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Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Taiwo A. Agbaje, Misc. Docket AG No. 87, September Term 2012, filed May 19, 2014. Opinion by Barbera, C.J.

http://mdcourts.gov/opinions/coa/2014/87a12ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

The Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent Taiwo A. Agbaje. The petition alleged that Respondent committed professional misconduct in entering into a Real Estate Investment Partnership with a current client who had no prior legal or real estate investment experience. The Court of Appeals referred the matter to the Honorable Jan Marshall Alexander of the Circuit Court for Baltimore County ("the hearing judge") to hold a hearing and make findings of fact and conclusions of law.

The hearing judge found that Respondent induced a client he represented in immigration matters, Dolapo Popoola, to enter into a real estate investment venture, in which Ms. Popoola would invest $40,000 to repair two properties in Baltimore City, Respondent would find purchasers for the properties, and Respondent and Ms. Popoola would receive a profit from the sales. The hearing judge found that Respondent did not disclose to Ms. Popoola either the risks attendant to the venture, or the nature of various conflicts of interest arising out of his connections to the two properties. Instead, Respondent suggested to Ms. Popoola that profit was a certainty.

After Respondent and Ms. Popoola entered into the agreement, Respondent largely failed to respond to Ms. Popoola's requests for updates as to the progress of renovations to the properties. When he did respond, the hearing judge found, Respondent was persistently misleading. In the end, Ms. Popoola received $2,000 in profit from the sale of one of the properties, but the other property went into foreclosure and, consequently, Ms. Popoola lost the $20,000 she had invested in that property.

Based on his factual findings, the hearing judge concluded that Respondent violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.8(a) and 8.4(a), (b), (c), and (d). The hearing judge found no mitigating circumstances. Respondent filed numerous exceptions related to process and procedure, as well as the hearing judge's findings of fact and conclusions of law.

Held:

The Court of Appeals found the hearing judge's findings of fact, with two limited exceptions, to be supported by clear and convincing evidence and his conclusions of law to be supported by the record. The Court found no merit in Respondent's exceptions concerning process and procedure.

As to the sanction for Respondent's violations of the MLRPC, the Court held that disbarment was appropriate, given his dishonest, deceitful, and fraudulent conduct toward Ms. Popoola. Although Respondent claimed before this Court to suffer from psychiatric conditions, he made no claim that he was debilitated as a result of any such conditions at the times pertinent to this disciplinary action. Accordingly, the Court found no mitigating circumstances justifying a lesser sanction.

Attorney Grievance Commission of Maryland v. Runan Zhang, Misc. Docket AG No. 11, September Term 2013, filed July 21, 2014. Opinion by Watts, J.

Adkins and McDonald, JJ., concur and dissent.

http://www.mdcourts.gov/opinions/coa/2014/11a13ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission ("the Commission"), Petitioner, charged Runan Zhang ("Respondent") with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.2 (Scope of Representation), 1.4 (Communication), 1.7 (Conflict of Interest: General Rule), 1.16 (Declining or Terminating Representation), 3.1 (Meritorious Claims and Contentions), 3.7 (Lawyer as Witness), 4.1 (Truthfulness in Statements to Others), 5.5 (Unauthorized Practice of Law), and 7.4 (Communication of Fields of Practice), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC), as well as the corresponding Virginia Rules of Professional Conduct ("VRPC") and District of Columbia Rules of Professional Conduct ("DCRPC").

A hearing judge found the following facts. On June 21, 2000, Respondent was admitted to the Bar of Maryland. Respondent maintained a solo practice with offices in Rockville, Maryland and the District of Columbia. Respondent's website stated that she specialized in immigration and corporate practice, and that she practiced family law in Maryland, the District of Columbia, and Virginia.

On April 10, 2010, Yuxuan Zhang ("Wife"), Respondent's niece, a non-United States citizen, married Daji Song ("Husband"), a United States citizen, in Fairfax, Virginia. On April 21, 2010, Respondent filed on Husband's behalf a petition for alien relative with the United States Citizenship and Immigration Services. From April 2010 until she withdrew her appearance on November 26, 2010, Respondent represented Husband in the immigration matter. (Although not specifically a part of the hearing judge's factual findings, the record reflected that after marrying Husband in Virginia, Wife returned to China.)

By November 2010, Husband and Wife had separated, and Wife wished to pursue an annulment of the marriage. In November 2010, Respondent assisted Wife in drafting a complaint for annulment that Wife could file *pro se* in the Prince William County Circuit Court in Virginia ("the Virginia Court"). Respondent was not a member of the Bar of Virginia and asked her colleague, Diana Metcalf ("Metcalf"), to serve as co-counsel. Metcalf is a member of both the Bar of Maryland and the Bar of Virginia, and had shared office space with Respondent in Rockville, Maryland since approximately 2003. On November 11, 2010, Respondent and

Metcalf agreed that they would represent Wife as co-counsel and that Metcalf would move for Respondent's admission to the Virginia Court *pro hac vice*. Respondent provided Wife's e-mail address to Metcalf, but advised Metcalf that Wife did not speak English fluently, and that Metcalf would be unable to directly communicate with Wife. Respondent assumed the responsibility of directly communicating with Wife. In reliance on Respondent's advisement concerning Wife's inability to fluently speak English, Metcalf had no direct contact with Wife.

On November 15, 2010, Respondent recognized she had a conflict of interest due to her representation of Husband in the immigration matter, so she did not pursue *pro hac vice* admission and did not enter her appearance in the annulment matter. On November 18, 2010, Wife, *pro se*, filed in the Virginia Court a complaint for annulment prepared by Respondent on Wife's behalf. This filing was an attempt by Respondent to conceal from the Virginia Court her conflict of interest and role as Wife's counsel. The complaint for annulment contained allegations of immigration fraud as to the marriage and the petition for alien relative that Respondent had filed on Husband's behalf.

On January 7, 2011, Respondent, Metcalf, and Leon S. Demsky ("Demsky"), Husband's counsel, appeared in the Virginia Court for a hearing, and Metcalf entered her appearance as Wife's counsel. Based on Respondent's assurances that Wife agreed to the terms, Metcalf signed a settlement agreement (the January Agreement) on Wife's behalf; Respondent had not in actuality discussed the terms of the agreement with Wife before its execution. Ultimately, the parties could not agree on the ground for annulment. On February 17, 2011, Michael W. Lu ("Lu"), Demsky's co-counsel, e-mailed Respondent to explore potential settlement of the annulment matter. In response, Respondent, as Wife's "legal counsel," stated that the proposed grounds were not acceptable and suggested instead that the parties pursue an annulment based on an alleged medical condition of Husband, namely, impotency. Respondent had never discussed the issue with Wife, and had no basis to pursue an annulment based on impotency. Respondent and Lu eventually agreed that Husband would "admit he has an impotency problem." On February 18, 2011, prior to a hearing, Respondent advised Metcalf that Husband was "impotent," that an agreement had been reached, and that Wife had participated in the negotiations and consented to settlement on that basis. In actuality, Wife had not participated in the negotiations. In reliance on Respondent's representations that Wife knew of and agreed to the terms of the agreement, and that Wife authorized Metcalf to sign the agreement, Metcalf executed the agreement (the February Agreement) on Wife's behalf. The Virginia Court signed a consent order reflecting the terms of the agreement. Later, upon learning of the agreement, on March 1, 2011, Wife e-mailed Metcalf in fluent English that Husband was not "impotent" and that she did not consent to or authorize execution of the agreement.

On March 3, 2011, Respondent filed in the Virginia Court a motion to set aside the agreement. Respondent assisted Metcalf in preparing for the hearing on the motion, and drafted notes and an argument for Metcalf. The notes prepared by Respondent contained multiple misrepresentations intended by Respondent to conceal her misconduct. On March 18, 2011, Respondent, Metcalf, and Demsky appeared in the Virginia Court for the hearing, and the Virginia Court vacated the consent order and stated that an attempted fraud had been perpetrated and that there was no good faith basis for the "impotency" claim.

Thereafter, in response to interrogatories that Husband propounded, Wife identified Respondent as a potential witness. At some later point, Husband and Wife were granted a divorce.

Based on the above facts, the hearing judge concluded that Respondent violated MLRPC 1.1, 1.2(a), 1.4(a), 1.7(a), 1.16(a), 3.1, 3.7(a), 4.1(a), 5.5(a), 7.4(a), 8.4(c), 8.4(d), and 8.4(a). The hearing judge based his conclusions of law solely on the MLRPC, and did not address the alleged violations of the VRPC and DCRPC.

The Commission did not except to any of the hearing judge's findings of fact or conclusions of law. Respondent excepted to a multitude of the hearing judge's findings of fact and to all of the hearing judge's conclusions of law. Respondent moved to dismiss the attorney discipline proceeding on the grounds that the MLRPC do not apply to her conduct and that the Amended Petition for Disciplinary or Remedial Action was not sufficiently clear and specific to inform her of which rules of professional conduct applied. Respondent also raised five contentions that do not constitute exceptions to the hearing judge's findings of fact and conclusions of law. The Commission recommended disbarment. Respondent argued that she should not be subject to formal discipline because the Commission failed to prove the violations of the MLRPC by clear and convincing evidence or, in the alternative, that she be reprimanded.

Held:

The Court of Appeals sustained one of Respondent's exceptions to the hearing judge's findings of fact; specifically, the Court sustained Respondent's exception to the finding that Metcalf signed the January Agreement on Wife's behalf "based on [Respondent]'s assurances that Wife consented to the terms"; the record indicated that Metcalf signed the January Agreement based on Respondent's assurances that Metcalf was authorized to sign the agreement because Respondent "had authority to speak for" Wife. The Court overruled the rest of Respondent's exceptions, and upheld the remainder of the hearing judge's findings of fact and all of the hearing judge's conclusions of law. The Court denied Respondent's motion to dismiss and rejected the five contentions that did not constitute exceptions to the hearing judge's findings of fact and conclusions of law. The Court determined that Respondent violated MLRPC 1.1, 1.2(a), 1.4(a), 1.7(a), 1.16(a), 3.1, 3.7(a), 4.1(a), 5.5(a), 7.4(a), 8.4(c), 8.4(d), and 8.4(a) by, among other things, representing Wife in an annulment/divorce matter despite a conflict of interest; by failing to provide competent representation and failing to conduct adequate research into grounds for annulment; by making misrepresentations to Metcalf concerning Wife's ability to communicate in English and Wife's knowledge of, and consent to, the terms of the February Agreement; and by effectively concealing her role in Wife's representation from the Virginia Court. The Court noted two aggravating factors: that Respondent engaged in a pattern of misconduct and violated several MLRPC in her representation of Wife. The Court noted one mitigating factor: absence of prior attorney discipline. The Court rejected Respondent's contentions that three other factors—motive, rectification, and attitude—were mitigating because the record refuted, rather than supported, Respondent's arguments.

