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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Michael C. Hodes, Misc. Docket AG No.61, September Term 2013, filed December 23, 2014. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2014/61a13ag.pdf

ATTORNEY DISCIPLINE – ATTORNEY MISCONDUCT – DISBARMENT

Facts:

The hearing judge found that Respondent, Michael Carl Hodes, represented Gloria Ominsky, beginning in 2005, and that during Ms. Ominsky's lifetime Hodes served as her attorney-in-fact. Hodes was appointed Trustee of the Gloria S. Ominsky Irrevocable Trust (hereinafter "Trust"), the funds of which were dedicated to a charitable foundation, the Ominsky Family Charitable Foundation. Upon Ms. Ominsky's death from cancer, Hodes withdrew two unearned checks from her personal checking account, one for $14,500.00 payable to his financial consulting company, Michael Carl Hodes Financial (hereinafter "MCH Financial") and one for $775.00 payable to his wife and then backdated the checks to make them appear as though they were issued prior to Ms. Ominsky's death. Hodes also instructed his secretary to create and backdate an invoice between MCH Financial and Ms. Ominsky for the $14,500.00. While acting as Trustee, Hodes also withdrew two checks from the Trust bank account, one for $270,000.00 payable to his art gallery, Mikelen Gallery, LLC, and one for $3,500.00 payable to MCH Financial. Hodes then transferred $265,000.00 to his and his wife's joint checking account to pay personal debts. Hodes also engaged in a series of acts to camouflage his behavior, including testifying falsely under oath during a Rule 16-732 statement that he had executed a personal guaranty for the $270,000.00 he removed from the Trust account.

The hearing judge concluded that Hodes violated Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.7, 1.15(d), 8.1(a), and 8.4(a), (b), (c) and (d), and Section 10-306 of the Business Occupations and Professions Article of the Maryland Code. Hodes filed numerous exceptions to the hearing judge's findings of fact and conclusions of law.

Held: Disbarment is the appropriate sanction.

The Court of Appeals determined, after considering Hodes's numerous exceptions, that his conduct was subject to the MLRPC even were he to have been operating in a personal or non-legal capacity as Ms. Ominsky's attorney-in-fact or as Trustee of the Trust, because those roles directly emanated out of his attorney-client relationship with Ms. Ominsky. His actions were dishonest and fraudulent when he withdrew two checks, one for $14,500.00 and one for $775.00 from Ms. Ominsky's personal account for the benefit of his financial consulting company and his wife, then backdated the checks to make it appear that they were issued prior to Ms. Ominsky's death, and additionally, when, as Trustee for the Trust, he withdrew two checks from the Trust bank account, one for $270,000.00 payable to his art gallery to pay personal debts, and one for $3,500.00 payable to MCH Financial. Hodes's conduct in engaging in the four improper transactions was dishonest, fraudulent and prejudicial to the administration of justice, and, therefore, constituted a violation of MLRPC 8.4 (a), (c) and (d). Hodes's conduct amounted to a conflict of interest, in violation of MLRPC 1.7, when he engaged in self-dealing in violation of his duties as a Trustee by removing $270,000.00 from the Trust for his own benefit and when he acted in his own interest by withdrawing $14,500.00 and $775.00 from Ms. Ominsky's personal account. Hodes violated MLRPC 1.15(d) and Section 10-306 when he failed to properly distribute the Trust funds to a charitable foundation as dictated by Ms. Ominsky's will, and instead circumvented the funds for his own use. Hodes actions in fraudulently and willfully removing the $270,000.00 from the Trust violated the strictures of Section 7-113(a) of the Criminal Law Article of the Maryland Code ("Embezzlement - fraudulent misappropriation by fiduciary.") and, therefore, MLRPC 8.4(b). Hodes, additionally, testified falsely during Bar Counsel's investigation that he executed a personal Guaranty for the $270,000.00 he removed from the Trust account, in violation of MLRPC 8.1(a).

Hodes's intentional dishonest and fraudulent conduct demonstrated his lack of the fundamental qualities of a lawyer: honest, integrity and respect for the legal system and, thus, warranted the severest sanction of disbarment.

Attorney Grievance Commission of Maryland v. Ronald Claude Brigerman, Jr., Misc. Docket AG No. 16, September Term 2013, filed December 18, 2014. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2014/16a13ag.pdf

ATTORNEY MISCONDUCT — DISCIPLINE — INDEFINITE SUSPENSION

Facts:

Petitioner, the Attorney Grievance Commission of Maryland ("Petitioner"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("Petition") against Respondent, Ronald Claude Brigerman, Jr. The Petition alleged violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") and the Maryland Rules in connection with Respondent's representation of Kent Brummell, Renee Copper, and Terry Holden.

The Court of Appeals assigned the matter to the Honorable Leah J. Seaton of the Circuit Court for Dorchester County (the "hearing judge"). After an evidentiary hearing, the hearing judge found the following facts:

Respondent represented Mr. Brummell in a criminal prosecution, in which Mr. Brummell was found guilty. On January 11, 2012, Mr. Brummell filed a complaint with Petitioner because Respondent had failed to respond to Mr. Brummell's repeated requests for copies of documents from his case file. Respondent claimed that he had never received Mr. Brummell's requests and offered to send the documents. Respondent, however, did not send the documents until August 17, 2012. Respondent also failed to respond to multiple letters from Petitioner.

