to police in the course of the interview with detectives. Detectives used this number to obtain the appellant's cellphone records from the telephone company. Even assuming that detectives needed the appellant's cellphone number to obtain his telephone records, they had obtained it by an independent source, the appellant himself. Whatever evidence the State introduced of the appellant's incoming and outgoing calls was gleaned from information provided by the telephone company, which was independent of information detectives wrote down from the appellant's cellphone during the police interview.

The appellant said nothing of inculpatory significance during the interview with detectives that did not come into evidence through another witness. The appellant's admission that he was present at the mall at the time of the shooting was self-evident, as that was where police discovered and initially detained him. The fact that he was present at the mall with other co-conspirators was evidenced by video from 268 mall security cameras and the testimony of other witnesses, including one of the co-conspirators.

John R. Leopold v. State of Maryland, No. 17, September Term 2013, filed March 26, 2014. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2014/0017s13.pdf

OFFICERS AND PUBLIC EMPLOYEES – OFFENSES

CONSTITUTIONAL LAW – CERTAINTY AND DEFINITENESS – VAGUENESS

SENTENCING AND PUNISHMENT – ILLEGAL SENTENCE – VALIDITY

Facts:

Appellant, John R. Leopold, appeals his conviction in the Circuit Court for Anne Arundel County for two counts of misconduct in office. On March 2, 2012, Leopold was charged by indictment with four counts of misconduct in office (Counts 1-4) and fraudulent misappropriation by a fiduciary (Count 5). Following a bench trial, the court found Leopold guilty of Counts 1 and 3, for directing his employees to engage in campaign activities and to empty his urinary catheter. He was acquitted of the remaining charges.

On March 14, 2013, Leopold was sentenced to two years' imprisonment with all but 60 days suspended on Count 1. An identical and concurrent sentence was imposed as to Count 3. Leopold was also placed on 5 years of supervised probation, ordered to pay a fine of $100,000.00, and ordered to complete 400 hours of community service by December 31, 2013. As a special condition of probation, the court prohibited Leopold from "be[ing] a candidate for any local, state, or federal elected office." On March 15, 2013, Leopold filed this appeal.

Held: Affirmed in part and vacated in part.

The crime of misconduct in office, with which appellant was charged, is not vague and amorphous; therefore, appellant was not deprived of due process, fair notice, and non-discriminatory application of the law, as he alleges. Appellant committed misconduct in office by directing his employees to wrongfully engage in campaign activity on his behalf, and to attend to his urinary catheter, while placing them in a position where they could not refuse his directions. Although we uphold the trial court's finding of misconduct in office, we vacate the portion of appellant's sentence that prohibits him from running for office because there exists a comprehensive statutory scheme governing the eligibility and removal of public officials in Maryland, and the court, by imposing this special condition of probation, improperly interfered with the process that has been put in place by the Legislature.

Bruce John Beattie v. State of Maryland, No. 765, September Term 2013, filed March 27, 2014. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2014/0765s13.pdf

VOID FOR VAGUENESS DOCTRINE – CRIMINALLY NEGLIGENT MANSLAUGHTER – CL § 2-210

Facts:

Bruce Beattie, appellant, a commercial tractor trailer driver, was driving on I-70 East when he realized he was lost and needed to be driving west on I-70. He pulled from the shoulder of I-70 East across three lanes of traffic, blocking the entire roadway, in an attempt to turn around via a break in the grassy median, which was intended for use by emergency vehicles. Prior to attempting the illegal U-turn, appellant looked for oncoming traffic. He did not see any, but due to a curve in the road, he was able to see only about a quarter of a mile. Michael Neimus was driving on I-70 East when appellant pulled across the three travel lanes. He swerved to try to avoid appellant's 70-foot vehicle, but was unable to do, crashing into the back of appellant's truck. Mr. Neimus was killed in the collision.

Among other charges, appellant was convicted in the Circuit Court for Baltimore County of criminally negligent manslaughter. The circuit court denied appellant's motion to dismiss the indictment on the ground that the statute creating the crime of criminally negligent manslaughter was unconstitutionally vague.

Held: Affirmed.