The Court held that disbarment was the appropriate sanction for Respondent's violations of MLRPC 1.1, 1.2(a), 1.4(a), 1.7(a), 1.16(a), 3.1, 3.7(a), 4.1(a), 5.5(a), 7.4(a), 8.4(c), 8.4(d), and 8.4(a). Respondent's conduct involved a series of intentional dishonest acts committed over a sustained period of time. Respondent's dishonest conduct ranged from misleading Metcalf about Wife's ability to speak English and Wife's consent to the February Agreement, to participating in deceiving the Virginia Court. The Court noted that there was only one mitigating factor, lack of prior attorney discipline, two aggravating factors, and no compelling extenuating circumstances. The Court examined Respondent's mental state, observing that Respondent's initial motivation, which may have been to help a relative, was accompanied by numerous acts of misconduct, and Respondent's motivation changed to concealment of her misconduct from the Virginia Court through intentional dishonest acts committed over a sustained period of time. The Court held that Respondent's abandonment of her ethical obligation to be honest on multiple occasions over such a significant period of time, combined with her involvement in sponsoring the false February Agreement to the Virginia Court, and her efforts to conceal her own misconduct, warranted disbarment.

Attorney Grievance Commission of Maryland v. Vaughn Miles Mungin, Misc. Docket AG No. 88, September Term 2012, filed July 18, 2014. Opinion by Watts, J.

Harrell and Battaglia, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2014/88a12ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission ("the Commission"), Petitioner, charged Vaughn Miles Mungin ("Respondent") with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.15 (Safekeeping Property), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC), Maryland Rule 16-607 (Commingling of Funds), Maryland Rule 16-609 (Prohibited Transactions), and Md. Code Ann., Bus. Occ. & Prof. (1989, 2010 Repl. Vol.) ("BOP") § 10-306 (Trust Money Restrictions). At the hearing, the Commission withdrew the charges with respect to MLRPC 1.15(b), (c), and (e), and Maryland Rule 16-607.

A hearing judge found the following facts. On March 7, 2005, Respondent was admitted to the Bar of Maryland. In 2006, Respondent became a solo practitioner and opened an office in Greenbelt, Maryland. On or about March 21, 2011, Respondent presented a check in the amount of $2,000, drawn on his attorney trust account, for payment to Capital One, N.A., the holder of his attorney trust account. Presentment of the check caused an overdraft of the attorney trust account in the amount of $1,548.84. On August 30, 2011, the Commission subpoenaed Respondent's attorney trust account records for the period between May 1, 2009, and June 30, 2011. The records revealed that, in May 2010, Respondent made three cash withdrawals from his attorney trust account totaling $500: one withdrawal of $100 in cash and two withdrawals of $200 in cash. Respondent had mishandled his attorney trust account in connection with nine separate client matters. Respondent's mishandling of his attorney trust account consisted of, among other things: transferring funds from his attorney trust account to his operating account, but failing to pay outstanding liens to clients' medical providers; being out of trust in client matters, i.e., lacking sufficient funds in his attorney trust account for payment to clients and/or third parties; failing to promptly account for and disburse settlement funds in a prompt manner; and maintaining a negative attorney trust account balance on two occasions.

Starting in late 2008, Respondent began experiencing a series of personal difficulties, involving his wife and teenaged son, that impacted his ability to maintain the business portion of his solo practice. During that time period, Respondent reconciled his attorney trust account once a

month, at best. As a result of these difficulties, at the end of 2008, on numerous occasions, Respondent visited a psychologist. In 2011, Respondent and his wife divorced.

Respondent did not deny that he mishandled his attorney trust account with respect to nine separate client matters. Respondent has since hired an accounting firm to help with bookkeeping and reconciliation of his accounts. Respondent reconciles his attorney trust account weekly, and has not had any problems with his attorney trust account since the Petition for Disciplinary or Remedial Action was filed. Numerous character reference letters were submitted on Respondent's behalf, including letters from judges in Prince George's County and from practicing attorneys. All of the letters' authors describe Respondent as trustworthy. The evidence was insufficient to support a finding that Respondent engaged in dishonesty, fraud, or deceit in handling his attorney trust account.

Based on the above facts, the hearing judge concluded that Respondent had violated MLRPC 1.1, 1.15(a), 1.15(d), 8.4(d), and 8.4(a), Maryland Rule 16-609(a)-(c), and BOP § 10-306, but had not violated MLRPC 8.4(b) or MLRPC 8.4(c).

Respondent did not except to any of the hearing judge's findings of fact or conclusions of law. The Commission excepted to the hearing judge's finding of fact that Respondent visited a psychologist on numerous occasions at the end of 2008, and to the hearing judge's conclusion of law that Respondent did not violated MLRPC 8.4(c). The Commission recommended disbarment, but conceded at oral argument that, if the Court overruled the exception to the hearing judge's conclusion that Respondent had not violated MLRPC 8.4(c), an indefinite suspension would be appropriate. Respondent recommended that he be indefinitely suspended with the right to apply for reinstatement after a reasonable time. At oral argument, Respondent's counsel recommended that Respondent be indefinitely suspended with the right to apply for reinstatement after six months.

Held:

The Court of Appeals sustained the Commission's exception to the hearing judge's factual finding that Respondent had visited a psychologist in 2008 because, in actuality, Respondent visited a Licensed Clinical Professional Counselor. The Court upheld the remainder of the hearing judge's findings of fact. The Court overruled the Commission's exception to the hearing judge's conclusion that Respondent had not violated MLRPC 8.4(c), and upheld all of the hearing judge's conclusions of law. The Court determined that Respondent violated MLRPC 1.1, 1.15(a), 1.15(d), 8.4(d), and 8.4(a), Maryland Rule 16-609(a)-(c), and BOP § 10-306 by mishandling his attorney trust account in connection with nine separate client matters; by withdrawing cash from his attorney trust account on three separate occasions; and by failing to properly account for and disburse settlement funds in a prompt fashion. The Court noted two aggravating factors: that Respondent engaged in a pattern of misconduct and committed multiple offenses by violating several MLRPC, Maryland Rule 16-609(a)-(c), and BOP § 10-306. The

Court noted three mitigating factors: absence of prior attorney discipline, personal problems, and character.

The Court held that an indefinite suspension with the right to apply for reinstatement after six months was the appropriate sanction for Respondent's violations of MLRPC 1.1, 1.15(a), 1.5(d), 8.4(d), and 8.4(a), Maryland Rule 16-609(a)-(c), and BOP § 10-306. The Court stated that Respondent's mishandling of his attorney trust account in connection with nine separate client matters over a sustained period of time, as well as his withdrawal of cash from the attorney trust account, were serious matters. The Court observed, though, that Respondent's misconduct was determined by the hearing judge to be due to negligence; *i.e.*, Respondent's misconduct did not result in a finding of intentional dishonesty, fraud, or deceit. Based on the record, the Court accepted the hearing judge's determination as to negligence. Respondent's character for trustworthiness was attested to in numerous character letters submitted on Respondent's behalf from judges and practicing lawyers. In addition, Respondent's misconduct occurred during a period of personal difficulties in his life involving his wife and teenaged son. The hearing judge had found that Respondent's personal life had stabilized, and that Respondent had taken steps to ensure that his attorney trust account is properly maintained, including reconciling his account on a weekly basis and hiring an accounting firm to assist with bookkeeping and reconciliation. For these reasons, the Court concluded that the appropriate sanction was an indefinite suspension with the right to reapply for reinstatement after six months.

Waterkeeper Alliance, Inc., et al. v. Maryland Department of Agriculture, et al., No. 87 September Term 2013, filed July 18, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/87a13.pdf

CIVIL PROCEDURE – FINAL JUDGMENT – CONSOLIDATED CASES

CIVIL PROCEDURE – FINAL JUDGMENT – UNRESOLVED CLAIMS

CIVIL PROCEDURE – FINAL JUDGMENT – APPELLATE ENTRY OF FINAL JUDGMENT

Facts:

On 4 February 2008, Waterkeeper Alliance, Inc. ("WKA") and eight other environmental advocacy groups filed an action ("WKA action") against the Maryland Department of Agriculture ("MDA") in the Circuit Court for Anne Arundel County ("A.A. Circuit Court") after the MDA denied a pair of requests by WKA for certain public records regarding private farm agricultural practices on the Eastern Shore, pursuant to the Maryland Public Information Act ("PIA"), Maryland Code (1984, 2009 Repl. Vol.), State Government Article §§ 10-601 to 10-628. The MDA believed that it was not permitted to allow disclosure of the information, citing § 10-615(2)(i) of the PIA and Md. Code (1973, 2007 Repl. Vol.), Agriculture Art., § 8-801.1(b)(2) as the operative statutes exempting the particular information and/or documents from disclosure. In its complaint, WKA asserted that § 8-801.1(b)(2) violated the Maryland and United States Constitutions, and that the MDA's denial of WKA's requests violated the PIA. WKA prayed for the court, inter alia, to declare § 8-801.1(b)(2) unconstitutional and to enjoin the MDA from withholding the public records sought by WKA. The parties attempted to negotiate the terms of disclosure out-of-court while the action remained pending.

Before the parties could reach a resolution, the Maryland Farm Bureau, Inc. ("MFB") and three anonymous farmers filed, on 18 July 2008, a related action ("MFB action") against the MDA in the Circuit Court for Dorchester County ("Dorchester Circuit Court"). MFB wanted to prevent the MDA from disclosing information that it felt was protected by § 8-801.1(b)(2). In its complaint, MFB prayed for the court, *inter alia*, to declare the scope and temporal limitations of § 8-801.1(b)(2), in accordance with MFB's interpretation, and to enjoin the MDA from disclosing the assertedly confidential information. Due to the interrelatedness of the claims asserted in the WKA action and the MFB action, the MDA moved to transfer the MFB action to the A.A. Circuit Court. The Dorchester Circuit Court granted that motion. The MDA moved then to have the actions consolidated into a single case in the A.A. Circuit Court. Meanwhile, MFB filed a Motion for Summary Judgment in the A.A. Circuit Court as to the issues raised in its initial complaint. MDA filed a Cross-Motion for Summary Judgment against MFB on the same issues. The A.A. Court granted ultimately the MDA's motion for consolidation and docketed both actions under a single entry. WKA filed a Motion in Opposition to MFB's

Motion for Summary Judgment and in Support of the MDA's Cross-Motion for Summary Judgment.