Respondent represented Ms. Copper as a plaintiff in a personal injury matter and filed a lawsuit on her behalf. Before trial, Respondent, with Ms. Copper's permission, settled with the defendant's insurance company for $10,000. Respondent then dismissed the case. Sometime later, Respondent received the $10,000 settlement check from the insurance company. Respondent, however, did not inform Ms. Copper of his receipt of the settlement check or the dismissal of her case. Instead, Ms. Copper only learned this information by contacting the insurance company and the court directly. Respondent did not provide Ms. Copper with her portion of the settlement proceeds until approximately four months after he had received it.

Respondent represented Ms. Holden as a defendant in a civil matter. Ms. Holden paid Respondent a flat fee of $2,500, but Respondent failed to perform any work on her matter beyond a five-minute telephone conversation with a potential expert witness. Ms. Holden repeatedly attempted to contact Respondent about her case, but she was unable to reach him. Respondent did not return his unearned fee to Ms. Holden until over one year later, during the evidentiary hearing on this disciplinary matter.

The hearing judge found that Respondent was experiencing marital and custody difficulties during the time of his misconduct and that he was remorseful for "dropping the ball" in Ms. Holden's case. Respondent also had no prior formal discipline.

Based upon these factual findings, the hearing judge concluded, by clear and convincing evidence, that Respondent had violated MLRPC 1.1; MLRPC 1.3; MLRPC 1.4(a) and (b); MLRPC 1.15(a), (c), and (d); MLRPC 1.16(d); MLRPC 8.1(a) and (b); MLRPC 8.4(a), (c), and (d); and Maryland Rule 16-604.

Held:

Petitioner filed one exception to the hearing judge's legal conclusion that Respondent violated MLPRC 8.4(c), in connection with his representation of Ms. Copper, because Petitioner had only charged Respondent with that violation in connection with his representation of Mr. Brummell. We sustained Petitioner's exception. No other exceptions were filed.

Based on the Court's *de novo* review of the record, the Court agreed with the hearing judge that Respondent violated MLRPC 1.1; MLRPC 1.3; MLRPC 1.4(a) and (b); MLRPC 1.15(a), (c), and (d); MLRPC 1.16(d); MLRPC 8.1(a) and (b); MLRPC 8.4(a), (c), and (d); and Maryland Rule 16-604.

The Court explained that Respondent's misconduct—namely his abandonment of Ms. Holden, his neglect of all three clients, and his failure to cooperate with Petitioner's investigation—was severe. The Court found it significant, however, that the hearing judge found that Respondent was experiencing personal problems during the time of his misconduct. Taking into account these mitigating factors, the Court held that indefinite suspension is the appropriate sanction for Respondent's misconduct.

Attorney Grievance Commission of Maryland v. John M. Green, Misc. Docket AG Nos. 32 & 46, September Term 2013, filed December 22, 2014. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2014/32a13ag.pdf

ATTORNEY GRIVANCE – INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission, Petitioner, filed a Petition for Disciplinary or Remedial Action ("Petition") against Respondent, John M. Green. The Petition alleged violations of the Maryland Lawyers' Rules of Professional Conduct. ("MLRPC") 1.1, 1.4(a)(2)-(3), 1.4(b), 1.5(a), 1.15(a), 1.15(c), 1.15(d), 8.1(b), 8.4(a), and 8.4(d) in one matter and MLRPC 8.1(b) and 8.4(d) in a second matter by failing to communicate the scope of his representation and the amount of time billed to a client, failing to deposit an unearned retainer in a client trust account or escrow, and not responding to the lawful orders of Bar Counsel for information and response to the complaints filed against him.

Respondent was retained by the client in the first matter, V'Etta Ward, to assist with the distribution of personal property over which she and the adult daughter of her late husband were in dispute. Ward and Respondent agreed to a fee of $250.00 per an hour and Ward paid Respondent a $3,500.00 retainer. At the time of the payment, although he had arranged a time for the adult daughter to retrieve some personal property from the home of Ward's late husband, Respondent had not earned all of the retainer. Responded did not deposit the unearned portion of the retainer into an attorney trust or escrow account.

Ward later sought additional legal guidance from Respondent regarding how to lawfully abandon her late husband's Fort Washington residential property. Although Respondent was unfamiliar with the specific legal principles and process at the outset, after consultation with a trusts and estates attorney and some legal research, he was able to file a petition to abandon that was accepted and acted upon favorably by the Orphans' Court for Prince George's County.

In the retainer agreement between Ward and Respondent, Respondent agreed to provide monthly invoices on a timely basis and request a replenishing retainer of $1,250.00 once the initial $3,500.00 retainer was exhausted. Despite Ward's frequent requests, Respondent never provided her with the agreed upon monthly invoices.