The circuit court did not err in denying appellant's motion to dismiss his indictment based on his contention that Md. Code § 2-210 (2011 Supp.) of the Criminal Law Article ("CL"), effective October 1, 2011, was void for vagueness. This provision criminalized the offense of criminally negligent manslaughter and provides that "a person may not cause the death of another as the result of the person's driving, operating, or controlling a vehicle or vessel in a criminally negligent manner." CL § 2-210(b). "[A] person acts in a criminally negligent manner" when "(1) the person should be aware, but fails to perceive, that the person's conduct creates a substantial and unjustifiable risk that such a result will occur;" and "(2) the failure to perceive constitutes a gross deviation from the standard of care that would be exercised by a reasonable person." CL § 2-210(c).

The elements of this crime are distinct from those in CL § 2-209, manslaughter by vessel or vehicle, which provides that a person may not cause the death of another by driving or operating a vehicle in a "grossly negligent manner," i.e., when the person is conscious of the risk but

proceeds nevertheless. CL § 2-210, however, criminalizes the defendant's failure to perceive a substantial and unjustified risk that death would occur. Thus, the two offenses differ in the defendant's mental state, i.e., his or her consciousness of the risk of his or her conduct.

CL § 2-210, which criminalizes a failure to perceive a substantial risk, which failure constitutes a gross deviation from the standard of care exercised by a reasonable person, is not unconstitutionally vague. The statute informs persons of ordinary intelligence of the prohibited conduct, and it provides a legally enforceable standard. Accordingly, the circuit court did not err in declining to dismiss the indictment.

Margaret K. Vito by Michael L. Vito v. E. Edward Klausmeyer, Jr., Personal Representative of the Estate of E. Edward Klausmeyer, Sr., No. 44, September Term 2013, filed March 4, 2014. Opinion by Eyler, James R., J.

http://www.mdcourts.gov/opinions/cosa/2014/0044s13.pdf

ESTATES & TRUSTS – ESTATE ADMINISTRATION

Facts:

Appellant appealed from an order by the Orphans' Court for Baltimore County denying her petition to vacate the court's prior approval of administration accounts in the estate of E. Edward Klausmeyer, Sr, decedent. Appellee is the personal representative of the estate. The question was whether the beneficiary of a testamentary trust may file exceptions to an administration account after the statutory deadline for doing so when the beneficiary did not receive notice of the filing of the account. The Court answered that question in the negative and affirmed the judgment.

On April 25, 2011, appellee filed a first administration account. On April 28, 2011, the orphans' court approved the account, subject to the filing of exceptions. No timely exceptions were filed. On December 8, 2011, appellee filed a second and final administration account. By order of the same date, the orphans' court approved the account, subject to the filing of exceptions. No timely exceptions were filed.

On August 22, 2012, appellant filed in orphans' court a petition to vacate the orders approving both administration accounts. The petition also contained exceptions to the administration accounts.

The petition to vacate the orders approving the administration accounts stated that appellant did not receive notice of the filing of either account. Appellant argued that, because she was not given notice, she should have the right to file exceptions, even though the deadlines for doing so had passed. Appellee filed an opposition and motion to dismiss the appellant's petition.

On February 25, 2013, the orphans' court held a hearing, and on March 1, 2013, it filed an opinion and order denying appellant's petition.

Held:

A personal representative is required to file administration accounts with a certification that he or she mailed a notice of the filing to all "interested persons." Md. Code, Estates and Trusts Article (ET) 7-501(a). A trust beneficiary is not an "interested person" as defined in section 1-101(m) and, therefore, is not entitled to notice under section 7-501(a). ET section 7-501(b) and

Maryland Rule 6-417(f) require that exceptions to an administration account must be filed within 20 days after approval of the account by the court. Rule 6-417(g) makes clear that, in the absence of fraud, mistake, or irregularity, if timely exceptions are not filed, "the order of the court approving the account becomes final." *Brewer v. Brewer*, 386 Md. 183, 198, (2005).

Under *Spry v. Gooner*, 190 Md. App. 1 (2010), appellant had standing to file exceptions. Appellant was not an "interested person" as defined in the Estates and Trusts Article, however. The legislature clearly defined persons to whom notice is required, i.e., "interested persons." ET section 1-101(i). The term does not include a beneficiary of a trust.

The concepts of notice and standing are different. The former is based on statutory interpretation, and the latter is based on common law. All persons with standing to challenge an action are not necessarily entitled to notice of the contemplated action. The Court concluded that, when read in context, ET section 7-502(b) refers to persons to whom notice was required to be given. By negative implication, persons entitled to notice as "interested persons" are not bound if notice is not given. This has no bearing on persons to whom notice was not required. Maryland Rule 6-417(g) is consistent with that conclusion. It states that, in the absence of the filing of timely exceptions, "the order of the court approving the account becomes final."