On 10 February 2009, the judge issued an Order ("2009 Order") in which it granted MDA's Cross-Motion for Summary Judgment, denied MFB's Motion for Summary Judgment, and issued three written declarations regarding the scope of § 8-801.1(b)(2). The A.A. Circuit Court did not make any mention in its 2009 Order of WKA's constitutional claim, and no parties attempted to litigate any constitutional issues. Over a year later, on 4 April 2010, the MDA received another PIA request, this time from a co-plaintiff of WKA in the prior action, regarding essentially the same information sought in the prior requests. This led ultimately to MFB filing another action for declaratory judgment and injunctive relief against the MDA in the Circuit Court for Worcester County on 13 September 2010. The action was transferred to the A.A. Circuit Court and dismissed with prejudice by the same trial judge who issued the 2009 Order in the consolidated case. On 9 May 2011, MFB filed, in the consolidated case, a Motion for Clarification of Memorandum Opinion and Order Dated February 10, 2009 in the A.A. Circuit Court asking the trial judge to clarify the 2009 Order in light of the new PIA request. On 14 July 2011, the court issued an Order ("2011 Order") granting MFB's motion and declaring how the 2010 PIA request was controlled by the 2009 decision. On 5 August 2011, the court issued a second Order "closing" the case "statistically."

WKA filed an appeal of the 2011 Order to the Court of Special Appeals. The intermediate court affirmed the judgment of the A.A. Circuit Court. *Waterkeeper Alliance, Inc. v. Maryland Dep't of Agric.*, 211 Md. App. 417, 65 A.3d 708 (2013). WKA filed then a Petition for Writ of Certiorari in the Court of Appeals, which was granted. During oral arguments, however, a judge of the Court of Appeals raised *sua sponte* the question of whether the A.A. Circuit Court had the power to issue the 2011 Order. The judge questioned whether the 2009 Order was a final judgment, and, if so, whether Maryland Rule 2-535 precluded the trial judge from revising it two years later.

Held: Appeal dismissed; judgment of the Court of Special Appeals vacated; case remanded to A.A. Circuit Court for further proceedings not inconsistent with the opinion of the Court of Appeals.

Prior to any possible consideration of the merits of the case, the Court of Appeals had to address the procedural posture of the case before it as to its "appealability." The Court concluded first that the A.A. Circuit Court retained the power to issue the 2011 Order because the 2009 Order was not a final judgment. The Court noted that the restrictions of Rule 2-535 apply only when the trial court attempts or wishes to revise a final judgment. The Court explained that an order constitutes a final judgment only if it resolves all claims raised by all parties. Because the 2009 Order was issued in a consolidated case, the Court had to determine whether the adjudication of MFB's claim could be a final judgment where WKA's constitutional claim remained unresolved. Although the trial judge did not exercise expressly his discretion, pursuant to Md. Rule 2-503(a), to treat the consolidated actions as combined for final judgment analysis purposes, the Court

explained that the trial judge must have intended to do so for three reasons. First, the Court observed that the trial judge understood that the outcomes of the two actions were meaningfully interdependent. The trial judge appeared to recognize that if WKA were to prevail on its claim that § 8-801.1(b)(2) is unconstitutional, MFB's claim requesting a declaration of that statute would be moot. Second, the Court observed that the trial judge was well aware that the broader dispute of the consolidated action was really between WKA and MFB, because the claims asserted in the respective complaints directly impacted the interests of the party in the opposing action. Third, the Court observed that the actions were maintained on the same docket, unlike other cases involving consolidated actions. In light of these observations, the Court of Appeals concluded that the finality of the 2009 Order depended on the resolution of the claims raised in both the WKA complaint and the MFB complaint. It found that the 2009 Order resolved effectively the claim in MFB's complaint, but did not address, let alone resolve, the constitutional claim from the WKA complaint. Thus, the Court held that the 2009 Order was not a final judgment, and not subject to the restrictions of Rule 2-535.

After making this determination, the Court explained that the 2011 Order could not constitute a final judgment for the same reasons that the 2009 Order did not constitute a final judgment. Once again, the A.A. Circuit Court did not resolve the constitutional claim raised in the WKA complaint when the 2011 Order was issued. The Court of Appeals emphasized that an order may be appealed only if it constitutes a final judgment, barring one of three categorical exceptions. The Court dismissed two of the three exceptions as being impertinent to the 2011 Order, and explained that the third exception could not apply to the present case, either. The third exception would have allowed either the trial court or the appellate court to exercise discretionary power under Rule 2-602(b)(1) or Rule 8-602(e)(1)(C), respectively, to certify for appeal the claim resolved by the 2011 Order, despite the pendency of the constitutional claim. The Court noted, however, that the power of certification of a non-final Order is to be exercised sparingly and should be guided by a desire to achieve judicial efficiency. In the case *sub judice*, the Court realized that certification would be highly inappropriate because of two primary reasons. First, the outcome of WKA's constitutional claim could render ultimately the outcome of the present appeal moot, which would greatly offend the Court's policy disfavoring piecemeal appeals. Second, choosing not to certify the 2011 Order would not result in a "harsh" outcome for the parties because WKA retained the right to pursue its constitutional claim without suffering any hardship, at which time all aggrieved parties could note appeals. Because the Court could not classify the 2011 Order as one of the few exceptional circumstances permitting immediate appeal of a non-final judgment, the Court concluded that the merits of the appeal could not be reached.

NVR Mortgage Finance, Inc., et al. v. Soren Carlsen, Misc. No. 11, September Term 2013, filed July 21, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/11a13m.pdf

FINDER'S FEE ACT – STATUTE OF LIMITATIONS – OTHER SPECIALTY

Facts:

Soren Carlsen ("Carlsen") and NVR, Inc. entered into a contract under which NVR, Inc. would build a home for Carlsen, who would use NVR Mortgage Finance, Inc. ("NVR Mortgage") to obtain financing for the home. Carlsen used NVR Mortgage to apply for a mortgage from C&F Mortgage Corporation. Carlsen paid NVR Mortgage a broker fee. More than three but fewer than twelve years later, in the Circuit Court for Baltimore County, Carlsen sued NVR Mortgage and NVR, Inc. for allegedly violating Md. Code Ann., Com. Law (1975, 2013 Repl. Vol.) § 12-805(d).

NVR removed this case to the United States District Court for the District of Maryland, which certified to the Court of Appeals the following question of law: "Is [an alleged violation of] the Maryland Finder's Fee Act [("the FFA"), Md. Code Ann., Com. Law (1975, 2013 Repl. Vol.) ("CL") §§ 12-801 to 12-809,] a[n] '[other] specialty' . . . under [Md. Code Ann., Cts. & Jud. Proc. (1973, 2013 Repl. Vol.) ("CJP")] § 5-102(a)(6)[, which is a twelve-year statute of limitations]?"

Held:

The Court of Appeals reformulated the certified question of law as follows: "Is an alleged violation of Md. Code Ann., Com. Law (1975, 2013 Repl. Vol.) § 12-805(d) an 'other specialty' under Md. Code Ann., Cts. & Jud. Proc. (1973, 2013 Repl. Vol.) § 5-102(a)(6), which is a twelve-year statute of limitations?"

The Court of Appeals answered the reformulated certified question of law "no" and held that that an alleged violation of CL § 12-805(d) is not an "other specialty" under CJP § 5-102(a)(6), and thus is subject to CJP § 5-101, which is the default three-year statute of limitations, because, in an action for an alleged violation of CL § 12-805(d), the duty sought to be enforced exists as a matter of common law, rather than having been created solely by CL § 12-805(d). A mortgage broker owes to a borrower a common law duty to disclose all facts or information which may be relevant or material in influencing the judgment or action of the borrower in the matter. Under CL § 12-805(d), a mortgage broker must disclose to a borrower in a prescribed manner a finder's fee's existence, which is information that may be relevant in influencing the borrower's judgment in the matter. An alleged violation of a statute is not an "other specialty" under CJP §

5-102(a)(6) where, in an action for an alleged violation of the statute, the duty sought to be enforced exists as a matter of common law, rather than having been created solely by the statute.

Lori A. Robinette v. Luann Hunsecker, No. 90, September Term 2013, filed July 18, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/90a13.pdf

FAMILY LAW – PROPERTY SETTLEMENT – RETIREMENT AND DEATH BENEFITS – CONSTRUCTIVE TRUST

Facts:

As part of their divorce, Luann Hunsecker and Roger Robinette, an employee of the Montgomery County Public Schools ("MCPS"), executed a Voluntary Separation and Property Settlement Agreement ("the Agreement"), which provided for Ms. Hunsecker to receive 50 percent of Mr. Robinette's government-sponsored pension plan benefits, including any death benefit, that accrued during the marriage. The Agreement stated that the judgment of divorce itself would serve as a "qualified domestic relations order" ("QDRO") under Employee Retirement Income Security Act of 1974 ("ERISA"). A QDRO is an order used by courts to allocate plan benefits between divorcing spouses when the plan is subject to ERISA. (As a government-sponsored plan, however, Mr. Robinette's plan was exempted from ERISA.) Neither Ms. Hunsecker nor Mr. Robinette obtained a separate QDRO, and neither informed Mr. Robinette's pension plan regarding the terms of the Agreement.

Subsequently, Mr. Robinette married Lori A. Robinette, and named Ms. Robinette as the beneficiary of record for his pension. Mr. Robinette remained employed with the MCPS until his death seven years later. Soon after Mr. Robinette's death, Ms. Robinette began to receive payments from his pension plan. Subsequently, Ms. Hunsecker applied to the pension plan for a portion of Mr. Robinette's death benefits pursuant to the Agreement. Because the pension plan had never received a QDRO indicating that Ms. Hunsecker was a beneficiary of Mr. Robinette's death benefits, it rejected her request for a portion of the benefits.

Ms. Hunsecker initiated a lawsuit against Ms. Robinette, alleging that Ms. Robinette had been unjustly enriched in receiving the entire pension and death benefits and requesting the court to impose a constructive trust on a portion of the pension and death benefits that had been received by Ms. Robinette.

The Circuit Court entered summary judgment in favor of Ms. Hunsecker. The court concluded that Ms. Hunsecker had a sufficiently higher equitable call to a portion of the pension proceeds. It ordered that Ms. Robinette account for the pension and death benefits that she had already received, and granted Ms. Hunsecker a constructive trust in a portion of those benefits. The court also indicated that it would approve a posthumous "QDRO" to be filed with the retirement plan with respect to future benefits. The "QDRO" was subsequently issued and filed with the retirement plan.

On appeal, the Court of Special Appeals affirmed the judgment of the Circuit Court, holding that the Circuit Court had acted within its authority under the State law in granting a posthumous "QDRO" and had properly imposed a constructive trust.

Held: Affirmed.

The Court of Appeals affirmed the Court of Special Appeals' ruling, holding that the Circuit Court properly issued a posthumous "QDRO" and properly imposed a constructive trust.

The Court noted that ERISA did not apply to Mr. Robinette's retirement plan because it was a government-sponsored plan. The Court considered Ms. Robinette's argument that ERISA still applied, by virtue of the parties' agreement, to the allocation of Mr. Robinette's pension benefits. It dismissed the argument as neither internally consistent nor substantively meritorious, given that the Agreement provided that the judgment of divorce would constitute a QDRO when, under ERISA, a judgment of divorce alone cannot serve as a QDRO. The Court held that the Circuit Court's issuance of a posthumous "QDRO" - i.e. the order to allocate Mr. Robinette's retirement benefits - was appropriate under Maryland law.