In August 2011, fifteen months after Respondent began his representation of Ward, Respondent billed Ward, claiming she owed $7,845.98 above the initial retainer of $3,500. Among the entries was a cumulative charge of $1,562.50 for all of the telephone calls between Respondent and Ward over the fifteen month period.

On 19 August 2011, Ward sent a letter to Respondent indicating that she disputed the charges. Ward requested a response within seven business days. Respondent did not respond to the letter until 29 May 2012 at which time he demanded payment and threatened the possibility of a collection action. After receiving Respondent's answer to her letter, Ward filed a grievance with the Attorney Grievance Commission.

On 3 July 2012, 3 August 2012, and 12 October 12 2012, the Office of Bar Counsel sent and re-sent a letter to Respondent through his P.O. Box requesting a response to Wards complaint, which was enclosed. Respondent received the correspondence, but he did not respond.

On 13 November 2012, Respondent was contacted by telephone by an Attorney Grievance Commission investigator. Respondent provided an updated residential address to which the Office of Bar Counsel sent a letter enclosing copies of all previous correspondence regarding Ward's complaint. The letter directed response by 30 November 2012. Again, Respondent did not respond.

In the second matter, Respondent was representing the husband of the complainant, Nicole Jackson-Young, in a family law matter. On 27 November 2012 the Office of the Bar Counsel sent a letter to the Respondent's updated residential address and his P.O. Box requesting a response to Jackson-Young's complaint. Respondent did not respond. On 17 January 2013, the Office of the Bar Counsel again sent a letter to Respondent's undated residential address and again Responded did not respond.

Held:

Respondent violated of MLRPC 1.4(a)(2)-(3), 1.4(b), 1.5(a), 1.15(a), 1.15(c), 1.15(d), 8.1(b), 8.4(a), and 8.4(d) in his representation of Ward and the subsequent investigation by the Office of Bar Counsel. Respondent violated MLRCP 8.1(b) and 8.4(d) in the investigation regarding Jackson-Young's complaint. For this misconduct, indefinite suspension from the practice of law in Maryland is the appropriate sanction. Because there is no indication in the record of the reasons for Respondent's misconduct the likelihood of recidivism, due to Respondent's multiple refusals to cooperate with bar counsel, an open-ended suspension without a minimum "sit-out" period is appropriate.

Attorney Grievance Commission of Maryland v. Christopher W. Poverman, Misc. Docket AG No. 2, September Term 2014, filed November 21, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2014/2a14ag.pdf

ATTORNEY DISCIPLINARY PROCEEDINGS – RECIPROCAL DISCIPLINE – INDEFINITE SUSPENSION

Facts:

In this reciprocal attorney discipline action, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, sought disbarment for Christopher W. Poverman's misconduct in Delaware. The Delaware Supreme Court had ordered that Poverman be publicly reprimanded.

Shortly after he was admitted to the Delaware Bar in 1991, Poverman was admitted to the Maryland Bar. By 2013, there were two petitions for disciplinary action pending against him in Delaware—one addressing his failure to complete his continuing legal education ("CLE") and the other addressing his failure to file an annual registration statement. The Delaware Supreme Court's Board on Professional Responsibility ("Board") conducted a hearing regarding the two petitions and issued findings of fact, conclusions of law, and a recommended sanction.

Poverman did not complete his 2011 continuing legal education ("CLE") by the February 1, 2012 deadline. The CLE Commission and the Delaware Office of Disciplinary Counsel ("ODC") sent him several letters and emails about this noncompliance, but he did not respond. Eventually, Poverman contacted the CLE Commission and agreed to complete his outstanding CLE by no later than December 31, 2012. Poverman, however, did not complete his CLE until May 15, 2013, over one year after the original deadline.

Poverman failed to complete his 2013 annual registration statement by the March 1, 2013 deadline. On March 27, 2013, the date on which he was due to appear before the Delaware Supreme Court to show cause why he had not completed a registration statement, Poverman called the Clerk of the Supreme Court and advised her that he would complete it online. Based on their conversation, the Clerk believed that Poverman had suffered two strokes, which hindered his completion of the registration statement. Poverman also represented to the ODC in an email that he had a "second stroke" in December 2012. Poverman, however, was never formally diagnosed as having suffered a stroke.

When Poverman completed his registration statement, he certified that there were no charges pending or threatened against him before any court or disciplinary agency. The Board found that Poverman knew this certification was false because when he made it, disciplinary charges were pending against him for his CLE deficiency. The Board did not find, however, that Poverman

knew he had never suffered a stroke when he made his contrary representations to ODC and the Clerk of the Supreme Court.

The Board recommended that Poverman be publicly reprimanded, concluding that his misconduct violated Delaware Lawyers' Rules of Professional Conduct 3.4(c), 8.4(c), and 8.4(d). The Delaware Supreme Court accepted the Board's recommendation.

Held:

The Court of Appeals concluded that Poverman violated Maryland Lawyers' Rules of Professional Conduct 8.1(b), 8.4 (c), and 8.4 (d). The Court observed that Poverman made two false representations: (1) informing the Clerk of the Supreme Court that he suffered two strokes; and (2) certifying on his 2013 registration statement that there was no disciplinary action pending or threatened against him. Bar Counsel, characterizing Poverman's conduct as "infested with dishonesty," contended that it was undisputed that Poverman knew both of these representations were false. The Court disagreed, emphasizing that the Board never found that Poverman knew he had not suffered two strokes. The Board found that only his false certification was a knowing misrepresentation.