John B. Parsons Home, LLC v. John B. Parsons Foundation, et al., No. 109, September Term 2013, filed March 4, 2014. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2014/0109s13.pdf

TRUSTS AND ESTATES – RIGHTFUL BENEFICIARY OF A TRUST

Facts:

On July 1, 1964, Francis C. Baker established a trust ("the Baker Trust"). The trust instrument ("the Deed") provides that, upon the death of certain named individuals ("the trigger event"), the trust will terminate, with the remaining proceeds distributed to three "named institutions, or [their] respective successor[s]." One such institution is the "John B. Parsons – Salisbury Home for the Aged."

At the time the Baker Trust was executed, an entity known as the John B. Parsons – Salisbury Home for the Aged ("JBP Salisbury") owned and operated a residential and health care home for the elderly ("the Home"). The Home and the entity that owned the Home shared the name the "John B. Parsons – Salisbury Home for the Aged" at the time the Baker Trust was established.

In the 1980s, due to economic considerations, JBP Salisbury solicited the financial and managerial support of J.P. Harrison, Incorporated. JBP Salisbury and J.P. Harrison executed an agreement whereby JBP Salisbury agreed to transfer the Home and the personal property associated with the Home to J.P. Harrison. Despite the transfer, however, JBP Salisbury continued on existence carrying out its philanthropic objectives.

Both J.P. Harrison and JBP Salisbury underwent corporate restructuring. J.P. Harrison was eventually converted to the "John B. Parsons Home, LLC" ("JBPH"), which is the entity that currently manages and operates the Home. JBP Salisbury converted to the John B. Parsons Foundation ("the Foundation"). The Foundation currently exists as a non-profit organization dedicated to providing a multitude of charitable services, including the care for the elderly.

Subsequently, upon the happening of the trigger event, Manufacturers and Traders Trust Company ("M&T"), the trustee of the Baker Trust, began making distribution payments to JBPH. Upon learning of the trust distributions, the Foundation demanded that M&T cease making the distribution payments to JBPH. The Foundation filed suit in the Circuit Court for Wicomico County requesting declaratory relief that it is the rightful beneficiary of the Baker Trust, not JBPH. The circuit court agreed with the Foundation and, therefore, granted the Foundation summary judgment.

Held: Affirmed.

The Court of Special Appeals held that a charitable entity is entitled to distributions from a trust when it is named in the trust instrument and when the entity continues to carry out its original charitable purpose, consistent with the Settlor's intent. Specifically, the Court of Special Appeals held that the Foundation is the rightful beneficiary under the Baker Trust because it is expressly named in the Baker Trust and because it continues to provide a multiple of charitable services, including the care for the elderly. Moreover, the Court held that JBP Salisbury did not transfer "all or substantially all" of its assets, as JBPH alleged. Rather, JBP Salisbury only transferred the real and personal property associated with the Home itself. As such, because the Foundation did not transfer "all" of its assets, and because the Foundation continues to exist as a charitable organization carrying out the same charitable purposes, it is the rightful beneficiary under the Baker Trust.

The Court of Special Appeals further held that, although a "chose in action" is a property interest, unknown beneficiary rights do not constitute "choses in action" subject to transfer.

In addition, the Court addressed the Foundation's cross-appeal that the circuit court erred in dismissing the Foundation's claim for trover and conversion. The Court of Special Appeals held that the passage of approximately nine years from the first distribution payments inevitably resulted in the commingling of the funds, thereby rendering the disputed funds not subject to a claim of conversion. The Court further held that, assuming the Baker Trust distribution payments are subject to a claim of conversion, permitting the Foundation to recover on the conversion claim would countenance double-recovery in favor of the Foundation. Accordingly, the Court rejected the Foundation's cross-appeal.

The Court of Special Appeals also rejected the issues raised by M&T in its cross-appeal. The Court held that JBPH's corporate parent, Harrison Enterprises ("Harrison"), is not entitled to intervene as an indispensable or necessary party. Specifically, the Court held that Harrison's interests are fully and adequately protected by JBPH and, therefore, Harrison is not permitted to intervene as a matter of right. In addition, the Court rejected M&T's argument that the circuit court erred in dismissing its constructive fraud claim against JBPH. The Court concluded that the circuit court correctly found that M&T failed to allege constructive fraud with the requisite specificity to withstand a motion to dismiss.