The Court then discussed decisions of other state appellate courts that addressed whether a trial court properly imposed a constructive trust to give effect to the terms of a separation agreement governing the distribution of retirement benefits from a government-sponsored retirement plan. The Court concluded that a circuit court has authority to impose a constructive trust on retirement benefits received by a surviving spouse when the decedent promised a portion of those benefits to a former spouse in circumstances that give the former spouse a "higher equitable call" to the promised benefits. As to Ms. Hunsecker's case, the Court explained that it is clear from the Agreement that there was a mutual understanding that Ms. Hunsecker had a 50 percent interest in the portion of Mr. Robinette's retirement benefits that constituted marital property, and the Agreement purported to be self-executing and did not make Ms. Hunsecker's entitlement contingent on her contacting the retirement plan or obtaining a separate QDRO.

Baltimore County, Maryland, et al. v. Baltimore County Fraternal Order of Police, Lodge No. 4, No. 96, September Term 2013, filed July 29, 2014. Opinion by Harrell, J.

McDonald, J., dissents.

http://www.mdcourts.gov/opinions/coa/2014/96a13.pdf

LOCAL GOVERNMENT – COLLECTIVE BARGAINING – STATUTORY INTERPRETATION

LOCAL GOVERNMENT – COLLECTIVE BARGAINING – WRIT OF MANDAMUS

Facts:

Baltimore County (the "County") includes, in its Policies and Procedures Manual (the "Manual"), an Attendance Recognition Program to encourage employees to refrain from using sick leave throughout the year. The Manual begins with a disclaimer asserting the County's right to discontinue, without prior notification, any of the policies contained in the Manual. Prior to 2011, the Attendance Recognition Program included a small monetary incentive. After the County announced in 2011 its intent to discontinue this portion of the program, the Fraternal Order of Police (the "FOP"), the collective bargaining agent for the union of county police, requested to bargain its discontinuation. The County refused, averring that the subject matter was non-negotiable as evidenced explicitly by the Manual's disclaimer. In response, the FOP submitted an unfair labor practice ("ULP") complaint to the County's Director of Human Resources (the "Director") and requested that the Director designate an independent third party agency to investigate the FOP's complaint, pursuant to BCC § 4-5-204(a)(1)(i). The Director denied the FOP's request, citing the non-negotiability of the subject matter.

On 25 October 2011, the FOP filed in the Circuit Court for Baltimore County a "Complaint for Declaratory and Injunctive Relief and for Writ of Mandamus," claiming that BCC § 4-5-204(a)(1)(i) assigned the Director an imperative duty to designate a third party agency anytime an employee organization submitted a ULP complaint. The FOP asked the Court to issue (1) an order declaring that the County's refusal to designate a third party agency constituted a violation of the Employee Relations Act (the "Act"); (2) an order enjoining the County from refusing to designate a third party agency to receive and investigate the ULP complaint in the future; and (3) a writ of mandamus compelling the Director to designate a third party agency to hear the ULP complaint. The County and the FOP filed Cross-Motions for Summary Judgment. The Circuit Court issued an Order, denying the County's Motion, granting the FOP's Motion, and issuing a Writ of Mandamus. The Order did not address explicitly the FOP's prayers for declaratory and injunctive relief. The County appealed. The Court of Special Appeals affirmed the Circuit Court's judgment in an unreported opinion.

The Court of Appeals granted the County's petition for writ of certiorari, *Baltimore Cnty. v. Fraternal Order of Police*, 435 Md. 266, 77 A.3d 1084 (2013), to consider: "Whether a personnel policy set forth in the [Manual], which, by definition is not subject to negotiation, should be referred to a third party neutral simply upon the invocation by FOP of the phrase 'refusal to negotiate in good faith'[?]"

Held: Reversed and Remanded.

The Court of Appeals addressed preliminarily the jurisdictional issue of whether the Circuit Court's Order was a final judgment. The Court found that the Circuit Court evinced an intent to dispose of all pending claims and to put the parties out-of-court, that the Order adjudicated the single claim presented in the FOP's Complaint (notwithstanding the multiple prayers for relief), and that the Order was entered appropriately on the docket. The Court held, therefore, that the Circuit Court issued a final, appealable judgment. On the related, but separate, problem regarding the absence of declaratory judgment in the Order, the Court concluded that this error was procedural and not jurisdictional, and could be remedied on remand.

Regarding the merits, the Court held that the Act did not warrant, and thus the Circuit Court erred in granting, a writ of mandamus compelling the Director to designate an independent third party agency to receive the FOP's ULP complaint. For a court to issue a writ of mandamus the duty sought to be compelled and the entitlement to the performance of the duty must be certain and undisputable. The Court concluded that BCC § 4-5-204(a)(1)(i) neither assigned such an imperative duty to the Director to designate a third party agency, nor provided the FOP a clear entitlement to such a designation, for each and every ULP complaint. BCC § 4-5-204(a)(1)(i) did not rule out the possibilities that the Director might exercise discretion in determining when to designate a third party agency to investigate a ULP complaint or that the Director may decline to make the designation when the subject matter of a ULP complaint is patently outside of the jurisdiction of a third party agency. This provision requires only that, when an employee organization (or the County) files a ULP complaint, it may do so only with an independent third party agency that has been designated by the Director.

Finally, the Court addressed the FOP's contention that, in deciding motions to compel or stay arbitration, Maryland's general policy is to refer the question of arbitrability to the arbitrator when it is unclear whether a dispute falls within the scope of an arbitration provision. The Court held, however, the present case to be distinguishable because, unlike in deciding motions to compel or stay arbitration, the present case required a determination of whether the language in the Act met the requisites to issue a writ of mandamus (which, as discussed above, the Court found that it did not).

Motor Vehicle Administration v. Joshua Salop, No. 93, September Term 2013, filed July 21, 2014. Opinion by Barbera, C.J.

http://mdcourts.gov/opinions/coa/2014/93a13.pdf

MOTOR VEHICLE ADMINISTRATION – ADMINISTRATIVE LICENSE SUSPENSION HEARING – INTERSTATE DRIVER LICENSE COMPACT

Facts:

Joshua Salop, Respondent, paid a fine for a speeding ticket he received in Delaware. Pursuant to the Interstate Driver License Compact, Md. Code (1977, 2012 Repl. Vol.), § 16-703 of the Transportation Article ("TR"), the Delaware Division of Motor Vehicles reported to the Maryland Motor Vehicle Administration ("MVA"), Petitioner, that Respondent had been convicted of speeding. In turn, the MVA notified Respondent that it would be suspending his provisional driver's license for 30 days. That notification permitted Respondent to request a hearing, and he did so.

At the hearing, delegated to an administrative law judge ("ALJ") of the Office of Administrative Hearings, Respondent argued that his payment of the fine did not constitute a conviction under Delaware law. The ALJ refused to consider that argument but did issue a reprimand in lieu of the 30-day license suspension. Upon judicial review of the decision of the ALJ, the Circuit Court for Montgomery County ruled that the payment of the fine did not constitute a conviction under Delaware law, reversing the decision of the ALJ.

Held: Reversed.

Applying the well-established principles of appellate review of administrative agency decisions, the Court of Appeals "looked through" the decision of the Circuit Court and reviewed the decision of the ALJ. Interpreting the Compact, the Court of Appeals concluded that the ALJ was correct in refusing to consider Respondent's argument regarding Delaware's report to Maryland that Respondent had been convicted of speeding. Articles III and IV of the Compact, the Court explained, speak to the respective powers and duties of states that are parties to the Compact. Article III imposes the obligation on a party state to report a conviction that occurs in that state, and Article IV imposes the obligation on a licensing state to record an out-of-state conviction reported to it. Article IV employs mandatory language in instructing the recording state and is silent as to considering the merits of a conviction. Accordingly, the Court held that the Compact affords no discretion to the recording state as to whether to record a conviction reported to it by another party state.

Further, the Court concluded that the Circuit Court exceeded the scope of its review, as limited by TR § 16-708(b), in considering Respondent's argument that the payment of a fine did not constitute a conviction under Delaware law. TR § 16-708(b) limits judicial review of challenges to out-of-state convictions "to establishing the identity of the individual who was convicted in another state." Respondent's contention plainly concerned the "validity" of his Delaware conviction, the Court determined, and was thus prohibited by TR § 16-708(b).

Sonia Carter, et al. v. The Wallace & Gale Asbestos Settlement Trust, No. 84, September Term 2013, filed July 21, 2014. Opinion by Greene, J.

Battaglia and Raker, JJ., concur and dissent.

http://www.mdcourts.gov/opinions/coa/2014/84a13.pdf

WRONGFUL DEATH – ASBESTOS LITIGATION – APPORTIONMENT OF DAMAGES

WRONGFUL DEATH – JOINDER OF USE PLAINTIFFS – STATUTE OF LIMITATIONS

Facts:

In four asbestos cases that were consolidated for trial in Baltimore City, all of the plaintiffs were separately awarded damages for their wrongful death claims against Wallace & Gale Asbestos Settlement Trust ("WGAST"). The four decedents who are the subject of these consolidated cases, Levester James ("James"), Mayso A. Lawrence Sr. ("Lawrence"), Rufus E. Carter ("Carter"), and Roger C. Hewitt, Sr. ("Hewitt"), all worked for various companies where Wallace & Gale, Co. ("W&G") installed asbestos-containing products. All four decedents died from lung cancer that was substantially caused by their exposure to asbestos.

In each of the four cases, the personal representatives of the decedents filed amended short form complaints against WGAST for wrongful death, as well as other counts. Each of the complaints named the decedents' immediate family members as use plaintiffs, which are plaintiffs for whom an action is brought in another person's name. None of the use plaintiffs filed any type of pleading to formally join in the action.

Decedent Hewitt worked at Bethlehem Steel for over 30 years where he was exposed to asbestos and also smoked half a pack to a full pack of cigarettes a day for 65 years. Witnesses for both parties testified that both Hewitt's asbestos exposure and cigarette smoking were factors in causing his death from lung cancer. Counsel for WGAST moved to offer the testimony of Dr. Gerald R. Kerby, who would opine that apportionment of damages was appropriate between Hewitt's cigarette smoking and his asbestos exposure. The trial judge excluded Dr. Kerby's testimony on the basis that this theory was not supported by Maryland law.

The use plaintiffs were deposed and were later called as witnesses at trial. In plaintiffs' proposed voir dire, both the use plaintiffs and party plaintiffs were designated as "plaintiffs," but in his opening statement, counsel referred to the use plaintiffs as "family members." After plaintiffs concluded their case, WGAST filed a Motion for Directed Verdict, arguing that the statute of limitations had run and that, therefore, the use plaintiffs were precluded from recovering damages because they failed to join the action as required by Maryland Rule 15-1001. The trial judge ruled to include the use plaintiffs on the verdict sheets, and following the rendering of

verdicts in their favor, ruled that the use plaintiffs were necessary parties whose failure to formally join in the proceedings did not preclude them from recovering damages.