Bar Counsel cited three cases in which the attorneys were disbarred for making knowingly false misrepresentations. The Court distinguished all three of the cases on the ground that the attorneys' misconduct was more egregious than Poverman's. The Court then discussed two cases in which the attorneys were indefinitely suspended for misconduct similar to Poverman's. Ultimately, the Court imposed a sanction of indefinite suspension with a right to apply for reinstatement after one year.

Attorney Grievance Commission of Maryland v. Michael Craig Worsham, Misc. Docket AG No. 14, September Term 2013, filed December 23, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2014/14a13ag.pdf

ATTORNEY DISCIPLINE – WILLFUL FAILURE TO FILE TAX RETURNS OR PAY TAX LIABILITY – DISBARMENT

Facts:

Respondent Michael Craig Worsham willfully failed to file federal or State income tax returns or pay federal or State income taxes for tax years 2005-2012. Additionally, Mr. Worsham willfully attempted to deposit earned fees into his Maryland attorney trust account to conceal his income from the federal and State taxing authorities.

After his failure to file returns or pay taxes was detected by the Internal Revenue Service, Mr. Worsham filed a petition in the United States Tax Court in which he raised only frivolous arguments challenging the constitutionality of the federal income tax laws and arguing that his wages as an attorney could not be taxed as income. He later repeated the same arguments before the United States Court of Appeals for the Fourth Circuit, which found them meritless and affirmed the Tax Court's conclusion that he had failed to file returns and pay taxes with fraudulent intent.

In May 2013, the Attorney Grievance Commission filed a Petition for Disciplinary or Remedial Action against Mr. Worsham alleging numerous violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") arising out of Mr. Worsham's failure to file returns or pay taxes, as well as violations arising out of his representation of four of his clients. The hearing judge found that Mr. Worsham had violated MLRPC 1.2(a), 1.4, 1.5, 1.8, 1.9, 1.15, 1.16, 3.1, 8.1, and 8.4(a)-(d), as well as Maryland Rules 16-606.1 and 16-607. Mr. Worsham filed exceptions. The Commission, through Bar Counsel, did not file exceptions, nor did it respond to Mr. Worsham's exceptions.

Held: Disbarment is the appropriate sanction with respect to the tax-related misconduct; the Court did not reach the merits of the allegations relating to his dealings with clients.

Mr. Worsham's willful failure to file federal or State tax returns or pay federal or State taxes for tax years 2005-2012 violated MLRPC 8.4(b), (c), and (d), and as a result, also violated MLRPC 8.4(a). Mr. Worsham's attempt to misuse his attorney trust account to conceal money from the federal and State taxing authorities violated MLRPC 8.4(c) and (d). Additionally, by filing a

frivolous petition before the Tax Court and continuing to raise the same frivolous positions before the Court of Appeals for the Fourth Circuit, Mr. Worsham violated MLRPC 3.1.

The Court held that because Mr. Worsham's willful failure to file tax returns or pay taxes was done with a fraudulent intent for personal gain, it warranted the severest sanction of disbarment.

Because disbarment was the appropriate sanction for Mr. Worsham's conduct relating to his willful and fraudulent failure to file returns or pay taxes, the Court did not discuss the hearing judge's findings and conclusions related to Mr. Worsham's representation of his clients.

Return to ToC

In the Matter of the Application of T. Z.-A. O. for Admission to the Bar of Maryland, Misc. No. 3, September Term 2014, filed December 22, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/3a14m.pdf

BAR ADMISSION – DENIAL OF ADMISSION

Facts:

On May 21, 2012, T. Z.-A. O. ("Movant") filed with the State Board of Law Examiners ("the Board") an application for admission to the Bar of Maryland. The Board forwarded the application to the Character Committee for the Fifth Appellate Circuit ("the Committee"). Movant passed the July 2012 Maryland Bar Examination. As a result of matters uncovered during the Committee's investigation, a three-member panel of the Committee conducted a hearing and thereafter issued a report, unanimously recommending that Movant be denied admission to the Bar of Maryland. The Board then conducted a hearing and issued a report, concluding, by a vote of four to two, that Movant had "not met his burden of proving that he currently possess good moral character and fitness for membership in the Bar of Maryland." Relying on the adverse recommendations of the Committee and the Board, the Court of Appeals denied Movant admission to the Bar of Maryland. Movant filed a Motion for Reconsideration, in which he requested oral argument. The Court of Appeals granted Movant's request, and heard oral argument.

Held: Denied.

The Court of Appeals denied Movant's Motion for Reconsideration of the Court's denial of Movant's application for admission to the Bar of Maryland. Upon consideration of the unfavorable recommendations of the Committee and the Board and an independent review of the record, the Court of Appeals held that Movant had not met the burden of proving that he possesses the requisite moral character and fitness for admission to the Bar of Maryland because Movant: (1) had demonstrated a consistent pattern of financial irresponsibility; and (2) completed and signed a car loan application which included false financial information and failed to include information about a recent bankruptcy.