John Beauchamp Reynolds, III v. Valerie Lambiase Reynolds, No. 1691, September Term 2012, filed February 26, 2014. Opinion by Matricciani, J.

http://www.mdcourts.gov/opinions/cosa/2014/1691s12.pdf

DIVORCE – ALIMONY – CHILD SUPPORT – IMPUTED INCOME – VOLUNTARY IMPOVERISHMENT – GIFT INCOME – STANDARD OF LIVING – MARITAL PROPERTY – FL § 8-201 – TRUSTS

Facts:

Husband and Wife graduated from Yale Law School in the early 1980's and took jobs with prestigious law firms in the Washington, D.C., area. After a difficult pregnancy with twins, the parties decided that Wife would not return to practice, where she had been earning approximately $120,000 per year. Husband continued to work in private practice and by 2010 was earning over $800,000 per year. The parties owned a residence worth approximately $2 million and paid for household help, dinners out, private school for the children, two international vacations each year, new model foreign cars, charitable donations to their alma maters, and substantial retirement savings.

After attempts at counseling failed, the parties abruptly separated on July 29, 2010. Husband rented a four-bedroom home at the cost of $5,000 per month. Meanwhile, Wife purchased a $1.52 million home jointly with her father. The purchase was financed in part by liquidating investments that Wife held as trustee for the parties' children.

Wife's father gave her over $100,000 between June of 2010 and April of 2011. In addition to these gifts, Wife received monthly $8,000 checks from a minority interest in her family's commercial real estate company.

Wife sued for absolute divorce and demanded alimony, child support, monetary award, and other relief. At trial, wife testified that she has rheumatic heart disease and will likely need valve replacement surgery as well as two leg surgeries, that she has difficulty sleeping, and that she requires psychiatric therapy. She also asked the court to impute the rate of return on United States Treasury securities to the pre-marital balance of her retirement account.

The trial court found that Wife had no earned income and awarded her indefinite alimony of $13,400 per month, to alleviate the parties' unconscionably different lifestyles. The court also found that the assets Wife used to purchase her new home were non-marital, and it refused to impute her proffered rate of return to her retirement account.

Held: Affirmed.

First,"imputed income" is a child support concept predicated on a finding of voluntary impoverishment. Although alimony is a separate issue from child support, it similarly requires the court to consider the ability of the party seeking alimony to be wholly or partly self-supporting and the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment. Thus, a finding of voluntary impoverishment would ordinarily entail a finding that the party seeking alimony could support him or herself, but chooses not to. Here, the court awarded indefinite alimony to Wife because of an unconscionable disparity in the parties' standards of living after their divorce. In this context, and because Wife was 56-years-old, had been unemployed for more than twenty years, and had significant health problems, the trial court did not err in refusing to impute a $30,000 and $40,000 annual income to her.

Third, where regular gifts from Wife's father ceased abruptly, nearly a year before trial, the court reasonably inferred that the father was "unable or unwilling to continue" the gifts to his daughter and did not err when it excluded them from its income calculations.

Fourth, although Wife was awarded half of Husband's retirement assets and would not technically "retire" from employment, the trial court rightly considered her need to save for the future—at her accustomed standard of living—when it awarded alimony to her.

Fifth, where wife spent money from her children's trust accounts to make part of the down-payment on property, she acted as a trustee and did not "acquire" the funds, which remained non-marital assets under FL § 8-201.

Sixth, the trial court did not err when it excluded evidence of the rate of return on United States Treasury Notes during the parties' marriage and refused to impute that rate to the initial, non-marital balance of Wife's retirement account. Although a trial court could, in principle, attribute a reasonable rate of return to assets, to do so in the present case would require complex financial accounting beyond the scope of the court's ordinary fact-finding ability.