On appeal, the Court of Special Appeals reversed, holding that the failure of the use plaintiffs to join the action as party plaintiffs before the expiration of the wrongful death three year limitations period precluded the use plaintiffs from recovering damages, and the Circuit Court erred when it refused to instruct the jury as to apportionment of damages and when it excluded expert's testimony on apportionment. The plaintiffs filed a petition for writ of certiorari, which the Court of Appeals granted.

Held: Reversed.

First, the Court of Appeals held that in order to remain consistent with Maryland law, apportionment of damages among different causes is only appropriate where the injury in question is reasonably divisible. If an injury is theoretically divisible, apportionment is still inappropriate where a portion of the damages is being apportioned to the injured plaintiff because this outcome would be based on comparative negligence principles, a concept that Maryland as expressly rejected. Where the injury in question is death caused by lung cancer, and where there is a single tortfeasor involved in the litigation, apportionment of damages is inappropriate.

Second, the Court of Appeals determined that under the state of the law at the time of trial, which was prior to the Court's decision in *University of Maryland Medical Systems Corp. v. Muti*, 426 Md. 358, 44 A.3d 380 (2012), and before the latest revisions to Maryland Rule 15-1001, the designated use plaintiffs were real parties in interest that were not required to formally join in the proceeding in order to share in an award for damages. Absent any clear direction or requirement that formal joinder was necessary, on the facts of this case, the use plaintiffs' knowing consent to and active participation in the litigation was the functional equivalent of joinder. So long as knowing consent to, and active participation in, the litigation occurred prior to the expiration of the statute of limitations, a use plaintiff could maintain a claim for damages where there was no formal joinder. The Court also noted that in any case affected by the January 1, 2013 amendments to Rule 15-1001, all use plaintiffs are now required to formally join in the proceedings in order to be entitled to an award for damages.

Dehn Motor Sales, LLC, et al. v. Joseph Schultz, et al., No. 94, September Term 2013, filed July 22, 2014. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2014/94a13.pdf

LOCAL GOVERNMENT TORT CLAIMS ACT – NOTICE REQUIREMENT-SUBSTANTIAL COMPLIANCE WITH NOTICE REQUIREMENT

SECTION 1983 OF TITLE 42 OF THE UNITED STATES CODE – CONSTITUTIONAL TORTS – QUALIFIED IMMUNITY

Facts:

Dehn Motor Sales, LLC (Dehn Motor), Petitioner, a used-car business, filed an action for replevin in the District Court of Maryland against, *inter alia*, Baltimore City, alleging that members of the Baltimore City Police Department and other City employees had towed sixty-seven of its vehicles from its used-car lot without a court order or warrant. The complaint sought the return of the vehicles and $60,000 in loss-of-use damages. Dehn Motor, more than two years later, filed an action in the Circuit Court for Baltimore City against Officer Schultz and Sergeant Proctor, Respondents, identifying them as the officers who ordered the towing of the vehicles. The complaint alleged violations of Articles 19, 24, and 26 of the Maryland Declaration of Rights as well as Section 1983 of Title 42 of the United States Code, based on violations of the Fourth and Fourteenth Amendments to the United States Constitution.

The police officers, thereafter, moved for summary judgment, which the Circuit Court granted. The Circuit Court concluded that the State constitutional claims were barred because Dehn Motor had not provided the City written notice of its claim within 180 days of the alleged injury, as required by the Local Government Tort Claims Act, and moreover, that the filing of the replevin action did not constitute substantial compliance with the notice requirement. With respect to the federal claims, the Circuit Court judge concluded that the officers were entitled to qualified immunity, a doctrine which shields government officials performing discretionary functions from civil liability, so long as their conduct does not violate clearly established statutory or constitutional law. The Court of Special Appeals affirmed.

Held: Affirmed.

The Court concluded that the replevin action did not constitute substantial compliance with the notice requirement, because it did not forewarn, as a notice of claim must, either explicitly or implicitly, that a subsequent suit for unliquidated damages would follow. The replevin action, rather, communicated to the City that it sought only the return of its vehicles and limited loss-of-use damages.

The Court of Appeals observed, with respect to qualified immunity, that when statutory law affirmatively authorizes a government actor's conduct, she is generally entitled to its protection. On the other end of the spectrum, an official who acts in contravention of clearly established statutory or constitutional law, loses the immunity's protection. In the sarcomere, however, between law that is prohibitory and law that expressly authorizes conduct, the Supreme Court has generally afforded qualified immunity to the official.

Turning to the facts of the instant case, the Court of Appeals, after reviewing the facts in a light most favorable to the non-moving party, concluded that the officers towed the vehicles under the belief that they posed environmental and fire hazards, because the officers testified in their depositions that the cars were seeping fluids into the ground. Given the factual circumstances with which the officers were presented, the Court reasoned that their conduct fell in the sarcomere between law which expressly authorized the officers' conduct and that which affirmatively prohibited it. Dehn Motor had not cited any statutory or case law that prohibited the towing of vehicles believed to pose a fire or environmental hazard, and thus, the officers were entitled to qualified immunity.

W. R. Grace & Co., et al. v. Andrew P. Swedo, Jr., No. 82, September Term 2013, *Florida Rock Industries, Inc., et al. v. Jeffrey P. Owens*, No. 91, September Term 2013, and *Robert W. Coffee v. Rent-A-Center, Inc., et al.*, No. 92, September Term 2013, filed July 22, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/82a13.pdf

MD. CODE (1991, 2008 REPL. VOL.), § 9-633 OF THE LABOR AND EMPLOYMENT ARTICLE – AWARD FOR PERMANENT PARTIAL DISABILITY REVERSED OR MODIFIED ON APPEAL – CREDIT FOR COMPENSATION PREVIOUSLY AWARDED AND PAID

Facts:

On November 3, 2002, Andrew P. Swedo, Jr. ("Swedo") was injured while working for W. R. Grace & Co. ("Grace"). Swedo filed a claim with the Workers' Compensation Commission (the "Commission"). After a hearing, the Commission found that Swedo had sustained a 70% permanent partial disability, 40% of which was due to the workplace accident and 30% of which was due to preexisting conditions. The Commission awarded Swedo $234 per week for 200 weeks. Swedo appealed the apportionment to the Circuit Court for Baltimore City, and a jury found that Swedo's disability was 50% due to the accident and 20% due to the preexisting conditions. The Circuit Court vacated and remanded the award on appeal. The Commission then amended its award to $525 per week for 333 weeks. At the time of the amended award, Grace had already paid 148 weeks under the initial award. Swedo requested clarification from the Commission regarding Grace's credit for payments already made. The Commission ordered that Grace be credited for the weeks it had paid Swedo under the previous award. Swedo appealed to the Circuit Court for Baltimore County, which affirmed the Commission. Swedo then appealed to the Court of Special Appeals, which reversed the Circuit Court, holding that employers should receive credit based on the total dollars paid under the initial award.

In a separate case, consolidated with *Swedo* for the purposes of the Court's opinion, Jeffrey P. Owens ("Owens") sustained an injury in May 2005 while working for Florida Rock Industries, Inc. ("Florida Rock"). On February 26, 2010, the Commission found that Owens had sustained a permanent partial disability resulting in a 30% industrial loss of the use of his body, and ordered Florida Rock to make weekly payments of $257 for 150 weeks, retroactive to July 15, 2008. On judicial review in the Circuit Court for St. Mary's County, a jury reversed the Commission's decision, finding that Owens had suffered a permanent partial disability amounting to a 50% industrial loss of the use of his body. On remand from the Circuit Court, the Commission amended its order to $410 per week for 333 weeks, but it did not credit Florida Rock for the weeks already paid. Florida Rock petitioned the Circuit Court for judicial review of the Commission's order, and filed a motion for summary judgment requesting credit for the 150 weeks of benefits already paid to Owens. Owens conceded that a credit was proper, but argued

that the credit should be based on the "monetary benefits paid" rather than the number of weeks paid. The court agreed with Owens, and found that Florida Rock was entitled to a credit for the dollar amount of benefits already paid. Florida Rock appealed to the Court of Special Appeals, which affirmed the Circuit Court in an unreported opinion.

In the final case, also consolidated with *Swedo* and *Owens*, Robert W. Coffee ("Coffee") was injured in December 2007 while working for Rent-A-Center, and filed a workers' compensation claim. The Commission determined that Coffee sustained a permanent partial disability equating to a 12% industrial loss of the use of his back, and awarded him 60 payments of $114, retroactive to March 21, 2009. Coffee petitioned the Circuit Court for Baltimore City for review of the award. The jury found that Coffee's permanent partial disability amounted to a 16% industrial loss, so the Commission's award was reversed in part. On January 18, 2012, the Commission issued an amended award of $283 per week for 80 weeks, retroactive to March 21, 2009. During the pendency of this appeal, Rent-A-Center paid Coffee all 60 weekly installments of initial award. Once the Commission amended the initial award, Rent-A-Center deducted the 60 weeks already paid at the initial rate and sent Coffee a check for the 20 week increase at $283 per week. Coffee filed Issues with the Commission to compel payment of the difference between the two awards computed according to the total dollars paid. The Commission determined that a weeks-paid standard was appropriate. Coffee sought judicial review of this decision in the Circuit Court for Baltimore City. The Circuit Court affirmed the Commission. Coffee appealed to the Court of Special Appeals, which did not rule on the case because the Court of Appeals granted Rent-A-Center's Petition for Writ of Certiorari.

Held: Affirmed in Cases No. 82 (*Swedo*) and 91 (*Owens*), and Reversed in Case No. 92 (*Coffee*).

The Court of Appeals held that the plain meaning of LE § 9-633 abrogates the previous holdings of *Ametek, Inc. v. O'Connor*, 364 Md. 308, 771 A.2d 1072 (2001) and *Philip Electronics North America v. Wright*, 348 Md. 209, 703 A.2d 150 (1997), that crediting is to be done on the basis of weeks paid. The Court of Appeals so held because the definition of "compensation" found in LE § 9-101 clearly demonstrates that the Legislature intended "compensation" to mean "money payable." The Court of Appeals determined that, read in conjunction with LE § 9-633, this definition evidenced a clear legislative intent that crediting for payments made under an award amended on appeal should be done on the basis of the total dollars paid.