State of Maryland v. Joseph William Payne & Jason Bond, No. 85, September Term 2013, filed December 11, 2014. Opinion by Battaglia, J.

Barbera, C.J., Harrell and McDonald, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2014/85a13.pdf

EVIDENCE – SUBJECT OF EXPERT TESTIMONY UNDER RULE 5-702 – TECHNICAL PROCESSES

EVIDENCE – HEARSAY EXCEPTIONS – PARTY OPPONENT

EVIDENCE – HEARSAY EXCEPTIONS – STATEMENT OF A CO-CONSPIRATOR

EVIDENCE – ADMISSIBILITY OF STATEMENTS OF A NON-TESTIFYING CO-DEFENDANT

Facts:

Detective Brian Edwards, while investigating the murder of Glenn Stewart, recovered Desmond Jones's cell phone number from Stewart's bedroom. Investigation of Jones's cell phone records led Detective Edwards to identify the phone numbers of individuals he identified as the "most pertinent" to the investigation, including those of Joseph Payne and Jason Bond. Detective Edwards amassed records of Payne's and Bond's cell phone calls, in the form of Call Detail Records; he testified that he parsed Payne's and Bond's records into a list of call entries, which were admitted into evidence. Excluded from both lists of call entries was information that Detective Edwards had determined was extraneous and that he had deleted.

Detective Edwards, further, had substituted his own derived geographical coordinates for the identification numbers of the cell towers associated with each call entry. The Detective testified that he could determine the cell towers through which Payne's and Bond's cell phones had operated, based upon the two sets of records, by matching certain data points from a call entry to a list of cell towers contained on a table available on an unnamed "secure Web site" or on "an Excel spread sheet that comes with the records", neither of which was submitted to the jury.

Payne's and Bond's attorneys objected to Detective Edwards's testimony on the basis that he should have been qualified as an expert witness under Maryland Rule 5-702 in order to explain the content of a Call Detail Record and the use of such a record to identify the location of the cell towers through which particular calls had been routed, as well as the location of the defendants' cell phones. The trial judge overruled the objection on the basis that the Detective's testimony concerned only facts verifiable from the face of the records.

Following the objection, the trial judge admitted into evidence maps that Detective Edwards had created depicting the location of the cell towers through which he had determined Payne's and

Bond's calls had been routed, as well as the location of the crime scene. Detective Edwards further testified that the towers were, respectively, one and a half and two miles from the crime scene. In closing, the prosecution emphasized the importance of Detective Edwards's testimony as evidence of Payne's and Bond's guilt "because it puts them right there" at the crime scene.

The State had also introduced as evidence six recorded phone calls in which Bond was a participant, but Payne was not. The State argued before the trial court that the calls could be admitted against Payne as the statements of a co-conspirator in a conspiracy to conceal the crime under Maryland Rule 5-803(a)(5), which provides an exception to the rule against hearsay for the statements of a co-conspirator. The State offered, as evidence of the conspiracy, records showing numerous phone calls between Payne, Bond and others, including Brittany Keller, who had provided a false alibi to the police during the investigation. During Keller's testimony, she recanted her alibi and explained that after she had spoken to Bond about the false alibi in one of the recorded phone calls, she had met face-to-face with Payne and spoke with him about "what was said by Jason".

The trial court found that, based on Keller's testimony, "all the players knew" of the false alibi, that Payne was a member of the conspiracy and, therefore, the recordings could be admitted against Payne.

The Court of Special Appeals reversed the convictions of Payne and Bond on the ground that Detective Edwards needed to be qualified as an expert under Maryland Rule 5-702, because only an expert could derive the location of a cell phone from evidence of the towers through which a cell phone communicated.

The Court of Special Appeals denied the admissibility of the recordings as statements of a co-conspirator under Rule 5-803(a)(5), because there was insufficient evidence of Payne's involvement in a conspiracy to conceal, but nevertheless upheld their admissibility as to Payne as the statements of a party-opponent as provided by Maryland Rule 5-803(a)(1), which excepts from hearsay exclusion the statements of a party-opponent.

Held: Vacated the judgment of the Court of Special Appeals and remanded with instructions to vacate the judgment of the Circuit Court and for a new trial.

The Court first reviewed what comprises a Call Detail Record and opined that, to understand the data presented in such a record required an understanding of the underlying technology of a cellular network. After discussing the technical aspects of a cellular network, the Court concluded that the means by which a cell phone connects to a particular tower is not common knowledge. The Court held that Detective Edwards, when testifying about the process by which he derived the communication path of Payne's and Bond's cell phones, as well as his determination that particular towers were the most pertinent communication points, needed to have been qualified as an expert. The Court noted that, because the basis of Detective Edwards's testimony was beyond the ken of a lay juror, under *Ragland v. State*, 385 Md. 706, 870 A.2d 609

(2005), in which the Court delineated the scope of expert testimony, interpreting such information required that Detective Edwards be qualified as an expert.