Darlene Matthews v. Housing Authority of Baltimore City, No. 2366, September Term 2012, filed March 26, 2014. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2014/2366s12.pdf

MANDAMUS – DECISIONS REVIEWABLE AND PROPER MODE OF REVIEW

UNITED STATES – HOUSING SUBSIDIES AND RENT SUPPLEMENTS

Facts:

On April 4, 2012, appellee, the Housing Authority of Baltimore City ("HABC"), informed appellant, Darlene Matthews ("Darlene"), that her participation in the Housing Choice Voucher Program ("HCVP") would be terminated because her husband, Gerald Matthews, Sr., had listed her HCVP residence as his mailing address and, therefore, was considered to have been residing in her household as an unauthorized occupant. Darlene requested an informal hearing, which was held on May 16, 2012. By letter dated May 31, 2012, the HABC Hearing Officer informed Darlene that the HABC's decision to terminate would be upheld. On June 14, 2012, Darlene filed a Petition for Administrative Mandamus in the Circuit Court for Baltimore City, asking the circuit court to review the HABC Hearing Officer's decision. Following a hearing on December 11, 2012, the court affirmed the HABC's decision. This timely appeal followed.

Held: Reversed.

Review of the HABC's decision is possible through administrative mandamus pursuant to Md. Rule 7-401(a). Nowhere in the HABC's Administrative Plan does it state that termination from the HCVP is warranted when a non-household member (*i.e.*, someone not physically living or residing in the house) uses the subsidized unit's address as his or her mailing address. Thus, there is no violation of any HABC policy or regulation of the Department of Housing and Urban Development which, when applied to the facts of the case, would warrant termination for failure to fulfill family obligations.

Blackstone International Ltd., et al. v. Maryland Casualty Company, et al., No. 2302, September Term 2012, filed February 28, 2014. Opinion by Matricciani, J.

http://www.mdcourts.gov/opinions/cosa/2014/2302s12.pdf

INSURANCE – DUTY TO DEFEND – POTENTIALITY OF COVERAGE – "ADVERTISING INJURY"

Facts:

Blackstone designs and manufactures lighting products. It was sued in 2010 by RMG, Inc., whose complaint alleged that the parties had agreed to a joint venture to market low vision lighting products, and that its efforts yielded various promotional materials and the product's brand name, which Blackstone used to promote its products. RMG further alleged that Blackstone breached its promise to give RMG seven percent of gross revenues from these products' sales, as well as a fifty-percent interest in related ventures. Based on these allegations, RMG claimed breach of oral contract, promissory estoppel, unjust enrichment, and intentional misrepresentation.

Appellees, the Insurers, had issued a policy to Blackstone covering damages from "advertising injuries." Their written agreement defined that term as injuries arising out of the use of another's advertising idea in Blackstone's advertisement, or out of infringement upon another's copyright, trade dress, or slogan. The policy's text excluded, however, intentional injuries and injuries arising out of a breach of contract, except an implied contract to use another's advertising idea in Blackstone's advertisement.

The Insurers brought a complaint seeking a declaratory judgment that they had no duty to defend or indemnify Blackstone. Blackstone counterclaimed and sought attorney's fees in both the underlying litigation and the present suit. Blackstone moved for partial summary judgment on the issue of the Insurers' duty to defend, and the Insurers moved for summary judgment on both their duty to defend and to indemnify Blackstone. The circuit court found for the Insurers and entered summary judgment in their favor.

Held: Vacated and remanded.

The Court of Special Appeals vacated the judgment and remanded the case for further proceedings. The Insurers had a duty to defend Blackstone in the underlying litigation under the "advertising injury" clause. The Insurers affirmatively waived the policy's exclusions for intentional acts and breaches of contract, which would otherwise have prevented RMG's claims from falling within the general definition of "advertising injury." Thus, coverage depended only on whether RMG's injuries "arose out of" the use of its advertising ideas in Blackstone's

advertisements. RMG's claims against Blackstone for breach of contract, promissory estoppel, and intentional misrepresentation were not "advertising injuries" because they did not "arise out of" the use of RMG's advertising ideas in Blackstone's advertisements; each claim depended only on RMG having worked to develop advertising ideas, not on their actual use by Blackstone. However, RMG's unjust enrichment claim depended on Blackstone retaining the benefit from the use of those advertising ideas. The claim thus bore a "direct and substantial" relationship to that use, and the injuries "arose out of" it, making them "advertising injuries" that the Insurers were bound to defend.