Richard A. Elms v. Renewal By Andersen, No. 89, September Term 2013, filed July 21, 2014. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2014/89a13.pdf

WORKERS' COMPENSATION ACT – COVERED EMPLOYEE – STATUTORY EMPLOYER PROVISION – § 9-508

Facts:

Petitioner Richard A. Elms ("Elms") was a licensed home improvement contractor, who owned and operated an unincorporated home improvement business, Elms Construction Company ("Elms Construction"). Elms, trading as Elms Construction, provided general construction services such as window and door installations, roofing, and carpentry. Respondent Renewal by Andersen ("Renewal") is a business that sells and installs windows and doors. In 2006, Elms began installing windows and doors for Renewal. At the beginning of the relationship between Renewal and Elms, Renewal provided Elms with detailed training as well as job site procedures and standards to which Elms and his workers were expected to adhere. Renewal scheduled all installations that Elms Construction completed on its behalf. Elms Construction used its own trucks and, usually, its own tools, but Elms always obtained the supplies and materials for installations from Renewal's warehouse. Renewal paid Elms Construction directly and did not withhold taxes. Elms Construction then paid its employees, including Elms.

Some years prior to entering into a relationship with Renewal, Elms secured workers' compensation insurance as a sole proprietor, but elected to exclude himself from coverage. On August 6, 2008, while installing a window at a Renewal customer's home, Elms fell from a ladder and injured his right foot. Following his injury, Elms filed a workers' compensation claim with the Commission, alleging that he was Renewal's common law employee and was working for Renewal at the time of the injury. The Commission concluded that Elms was an independent contractor and, therefore, not entitled to collect workers' compensation benefits under Renewal's insurance policy. Elms filed a petition for judicial review in the Circuit Court for Carroll County, which reversed the decision of the Commission, concluding that Elms was Renewal's common law employee. Renewal then appealed to the Court of Special Appeals, which vacated the judgment of the Circuit Court, remanding the case to the Commission in order to determine whether Renewal was a "principal contractor," whether Elms Construction was a "subcontractor," and whether Elms was Elms Construction's "sole proprietor" under § 9-508(f) of the Maryland Workers' Compensation Act, codified at Maryland Code (1991, 2008 Repl. Vol., 2013 Cum. Supp.), Title 9 of the Labor and Employment Article. Elms filed a petition for writ of certiorari to the Court of Appeals, which was granted.

Held: Vacated.

First, the Court of Appeals considered the Commission's conclusion that Elms was an independent contractor, rather than an employee of Renewal, using the common law employment test. In undertaking a common law employment relationship analysis, courts typically consider five factors: "(1) the power to select and hire the employee, (2) the payment of wages, (3) the power to discharge, (4) the power to control the employee's conduct, and (5) whether the work is part of the regular business of the employer." *Whitehead v. Safway Steel Products, Inc.*, 304 Md. 67, 77-78, 497 A.2d 803, 808-09 (1985). Although all five factors are relevant in determining whether there is an employer/employee relationship, the power to control the employee's conduct is the most important factor. In other words, the one exercising control is the employer. In this case, the Court concluded that Elms was a common law employee of Renewal based on the amount of control exerted over Elms by Renewal.

Second, the Court reviewed the Court of Special Appeals's holding that § 9-508 of the Workers' Compensation Act abrogates the common law employment analysis. Section 9-508 provides that, in certain instances, a principal contractor will be liable to an employee of a subcontractor for injuries sustained during the course of the work undertaken by the principal contractor and subcontractor(s). By its terms, § 9-508 only operates to make a principal contractor liable when an employee is unable (for whatever reason) to recover workers' compensation benefits from his direct employer, the subcontractor. The application of § 9-508 to a particular set of facts does not depend on merely a finding that a certain individual or entity is a "principal contractor" or that another is a "subcontractor" or "sole proprietor," as proposed by the Court of Special Appeals. Thus, the Court concluded that the statute does not "abrogate" the common law employment relationship; instead, it creates a potential alternate relationship where the common law employer/employee relationship does not exist between the injured worker and the principal contractor.

COURT OF SPECIAL APPEALS

Keith N. Wilson v. Maryland Department of the Environment, No. 2551, September Term 2012, filed May 27, 2014. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2014/2551s12.pdf

ADMINISTRATIVE LAW – SERVICE OF PROCESS – DEFAULT JUDGMENT – CONFLICTING AFFIDAVITS

Facts:

The Maryland Department of the Environment ("MDE"), appellee, issued an administrative complaint and order against Keith N. Wilson, appellant, after it determined that Mr. Wilson had failed to certify that two properties he owned in Baltimore City complied with applicable lead paint risk reduction standards. Mr. Wilson failed to respond to MDE's complaint, and an Administrative Law Judge ("ALJ") found him in default.

Mr. Wilson filed a motion to vacate the default order, asserting that he was not properly served with the complaint. He attached to his motion an affidavit, in which Corey Blandon attested that he was Mr. Wilson's tenant, and although a process server attempted to serve him with the administrative order and complaint, he did not accept service on behalf of Mr. Wilson. An affidavit from a private process server attached to MDE's complaint stated that Mr. Blandon was properly served with the complaint. The ALJ denied Mr. Wilson's motion to vacate, based in part on his finding that the affidavit from the private process server contradicted that of Mr. Blandon. The circuit court affirmed the ALJ's ruling, and this appeal followed.

Held: Vacated.

It is not proper to resolve a credibility determination based solely on conflicting affidavits. Where the only evidence before the ALJ regarding service of process was two conflicting affidavits regarding whether Mr. Wilson was properly served, there was insufficient evidence to support the ALJ's decision to deny Mr. Wilson's motion to vacate the default order.

Jane Doe, et al. v. Sovereign Grace Ministries, Inc., et al., No. 917, September Term 2013, filed June 26, 2014. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2014/0917s13.pdf

APPEAL – JURISDICTION – PREMATURELY NOTED APPEAL NOT EFFECTIVE – APPELLATE SAVINGS PROVISIONS NOT APPLICABLE.

Facts:

In this multi-party case, the appellants all alleged that, when they were minors, they had been sexually and/or physically abused by persons employed by or affiliated with churches operated under the auspices of Sovereign Grace Ministries ("SGM"), an appellee. They brought suit against SGM, two affiliated churches, an affiliated school, and numerous individual defendants asserting claims arising from an alleged conspiracy to cover up the abuse.

The Circuit Court for Montgomery County entered an order dismissing the claims of all but two plaintiffs with prejudice on limitations grounds; dismissing the claims against some, but not all, of the defendants for lack of personal jurisdiction; and dismissing the claims of the remaining two plaintiffs, against the remaining defendants, without prejudice and with leave to amend within ten days. The plaintiffs moved for reconsideration of the order dismissing their claims. While the motion for reconsideration was pending, they filed a notice of appeal. Two months later, the circuit court issued an order denying the motion for reconsideration and stating that, because the two plaintiffs who had been granted leave to amend had not done so within the time allowed, the case was closed. That order was entered on the docket and no notice of appeal or amended notice of appeal was filed thereafter.

Held: Appeal dismissed for lack of jurisdiction.

The order dismissing the claims of all but two of the plaintiffs with prejudice, but granting leave to amend to the two remaining plaintiffs, was not a final judgment because it did not adjudicate all of the claims of all of the parties in the case. The notice of appeal filed within 30 days of the entry of that order was premature, in that it was taken from a non-final and not appealable order. Final judgment was entered in the case by means of the order denying the motion for reconsideration and closing the case because the plaintiffs who had been given leave to amend had not done so. For this Court to have jurisdiction, a notice of appeal had to have been filed within 30 days of the entry of that judgment. No such notice of appeal was filed.

The appellate savings rules also do not apply here. If a court rules from the bench adjudicating all claims by and against all parties, and a written order is to be issued to memorialize that ruling as a final judgment, a notice of appeal filed after the oral ruling but before the entry of the final

judgment will be treated as filed on the date of the entry of the final judgment. In this case, the notice of appeal was filed after entry of a non-final order, so that savings provision does not apply. Also, if an appeal is noted after the entry of an order adjudicating the claims of some of the parties but not all of them, and the circuit court properly could have exercised its discretion to certify the adjudicated claims for appeal under Rule 2-602(b), this Court can exercise discretion to so certify the claims itself. In this case, the circuit court would have abused its discretion had it certified the claims adjudicated in the first order for appeal, as the "no just reason for delay" standard could not be met.

Tommy Garcia Bonilla v. State of Maryland, No. 508, September Term 2012, filed May 27, 2014. Opinion by Salmon, J.

http://www.mdcourts.gov/opinions/cosa/2014/0508s12.pdf

CRIMINAL LAW – IF A DEFENDANT ENTERS INTO A BINDING ABA PLEA AGREEMENT WITH THE STATE, BUT THE SENTENCING JUDGE IMPOSES A SENTENCE MORE LENIENT THAN THE SENTENCE AGREED UPON, THE COURT, PURSUANT TO MD. RULE 4-345(a), MAY LATER INCREASE THE DEFENDANT'S SENTENCE TO CONFORM WITH THE PLEA AGREEMENT.

Facts:

In 1989, Tommy Garcia Bonilla ("Bonilla") was indicted by a Prince George's County grand jury on two counts of first-degree murder and numerous other serious crimes. Count I of the indictment charged Bonilla with the first-degree murder, on April 14, 1989, of Jose Lozano. In count III, Bonilla was charged with the first-degree murder of Ruth Vasquez.

On August 28, 1990, Bonilla changed his plea to guilty in regards to the first-degree murder charges set forth in counts I and III of the indictment. Prior to pleading guilty, the State, the presiding judge, and Bonilla entered into an unambiguous ABA plea agreement. The terms of that agreement were that Bonilla would, if called by the State, testify truthfully at the trial of a co-defendant and would enter guilty pleas as to counts I and III of the indictment. In exchange; 1) as to count III, which charged appellant with the premeditated first-degree murder of Ruth Vasquez, the judge would sentence Bonilla to life imprisonment; 2) as to count I, which charged Bonilla with the first-degree murder of Jose Lozano, the court would impose a consecutive sentence of life imprisonment with all but 20 years suspended; and 3) on the date of sentencing, the State would withdraw its notice of intent to seek a life without possibility of parole sentence and, except as to counts I and III, *nol pros* all counts against Bonilla.

At the sentencing hearing, Bonilla's trial counsel placed on the record his recollection of the terms of the ABA plea agreement, but in doing so he got the counts mixed up. Defense counsel said that the agreement was that as to count I, Bonilla would receive a life sentence, and as to count III, he would receive a consecutive sentence of life, suspend all but 20 years. This, of course, was incorrect, but the prosecutor, when his turn to speak arose, confirmed that what the defense attorney had said in regard to the plea agreement was accurate. The sentencing judge then proceeded to give the following sentence: As to count I - life imprisonment; as to count III, life imprisonment suspend all but 20 years, sentence to run consecutive to the sentence imposed in count I.