As to the six recorded phone calls, the Court agreed with the Court of Special Appeals that, for the recordings to be admissible under Rule 5-803(a)(5), as the statements of a co-conspirator, the State must have shown the existence of a conspiracy and Payne's agreement to that conspiracy.

The Court noted that *State v. Rivenbark*, 311 Md. 147, 158, 533 A.2d 271, 276 (1987), controlled whether there was a conspiracy to conceal and that there was a prima facie showing of a conspiracy to conceal, but that the State failed to show Payne's involvement in that conspiracy; therefore, the recordings could not be admitted against Payne as the statements of a co-conspirator.

The Court then offered guidance to the trial court by first noting that the recordings were not admissible against Payne as the statements of a party-opponent, because co-defendants could not be each other's party-opponent.

The Court finally addressed the State's argument that even if the six recordings were inadmissible against Payne they could still be played at a joint trial without violating *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), which requires severance if, during a joint trial, the State wishes to introduce statements by a non-testifying defendant that inculpate his co-defendant, because doing so violates the co-defendant's Confrontation Clause rights. The Court noted that, because *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177, 203 (2004), limits Confrontation Clause analysis to "testimonial" hearsay and the statements contained in the wiretap recordings were non-testimonial, *Bruton* would not be implicated by the admission of the recordings during a new trial.

The Court concluded, however, that severance may be required as determined by the trial court pursuant to Maryland Rule 4-253(c), which grants the trial court discretion to sever a joint trial if a party would be "prejudiced"; a term the Court had previously defined to refer only "to prejudice resulting to the defendant from the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Galloway v. State*, 371 Md. 379, 394 n.11, 809 A.2d 653, 663 n.11 (2002).

Bernard Delaney McCree, Jr. v. State of Maryland, No. 20, September Term 2014, filed December 18, 2014. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2014/20a14.pdf

TRADEMARK COUNTERFEITING – FACIAL OVERBREADTH – FACIAL VAGUENESS

Facts:

The State, Respondent, charged Bernard Delaney McCree, Jr. ("McCree"), Petitioner, with numerous crimes, including violating Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol.) ("CR") § 8-611. In the Circuit Court for Queen Anne's County ("the circuit court"), McCree moved to dismiss the charges for violating CR § 8-611 on the ground that CR § 8-611 is unconstitutional, arguing that the statute is facially overbroad and facially void-for-vagueness. The circuit court denied the motion to dismiss. A jury convicted McCree of violating CR § 8-611. McCree appealed, and the Court of Special Appeals affirmed. McCree filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that that CR § 8-611 is not facially overbroad. Read in its entirety, CR § 8-611 criminalizes the "display [or] distribut[ion of] goods . . . that . . . bear[] or are identified by a counterfeit mark[,]" CR § 8-611(b), only if the goods have "retail value[.]" CR § 8-611(c), (d). Specifically, by their plain language, the penalty provisions delineate that, "[i]f the aggregate retail value of the goods . . . is $1,000 or more, [the defendant] is guilty of [a] felony[,]" CR § 8-611(c), and, "[i]f the aggregate retail value of the goods . . . is less than $1,000, [the defendant] is guilty of [a] misdemeanor[.]" CR § 8-611(d). "Retail value" means a "selling price[.]" CR § 8-611(a)(4)(i), (ii). In other words, CR § 8-611 does not criminalize the display or distribution of goods that have no retail value and are not meant to be sold. Accordingly, CR § 8-611 does not criminalize conduct that the Free Speech Clause indisputably protects—for example, the mere display of signs or distribution of pamphlets.

The Court of Appeals also held that CR § 8-611 is not facially void-for-vagueness. CR § 8-611 criminalizes the "manufacture, produc[tion], display, advertise[ment], distribut[ion], offer[ing] for sale, [sale], or possess[ion] with the intent to sell or distribute goods or services that [a defendant] knows are bearing or are identified by a counterfeit mark." CR § 8-611(b). A "counterfeit mark" is "an unauthorized copy of intellectual property[,]" CR § 8-611(a)(2)(i), or "intellectual property affixed to goods knowingly sold, offered for sale, manufactured, or distributed, to identify services offered or rendered, without the authority of the owner of the intellectual property." CR § 8-611(a)(2)(ii). "Intellectual property" is "a trademark, service mark, trade name, label, term, device, design, or word adopted or used by a person to identify the

goods or services of the person." CR § 8-611(a)(3). CR § 8-611(a)(3) makes clear that "intellectual property" is something that is adopted or used by a person to identify the person's goods or services. CR § 8-611's prohibitions of certain acts involving "intellectual property" are clearly defined, and there is no need to guess at CR § 8-611's meaning or differ as to CR § 8-611's application.