Woodburn's Beverage, Inc. v. Board of License Commissioners for Calvert County, et al., No. 763, September Term 2012, filed March 26, 2014. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2014/0763s12.pdf

ALCOHOLIC BEVERAGES – LICENSES – PROPOSED TRANSFER TO CHAIN STORE

STATUTORY CONSTRUCTION – ADMINISTRATIVE CONSTRUCTION – IMPACT OF LAXITY IN ENFORCEMENT

Facts:

In 2011, Woodburn's Beverage, Inc., the alcoholic beverage license component of Woodburn's Food Market sought to convert its license to a Class A beer and wine license and transfer it to the Food Lion, a large chain store. The Board of License Commissioners for Calvert County rejected the transfer as inconsistent with Md. Code (1957, 2011 Repl. Vol.), Art. 2B, § 9-102(a-1). That statute provides that a Class A, B, or D alcoholic beverage license may not be transferred to any business establishment of the type commonly known as chain stores, supermarkets, or discount houses. This law originally enacted in 1952, and apparently expanded in 1978 to all major classes of alcoholic beverages licenses, contained a grandfather provision. This exemption states that the prohibition does not affect a business establishment "already holding such a license" or the possibility of such licensee having the license transferred to "a similar type" of business establishment.

Woodburn's argued before the Liquor Board that it already held in 1962 and 1978 one of the licenses enumerated in § 9-102(a-1) and, in any event, the proposed transfer to the Food Lion would be made to a similar type of business establishment. In an ambiguously worded decision, the Board clearly rejected the first contention because Woodburn's license had changed classes and implicitly rejected the second argument. The Circuit Court for Calvert County agreed with the Board finding that the Food Lion was not similar to Woodburn's without addressing the first rationale for the administrative determination.

Held: Affirmed.

On appeal to the Court of Special Appeals, the Court affirmed on both grounds. The Court held that under Article 2B, § 9-102(a-1), a change in the class of license by a business grandfathered in 1962/1978 removes the licensee from that exemption and subjects the business to the chain store/supermarket prohibition. It noted that "categories of licenses are neither equivalent nor fungible" and also emphasized the absence of language found in local chain store/supermarket grandfather provisions that expressly sanctioned changes in license classification. The Court

rejected Woodburn's contention that the Board had ignored the law's prohibition by its past approval of Woodburn's license changes. "[A]ny long-standing administrative interpretation or practice or laxity in enforcement that is contrary to the clear and ambiguous language of a statute cannot be given effect," the Court said.

Turning to the second question before the Board, the Court held that the Food Lion was not similar to Woodburn's "whether in 1962, 1978 or 2010." The Court said that Woodburn's, even at its peak, was a small, but growing one-store 16,000 square foot food market, not comparable to a 39,000 square foot chain store.

ATTORNEY DISCIPLINE

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By a Per Curiam Order of the Court of Appeals dated March 7, 2014, the following attorney has been disbarred:

RONAL MARC LEVIN

*

By a Per Curiam Order of the Court of Appeals dated March 7, 2014, the following attorney has been disbarred:

LEE ELLIOTT LANDAU

*

By an Order of the Court of Appeals dated March 10, 2014, the following attorney has been disbarred by consent:

KIRAN MOOLCHAND DEWAN

*

This is to certify that the name of

JIMMY ANTHONY BELL

has been replaced upon the register of attorneys in this state as of March 20, 2014.

*

By an Opinion and Order of the Court of Appeals dated March 24, 2014, the following attorney has been placed on inactive status:

NIKOLAOS PANAGIOTIS KOURTESIS

*

*

By an Order of the Court of Appeals dated March 28, 2014 the following attorney has been indefinitely suspended by consent:

SANDY F. THOMAS-BELLAMY

*

By an Order of the Court of Appeals dated March 28, 2014, the following attorney has been disbarred:

ERIN MARIE WEBER aka ERIN WEBER ANDERSON

*

Return to ToC

JUDICIAL APPOINTMENTS

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On February 24, 2014, the Governor announced the appointment of the **HON. MELISSA KAYE COPELAND** to the Circuit Court for Baltimore City. Judge Copeland was sworn in on February 28, 2014 and fills the vacancy created by the retirement of the Hon. David W. Young.

*

On February 24, 2014, the Governor announced the appointment of the **HON. SHANNON ELIZABETH AVERY** to the Circuit Court for Baltimore City. Judge Avery was sworn in on March 4, 2014 and fills the vacancy created by the retirement of the Hon. M. Brooke Murdock.

*

On February 24, 2014, the Governor announced the appointment of the **HON. KAREN FRIEDMAN** to the Circuit Court for Baltimore City. Judge Friedman was sworn in on March 5, 2014 and fills the vacancy created by the retirement of the Hon. Marcella A. Holland.