On November 7, 2011, Bonilla filed a motion to correct an illegal sentence in which he asked the court to change the sentence imposed in count I to conform with the plea agreement, i.e., a sentence of life imprisonment, suspend all but 20 years, to run consecutively with the sentence

imposed in count III. If the court had granted the motion, without also changing the sentence imposed as to count III, Bonilla's total sentence would be life, suspend all but 40 years, which would have been far less than the total sentence contemplated by the ABA plea agreement, i.e., life plus 20 years.

The State filed a cross-motion to correct the sentence entered as to count III. The State took the position that the court was required to correct **both** sentences in order to conform with the plea agreement. The Circuit Court for Prince George's County re-sentenced Bonilla as to count III to life imprisonment; as to count I, the sentence was reduced from the once originally imposed in 1991, to life suspend all but 20 years, sentence to run consecutively to the sentence imposed as to count III, sentence to commence as of April 21, 1989. Put another way, the sentencing Judge, in March 2012, gave Bonilla the sentence agreed upon when the ABA plea agreement was placed on the record in 1990.

Bonilla filed a timely appeal in which he contended that the trial judge erred when he increased his sentence as to count III.

Held: Affirmed.

The Court of Special Appeals, in a case of first impression, held that a sentence imposed that is less than the sentence agreed upon in a binding ABA plea agreement is illegal and may be corrected, at any time, pursuant to Md. Rule 4-345(a).

Return to ToC

George Varriale v. State of Maryland, No. 1261, September Term, 2013, filed July 30, 2014. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2014/1261s13.pdf

FOURTH AMENDMENT – UNREASONABLE SEARCH AND SEIZURE – CONSENT – DNA EVIDENCE

STATUTORY INTERPRETATION – ADMINISTRATIVE DEFERENCE

Facts:

Anne Arundel County police were searching for a suspect in an alleged rape when they encountered appellant in a tent in a wooded area behind a liquor store. After explaining why they were in the area, they asked appellant, a homeless man, whether he would sign a form consenting to provide DNA samples in order to eliminate him as a suspect in an alleged rape. Appellant signed the consent form, and the police collected a sample of his DNA and submitted it to the Anne Arundel County Police Department's crime laboratory for further analysis.

A DNA analyst reported that the DNA profile excluded appellant as a suspect in the alleged rape. However, the DNA analyst uploaded appellant's DNA profile into the "suspect index" of the County and state DNA databanks. In doing so, the analyst performed an automatic search of the County databank that compared the DNA profiles of known persons to DNA profiles developed from crime scene evidence. A few days later, a report was generated that a match had been established between appellant's DNA profile and a DNA profile associated with a 2008 burglary in Glen Burnie, Maryland.

Based on that DNA profile match, the State charged appellant with two counts of second-degree burglary, theft over $1,000, and malicious destruction of property. In pre-trial proceedings, appellant moved to suppress the DNA evidence, but the trial court denied the motion. Thereafter, appellant entered a conditional guilty plea to burglary in the second degree.

The circuit court sentenced appellant to four years of imprisonment, with the entirety of the sentence suspended, except for time served. The circuit court also placed appellant on probation for two years. The State entered a *nolle prosequi* for the remaining counts of the indictment. This timely appeal followed.

Held: Affirmed.

The police did not violate appellant's Fourth Amendment rights when they took his DNA samples and uploaded them to the DNA database because he signed a form consenting to the police collecting his DNA samples. While Varriale may not have unambiguously consented to

the use of his DNA outside of the rape investigation, the State had no obligation to obtain a warrant before reexamining the DNA sample. Once the State lawfully obtained a DNA sample of appellant, the retention and examination of the sample did not amount to a new search for purposes of the Fourth Amendment.

Police also did not violate Maryland's DNA Collection Act by uploading appellant's DNA profile to the DNA database. The DNA Collection Act requires the expungement of a person's DNA from the State DNA databank if a criminal action begun against an individual does not result in a conviction of that individual. An individual who has not been charged with a crime does not obtain the protections of the Act as it is currently written. Thus, the Act permits the retention of an individual's DNA even if he or she has been cleared of suspicion in the investigation in which the sample was obtained, as long as he or she was never charged with a crime. While it may seem anomalous that a volunteer like appellant would have fewer statutory protections than someone who had been charged with a serious criminal offense, the anomaly is a result of the history and structure of the DNA Collection Act itself.

State of Maryland v. Jermaine Hailes, No. 2384, September Term 2013, filed May 27, 2014. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2014/2384s13.pdf

CRIMINAL EVIDENCE – HEARSAY EXCEPTIONS – DYING DECLARATION – MD. RULE 5-804(b)(2) – SIXTH AMENDMENT RIGHT TO CONFRONTATION – CRAWFORD v. WASHINGTON – STATE APPEAL OF ADVERSE SUPPRESSION RULING – CJP § 12-302(c)(3) – PHOTO IDENTIFICATION – FOURTEENTH AMENDMENT DUE PROCESS

Facts:

Melvin Pate was shot in the face on November 22, 2010. He was transported to the Shock Trauma Unit of the University of Maryland Hospital. He was in critical and very unstable condition and was unable to speak. A physician informed his mother, who was standing next to Pate's bed, that Pate was unlikely to live more than 24 hours. On hearing the news, tears came out of Pate's eyes. On November 26, 2010, police detectives showed Pate a photographic array. Pate identified the third photo, the appellant's, as his shooter, by blinking hard. He did not blink when shown any of the other five photos. The identification procedure was videotaped. Pate died nearly two years later, on November 27, 2012.

The appellant moved to suppress Pate's identification as evidence in his trial for Pate's murder. After a hearing, the Circuit Court for Prince George's County granted the motion, ruling that the photo identification was inadmissible because of the Sixth Amendment Confrontation Clause and the Fourteenth Amendment Due Process Clause. The State appealed from that ruling to the Court of Special Appeals.

Held: Suppression order reversed and case remanded for trial.

The appellant moved to dismiss the State's appeal as not authorized by Md. Code, § 12-302(c)(3) of the Courts & Judicial Proceedings Article. The appellant argued that the statute allows for appeals only of decisions to suppress tangible physical evidence. The Court of Special Appeals denied the motion and held that the State may appeal any adverse suppression ruling that was rendered on constitutional grounds.

In a criminal prosecution for homicide, the rule against hearsay does not exclude an out-of-court statement made by an unavailable declarant while believing his death was imminent and concerning the cause or circumstances of what he believed to be his impending death. The dying declaration hearsay exception dates to the early 1700s and is exempted from the Sixth Amendment Confrontation Clause and the Supreme Court's reinterpretation of that clause in *Crawford v. Washington* and other cases. Pate's November 26, 2010 photo identification is

admissible as a dying declaration in the appellant's trial for his murder and it should not have been suppressed based on the Confrontation Clause.

As an alternative ground, the circuit court found that the photo identification should be suppressed based on the Fourteenth Amendment Due Process Clause. The court found that the identification procedure used was not impermissibly suggestive, but also found that Pate's identification was not reliable. Under the Due Process Clause, if a photo identification procedure is not impermissibly suggestive, except in extreme cases, the identification's reliability is irrelevant to the question of admissibility and is, instead, a question of weight for the factfinder. The photo identification in this case should not have been suppressed based on the Due Process Clause.

Dustin Meredith v. State of Maryland, No. 1603, September Term 2013, filed June 26, 2014. Opinion by Raker, J.

http://www.mdcourts.gov/opinions/cosa/2014/1603s13.pdf

CRIMINAL LAW – WAIVER OF RIGHT TO JURY TRIAL – MARYLAND RULE 4-246 - PRESERVATION

Facts:

Dustin Meredith was convicted in the Circuit Court for Caroline County of theft scheme between $1,000 and $10,000 and six counts of theft. Pre-trial, Meredith purported to waive his right to a jury trial. The court conducted a thorough waiver examination on the record and found that Meredith had waived his right to a jury trial, stating as follows:

> "All right, I'm going to rule that [Meredith has] knowingly and intelligently waived [his] right to a jury trial."

Meredith did not object to the trial court's ruling. Following a jury trial, Meredith was convicted of theft scheme between $1,000 and $10,000 and six counts of theft.

Held: Affirmed.

Pursuant to *Nalls & Melvin v. State*, 437 Md.674 (2014), the Court of Special Appeals held that because Meredith failed to object to the waiver procedure, he failed to preserve for appellate review his challenge to the effectiveness of the waiver. The Court of Special Appeals declined to exercise its discretion under Rule 8-131 to consider the issue.

Maryland Rule 4-246(b) provides that the trial court may not accept a defendant's purported waiver of a jury trial "until . . . the court determines and announces on the record that the waiver is made knowingly and voluntarily." In *Valonis & Tyler v. State*, 431 Md. 551, 567, 66 A.3d 661, 670 (2013), the Court of Appeals made clear that, to comply with the Rule, the trial judge must make a determination, on the record, that the defendant's waiver is both *knowing* and *voluntary*. In *Valonis*, the Court exercised its discretion under Rule 8-131 and addressed appellants' arguments even though there was no contemporaneous objection lodged in the trial court. The Court did so to address a perceived recurring problem–namely, the failure of trial judges to adhere to the letter of Rule 4-246(b).

Less clear after *Valonis* was whether an appellate court would review a jury trial waiver in the absence of a contemporaneous objection in the trial court. In *Nalls & Melvin*, the Court of Appeals again exercised its discretion under Rule 8-131 to address a trial judge's failure to

comply with Rule 4-246(b). After exercising its discretion to review the challenged waiver, the Court stated:

> "Going forward, however, the appellate courts will continue to review the issue of a trial judge's compliance with Rule 4-246(b) provided a contemporaneous objection is raised in the trial court to preserve the issue for appellate review."

Id., slip op. at 15.

In Re: Adoption/Guardianship of Jasmine D., No 1470, September Term 2013, filed June 30, 2014. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2014/1470s13.pdf

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS – JUVENILE COURT REQUIRED TO FIND PARENTAL UNFITNESS OR EXCEPTIONAL CIRCUMSTANCES, NOT BOTH.

Facts:

Jasmine D. ("Jasmine") is the daughter of appellant, Stephanie N. ("Ms. N."), and an unknown father. Jasmine was three years old when she first entered foster care, and spent over five of her eleven years of life in foster care as a result of Ms. N's alcoholism. Jasmine's most recent placement in foster care began on November 4, 2009, and continues to the present. On December 2, 2009, Jasmine was adjudicated CINA and placed in the care and custody of appellee, the Howard County Department of Social Services (the "Department").

The event that prompted Jasmine's entry into foster care in 2009 occurred when Ms. N. arrived at Jasmine's elementary school demanding that Jasmine be removed from her class. Ms. N. was intoxicated and had visible injuries on her face that she admitted were the result of a domestic dispute that day with her live-in boyfriend. Ms. N.'s emotions vacillated from crying hysterically to being belligerent with the police officers who had been called by school personnel. When Ms. N. refused to enter a safety plan for Jasmine, Jasmine was removed from Ms. N.'s care.