COURT OF SPECIAL APPEALS

Balfour Beatty Construction, et al. v. Maryland Department of General Services, et al., No. 957, September Term 2013, filed December 2, 2014. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2014/0957s13.pdf

ADMINISTRATIVE LAW AND PROCEDURE – STATE PROCUREMENT

ADMINISTRATIVE LAW AND PROCEDURE – STATE PROCUREMENT – PUBLIC CONTRACTS

ADMINISTRATIVE LAW AND PROCEDURE – STATE PROCUREMENT – REVIEW

Facts:

During 2011, the Maryland Department of General Services ("DGS") explored the use of a project labor agreement ("PLA") for the construction of Juvenile Justice facilities generally and on the Cheltenham Youth Facility specifically. DGS issued a request for proposals ("RFP") for Construction Manager at Risk services for the new facility to replace the rundown and unsafe buildings at Cheltenham in Prince George's County (the "Project"). The RFP required the submission of a price proposal and a technical proposal, each to be given equal weight under this procurement. The technical proposal was to be evaluated based on seven evaluation factors listed in the RFP in descending order of importance. Evaluation factor #6 was: "the presence of a PLA."

Prior to the submission of proposals, Balfour Beatty Construction, Coakley & Williams Construction, Hensel Phelps Construction, and Manhattan Construction ("Protestors") filed a joint pre-award bid protest pursuant to COMAR 21.10.02, challenging DGS's use of a PLA as an "unprecedented" evaluation factor. Specifically, Protestors argued that the inclusion of the PLA evaluation factor "compel[led] offerors responding to the RFP to agree to enter into a Project Labor Agreement as a condition of receiving full consideration for award of the Project," thereby unduly restricting competition in violation of SFP § 13-205(a) and creating "a radical new procurement policy" in violation of the rulemaking provisions of the APA, Maryland Code (1984, 2009 Repl. Vol., 2014 Supp.), State Government Article ("SG") § 10-110. Protestors contended, *inter alia*, that their non-union contractors and subcontractors would be unable to use their own employees for the Project and would likely have to pay duplicative costs for various union benefit programs. Protestors also charged that the PLA evaluation factor was a "preference" that violated Maryland's public policy favoring "Maximum Practicable

Competition," and that the RFP did not "contain any explanation or proof of need for a restrictive PLA preference."

Before issuing her decision on the Protest, the procurement officer issued two addenda to the RFP, clarifying that firms were not required to include a PLA as part of their proposal. The procurement officer denied the Protest after concluded that the inclusion of a non-mandatory PLA as an evaluation factor was reasonable and nondiscriminatory, and did not constitute a change in procurement policy. Protestors appealed to the MSCBA on February 22, 2012. Following submission of the record and competing affidavits, the MSBCA heard oral argument on September 20, 2012. After final briefing, the Board issued its decision denying the appeal on November 16, 2012.

Held: Affirmed.

The Court of Special Appeals first notes that the Maryland APA, Title 10, subtitle 1, sets forth certain requirements for the adoption of regulations by executive agencies establishing a process known as "notice and comment" rulemaking. It is undisputed that the DGS, in the instant case, failed to follow these procedures. Therefore, the crucial determination is whether the first-time inclusion of a new bid specification, in light of the surrounding facts, constitutes a "regulation" under the Maryland APA.

Maryland courts have consistently held that where an agency action does not "formulate new rules of widespread application, change existing law, or apply [rules] retroactively to the detriment of an entity that had relied on the agency's past pronouncements," there is no regulation in the sense contemplated by the Maryland APA. *Md. Ass'n of Health Maint. Orgs. v. Health Servs. Cost Review Comm'n.*, 356 Md. 581, 601 (1999) (quoting *Dep't of Health & Mental Hygiene v. Chimes*, 343 Md. 336, 346 (1996)). The Court first addresses circumstances in which an executive agency has been permitted to proceed with agency action in a case-by-case manner. In contrast, the Court then looks to agency actions creating "substantially new generally applicable policy" which require that the agency proceed through formal rulemaking.

The Court of Special Appeals agrees with the MSBCA's conclusion that this was a "pilot project" and "is neither of general application nor future effect." The inclusion of the PLA evaluation factor was neither a regulation under SG § 10-101, nor did it herald the implementation of new procurement policy. Further, the specification here did not "apply retroactively to the detriment of a company that had relied upon the [agency's] past pronouncements." The Court opines that a requirement that agencies must amend their regulations each time they introduce a new or novel specification would not only constitute an unnecessary and costly burden on the State at the expense of efficient government, it would no doubt have a chilling effect on the State's ability to take advantage of innovative technologies and services that could greatly benefit the citizens of the State. In the interest of effective administrative process, agencies should retain reasonable power to deal with issues on a case-to-case basis. Accordingly the Court held that a novel specification included in a single RFP,

without more, does not change existing procurement law or formulate a new policy of widespread application or future effect and, therefore, does not mandate predicate rulemaking under the Maryland APA.

The second issue addressed in the opinion is Appellants' allegation that the PLA technical evaluation factor restricted competition and unlawfully discriminated against Maryland's non-union construction contractors. Maryland law provides that specifications in a solicitation should be drafted "to encourage maximum practicable competition without modifying the requirements of the State." SFP § 13-205(a)(1). Echoing the MSBCA's observation that "every procurement spec [sic] may be fairly deemed to impose upon offerors some level of restriction," the Court emphasizes that in drafting specifications, a state agency is in a unique position to determine those specifications that most accurately reflect the minimum needs of the State. When reviewing those specifications, the MSBCA defers to the technical judgment of the procuring agency unless it is clearly erroneous. The role of the Court of Special Appeals, on judicial review of an MSBCA decisions is, therefore, generally narrow and "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." In this matter, DGS, as the procuring agency, met its burden of producing reasonable facts upon which the MSBCA could conclude that the inclusion of the PLA evaluation factor was not unreasonably restrictive and did advance the legitimate interests of the State. The Court concludes, therefore, that the MSBCA decision was supported by substantial evidence and that the judgment of the MSBCA was proper.