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On February 24, 2014, the Governor announced the appointment of **DAVID BRIAN ALDOUBY** to the District Court of Maryland – Baltimore City. Judge Aldouby was sworn in on March 5, 2014 and fills a new judgeship created by the General Assembly.

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On February 24, 2014, the Governor announced the appointment of **CYNTHIA HOLLY JONES** to the Circuit Court for Baltimore City. Judge Jones was sworn in on March 13, 2014 and fills the vacancy created by the retirement of the Hon. Martin P. Welch.

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On February 24, 2014, the Governor announced the appointment of **JULIE LYNN GLASS** to the Circuit Court for Baltimore County. Judge Glass was sworn in on March 17, 2014 and fills the vacancy created by the retirement of the Hon. Patrick Cavanaugh.

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On February 24, 2014, the Governor announced the appointment of the **HON. MICHAEL WILSON REED** to the Court of Special Appeals. Judge Reed was sworn in on March 18, 2014 and fills the vacancy created by the elevation of the Hon. Shirley M. Watts.

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On February 24, 2014, the Governor announced the appointment of **ANDREA MARGARETTA LEAHY** to the Court of Special Appeals. Judge Leahy was sworn in on March 18, 2014 and fills a new judgeship created by the General Assembly.

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On February 24, 2014, the Governor announced the appointment of **KEVIN FRANCIS ARTHUR** to the Court of Special Appeals. Judge Arthur was sworn in on March 18, 2014 and fills a new judgeship created by the General Assembly.

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On February 24, 2014, the Governor announced the appointment of **JAMES HARRY GREEN** to the District Court of Maryland – Baltimore City. Judge Green was sworn in on March 20, 2014 and fills the vacancy created by the elevation of the Hon. Karen Friedman.

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On February 24, 2014, the Governor announced the appointment of **SPYROS JAMES SARBANES** to the Circuit Court for Wicomico County. Judge Sarbanes was sworn in on March 21, 2014 and fills a new judgeship created by the General Assembly.

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On February 24, 2014, the Governor announced the appointment of **MICHAEL ANTHONY DiPIETRO** to the Circuit Court for Baltimore City. Judge DiPietro was sworn in on March 21, 2014 and fills the vacancy created by the elevation of the Hon. Michael W. Reed.

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On February 24, 2014, the Governor announced the appointment of **MASTER ANDREA REESE SINE WATKINS** to the District Court of Maryland – Charles County. Judge Watkins was sworn in on March 21, 2014 and fills a new judgeship created by the General Assembly.

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On February 24, 2014, the Governor announced the appointment of **MARGARET MARIE SCHWEITZER** to the District Court of Maryland – Montgomery County. Judge Schweitzer was sworn in on March 21, 2014 and fills the vacancy created by the death of the Hon. J. Michael Conroy

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On February 24, 2014, the Governor announced the appointment of the **HON. JOYCE MAZEPPA BAYLOR-THOMPSON** to the District Court of Maryland – Baltimore City. Judge Baylor-Thompson was sworn in on March 21, 2014 and fills the vacancy created by the elevation of the Hon. Melissa Kay Copeland.

*

On February 24, 2014, the Governor announced the appointment of the **HON. LAWRENCE VINCENT HILL, JR.** to the Circuit Court for Prince George's County. Judge Hill was sworn in on March 24, 2014 and fills the vacancy created by the retirement of the Hon. Sherrie L. Krauser.

*

On February 24, 2014, the Governor announced the appointment of **MASTER PAUL JOSEPH HANLEY** to the Circuit Court for Baltimore County. Judge Hanley was sworn in on March 24, 2014 and fills the vacancy created by the death of the Hon. S. Ann Brobst.

*

On February 24, 2014, the Governor announced the appointment of **DIANA A. E. SMITH** to the District Court of Maryland – Baltimore City. Judge Smith was sworn in on March 24, 2014 and fills the vacancy created by the elevation of the Hon. Shannon E. Avery.

*

On February 24, 2014, the Governor announced the appointment of **ERIC JOHN NEE** to the District Court of Maryland – Montgomery County. Judge Nee was sworn in on March 24, 2014 and fills a new judgeship created by the General Assembly.

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On February 24, 2014, the Governor announced the appointment of **COLLEEN ANN CAVANAUGH** to the Circuit Court for Baltimore County. Judge Cavanaugh was sworn in on March 27, 2014 and fills the vacancy created by the retirement of the Hon. John G. Turnbull.

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