Over the next three years, the Department engaged in extensive efforts for reunification of Ms. N. with Jasmine, all to no avail. In early 2010, Ms. N. was diagnosed with mood disorder and alcohol dependence. Ms. N., however, refused to acknowledge her alcohol dependence, stating on many occasions that she did not drink. Ms. N. was directed by the Department and the juvenile court, among other things, to complete substance abuse treatment and to submit to random drug and alcohol testing. From July 2010 to October 2012, Ms. N. tested positive for alcohol nine times and refused to take a random test approximately thirty times. The Department also arranged for Ms. N. to enter inpatient treatment for alcohol dependence four times, but Ms. N. refused each offer, stating again that she did not drink. Ms. N. also had a history of calling the Department and threatening to commit suicide.

During the same three year period, the Department offered Ms. N. supervised visitation with Jasmine once a week for two hours. Ms. N. missed forty-five of those scheduled visits. At one point, the juvenile court ordered that Ms. N.'s supervised visitation with Jasmine be suspended until Ms. N. entered into inpatient treatment for alcohol dependency. Ms. N. never entered inpatient treatment.

On December 6, 2012, the juvenile court ordered a change in Jasmine's permanency plan from reunification to adoption. Later that mouth the juvenile court again suspended Ms. N.'s supervised visitation with Jasmine until Ms. N. provided documentation that she was receiving mental health treatment. No such documentation was ever submitted, and thus Ms. N. has not seen Jasmine since December of 2012.

On March 13, 2013, the Department filed a TPR petition in the juvenile court. Ms. N. filed an objection, stating that "I am a very good mother and I don't drink." The TPR trial was conducted on August 28 and 29, 2013. Jasmine, through counsel, supported the termination of Ms. N.'s parental rights. Ms. N. was not present on either day of the trial.

As the end of the trial, the juvenile court rendered an oral opinion. The court determined by clear and convincing evidence that Ms. N. was unfit to remain in a parental relationship with Jasmine, discussed in detail each factor under Section 5-323(d) of the Family Law Article ("FL"), and concluded that, based on all of the facts of the case, Ms. N.'s parental rights should be terminated. Ms. N. appealed.

Held: Affirmed.

Ms. N. did not challenge the juvenile court's factual findings or analysis of the statutory factors under FL §5-323(d). Instead, Ms. N. argued primarily that the evidence did not support a finding of exceptional circumstances that would make the continuation of the parental relationship detrimental to Jasmine's best interests. The Court rejected this argument, observing that the juvenile court did not determine that exceptional circumstances existed; rather, it concluded that Ms. N. was an unfit parent. The Court explained that under the language of FL §5-323(b), before parental rights can be terminated, the juvenile court must find by clear and convincing evidence that either the parent is unfit to remain in a parental relationship with the child, or exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the child's best interests.

The Court also held that, when a juvenile court finds parental unfitness, there is no need for an express finding that "the continuation of the parental relationship [would be] detrimental to the best interests of the child," because the continuation of the parental relationship is, by definition, detrimental to the child's best interests where the parent "is unfit to remain in a parental relationship with the child." *See* F.L. §5-323(b). Thus Ms. N.'s arguments regarding exceptional circumstances were beside the point.

Gleen Cooper v. Richard Singleton, No. 849, September Term 2013, filed June 26, 2014. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2014/0849s13.pdf

BURDEN OF PERSUASION – BURDEN OF PRODUCTION – EVIDENTIARY PRESUMPTIONS – JURY INSTRUCTIONS – TORTS – NEGLIGENCE – ANDRADE v. HOUSEIN

Facts:

The plaintiff was one of a line of four cars stopped at a red light that were hit by the defendant from the rear. The plaintiff filed suit for damages in the Circuit Court for Montgomery County. The case was tried to a jury. The defendant raised the defense of sudden incapacity, to wit, a grand mal seizure. The plaintiff relied exclusively on an alleged presumption of negligence that, he claimed, "arises where a motor vehicle is lawfully stopped on a highway awaiting for traffic to clear before an intersecting highway and that vehicle is suddenly struck from behind by another vehicle." *See Andrade v. Housein*, 147 Md. App. 617, 623, 810 A.2d 494 (2002). The plaintiff requested a non-standard jury instruction to that effect based on *Andrade*, which the court declined to give. Instead, the court gave standard instructions, explaining that the burden was on the plaintiff to persuade the jury of the defendant's negligence by a preponderance of the evidence; and that the defendant was offering the defense of sudden incapacity and that the defendant had the burden of persuading the jury of the existence of that defense by a preponderance of the evidence. The jury found for the defendant and the plaintiff appealed to the Court of Special Appeals.

Held: Affirmed.

The court's jury instructions were correct. An abstract proposition extracted from a judicial opinion is not necessarily a proper jury instruction in a particular case. In *Andrade*, the plaintiff presented evidence that his vehicle had been struck from behind by the defendant's vehicle. The defendant presented no evidence at all, and the court granted a directed verdict in favor of the defendant. On appeal, this Court reversed. This Court's *Andrade* decision held simply that the fact of being struck from behind was enough in and of itself to save the plaintiff's case against the defendant from a directed verdict. The decision said nothing about the burden of persuasion. Even if an evidentiary presumption may shift the burden of production, the ultimate burden of persuasion always remains with the plaintiff.

Blue Ink, Ltd. v. Two Farms, Inc. d/b/a Royal Farms, Inc., No. 1487, September Term 2012, filed July 30, 2014. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2014/1487s12.pdf

NUISANCE – PRIVATE NUISANCE – STANDARD

Facts:

Bengies Drive-In Movie Theatre ("Bengies"), through its owner and operator Blue Ink, Ltd., filed a lawsuit against Two Farms, Inc. (doing business as Royal Farms, Inc.) alleging the lights emanating from the Royal Farms premises at nighttime interfered with the drive-in and constituted a private nuisance. After a trial, the jury found in favor of Bengies and awarded $838,000.00 in damages, valuing the cost of constructing a fence to block light and associated insurance costs. The Circuit Court for Baltimore County considered Royal Farms' Motion for Judgment Notwithstanding the Verdict ("JNOV") and, after concluding there was insufficient evidence for a jury to find a private nuisance, set the jury's verdict aside and entered judgment in favor of Royal Farms. Bengies appealed.

Held: Affirmed.

The Court of Special Appeals first reviewed the standard governing appellate review of a grant of a Motion for JNOV. It is the responsibility of the court to aid a jury in the correct discharge of its duty and to correct error. On appeal, the Court reviews the trial court's decision to grant the JNOV de novo, and in so doing, must determine whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence.

The Court then concluded that under Maryland law governing private nuisance actions, a successful plaintiff must demonstrate that the defendant's interference with plaintiff's property rights is both unreasonable and substantial, and that the harm or inconvenience created by such interference is "objectively reasonable" to the ordinary person. Applying this standard to the instant case, the Court determined that the evidence presented at trial failed to satisfy either requirement. The Court highlighted the lack of evidence demonstrating "unreasonable and substantial" interference. The Court next noted that the alleged harm caused by the lights was not "objectively reasonable" to the ordinary person or company. The evidence established that the drive-in is unique in its need for darkness to operate, but, the Court instructed, a private nuisance action cannot be maintained based solely on the special sensitivities of a plaintiff. Moreover, although Bengies presented expert testimony to support its claim that the lights from the Royal Farms could have interfered with the drive-in, the testimony did not link the *possibility* of interference with testimony that any objectively reasonable actual harm or inconvenience occurred. Aside from the owner of Bengies, who conceded that he is personally sensitive to

light, no evidence was presented that patrons or employees of the drive-in were ever harmed or inconvenienced by the lights at the Royal Farms.

The Court clarified that its holding does not preclude a drive-in (or similar business) from maintaining an action for private nuisance. A scenario could exist in which the lights emanating from an adjacent property could support a private nuisance action, but those lights must be unreasonable and substantial, and such that it would interfere with an ordinary business's reasonable, ordinary use of its property. The trial court properly granted the JNOV where this scenario was not presented to the jury.

Robert White v. State of Maryland, No. 1187, September Term 2013, filed June 27, 2014. Opinion by Raker, J.

http://www.mdcourts.gov/opinions/cosa/2014/1187s13.pdf

TRANSPORTATION – SUSPENDED AND EXPIRED LICENSE – PRIVILEGE TO DRIVE – STATUTORY INTERPRETATION

Facts:

Robert White was convicted of driving on a suspended license in the Circuit Court for Wicomico County. In October 2012, White was stopped by the police and charged with driving on a suspended license among other charges. His license was issued in 1986, suspended for failure to pay fines sometime before 1990, and it expired in 1990. White, after being tried on an agreed statement of facts, was convicted of driving on a suspended license and acquitted of the other charges. Before the Court of Special Appeals, White argued that he should not have been convicted of driving on a suspended license because his license had expired when he was charged.

Held: Affirmed.

The Court of Appeals held in *Sullivan v. State*, 407 Md. 493, 502-03 (2009) that Maryland Code (1977, 2012 Repl. Vol.) § 16-303 of the Transportation Article, with its prohibition on driving while one's license or "privilege to drive" is suspended or revoked, means that one cannot be convicted of driving on a revoked license if that person never held a license in the first place.

In this case, appellant relied on *Sullivan* and argued that since his license had expired, he had no license or "privilege to drive" under the statute and should not have been convicted of driving on a suspended license. The Court of Special Appeals held that since appellant's license was valid and unexpired when suspended, its subsequent expiration did not cancel the suspension. The Court pointed out that a contrary interpretation of the statute would be illogical and unreasonable, because it would mean that someone like appellant, whose license was suspended indefinitely for failure to pay fines and child support, would have no incentive to pay his delinquencies once his license expired and the suspension disappeared.

ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated June 4, 2014, the following attorney has been suspended for thirty days by consent, effective July 7, 2014:

GWYN CARA HOERAUF

*

By an Order of the Court of Appeals dated July 9, 2014, the following attorney has been disbarred by consent:

JILL H. BERMAN

*

By an Order of the Court of Appeals dated July 16, 2014, the following attorney has been disbarred by consent:

JOHN J. SULIVAN, JR.

*

By an Order of the Court of Appeals dated July 18, 2014, the following attorney has been indefinitely suspended by consent:

LAURA ELIZABETH JORDAN

*

By an Order of the Court of Appeals dated July 18, 2014, the resignation of

DANIEL F. MCMULLEN, JR.

from the further practice of law in this State has been accepted.

*

*

By an Opinion and Order of the Court of Appeals dated July 21, 2014, the following attorney has been disbarred:

RUNAN ZHANG

*

By an Order of the Court of Appeals dated July 24, 2014, the following attorney has been disbarred by consent:

ANTHONY MAURICE HARMON

*

By an Order of the Court of Appeals dated July 25, 2014, the following attorney has been disbarred by consent:

KAREN JONES MILLER

*