Bank of New York Mellon v. Nagachandra M. Nagaraj, et al., No. 2029, September Term 2013, filed December 3, 2014. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2014/2029s13.pdf

RES JUDICATA – MD. RULE 2-535(b – FRAUD, MISTAKE, IRREGULARITY – JURISDICTION TO MODIFY JUDGMENT

Facts:

This is the second appeal relating to foreclosure proceedings on property owned by appellees, Nagachandra Nagaraj, Mysore Nagaraj, and Indra K. Nagaraj (the "Nagarajs"). In this case, appellant, Bank of New York Mellon, appealed from an order of the Circuit Court for Montgomery County vacating a final ratification order of a foreclosure sale almost three years after the final ratification order was entered.

After the foreclosure sale was ratified, the Nagarajs filed their first appeal to this Court, arguing that the order ratifying the sale in the foreclosure proceeding was erroneous and should be vacated. We disagreed, and affirmed the circuit court's judgment. Although the foreclosure sale had been ratified and affirmed on appeal, the Nagarajs remained in possession of the property. Thus, Bank of New York Mellon filed a motion for possession of property.

Thereafter, the Nagarajs filed a motion in the circuit court to vacate the ratification of trustee's sale, asserting that the sale was contrary to public policy, as enunciated in *Maddox v. Cohn*, 424 Md. 379 (2012), which was decided more than a year after the sale in this case was ratified, and held that it was an impermissible abuse of discretion for trustees or lenders who "'bid in' properties" to include in the advertisement of sale the legal fees of attorneys conducting the foreclosure proceeding sales. Bank of New York Mellon filed an opposition to the Nagarajs' motion to vacate ratification, asserting that the Nagarajs did not raise any issue of "improper advertisement" in the prior appeal to this Court, but rather, they waited to raise the issue for the first time "almost three years after the date of the foreclosure sale and after the order ratifying the foreclosure sale was entered." The bank argued that, because the Nagarajs failed to raise the *Maddox* claim within 30 days of ratification, the ratification was an enrolled judgment, and the court could exercise revisory power over the judgment only in the case of fraud, mistake, or irregularity, which the Nagarajs had not shown. It argued further that the Nagarajs did not raise the *Maddox* issue earlier, and because this Court affirmed the ratification of sale, *res judicata* applied.

After a hearing, the circuit court vacated the ratification sale and denied Bank of New York Mellon's motion for judgment of possession.

Held: Reversed.

The final ratification of the sale of property in foreclosure is *res judicata* as to the validity of such sale, except in case of fraud or illegality, and hence its regularity cannot be attacked in collateral proceedings. The circuit court made no finding of fraud, mistake, or irregularity. Md. Rule 2-535(b).

A trial court no longer has jurisdiction to modify a judgment after it has been affirmed on appeal. Because the ratified foreclosure sale had been affirmed on appeal, the circuit court was precluded from revisiting the validity of the sale.

Robert Arnold Jarrett, Jr. v. State of Maryland, No. 1298, September Term 2013, filed December 17, 2014. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2014/1298s13.pdf

CRIMINAL LAW – HEARSAY – JURY INSTRUCTIONS

Facts:

On January 3, 1991, Christine Jarrett ("Christine"), age thirty-four, went missing. Her skeletal remains were found twenty-one years later, encased in concrete under the floor of the backyard shed at the home Christine had shared with her husband, appellant Ronald Arnold Jarrett, Jr. ("Jarrett"). Jarrett was subsequently arrested and charged with murder and associated crimes, and was ultimately convicted of second-degree murder following a jury trial.

At trial, the circuit court permitted the State to play for the jury certain recordings of telephone calls between Jarrett and his son while Jarrett was incarcerated over defense objection. In one particular conversation, the son asked Jarrett to assist "money-wise" for the cremation of "mom." Jarrett responded, "Okay."

Several issues arose at trial with respect to jury instructions. Jarrett requested a jury instruction on the gross negligence form of involuntary manslaughter as well as an instruction on missing evidence. The trial court declined to propound either requested instruction.

The trial court propounded a concealment of evidence jury instruction, instructing the jury that if it found that Jarrett concealed and/or destroyed evidence in the case, it may consider whether that conduct showed a consciousness of guilt.

This appeal followed.

Held: Affirmed.

The Court of Special Appeals held that the trial court did not abuse its discretion by permitting the challenged telephone conversation to be played for the jury, concluding that various statements and questions uttered by the defendant and his son were admissible as non-hearsay and/or were admissible as exceptions to the rule against hearsay. The Court of Special Appeals held that certain statements made by the defendant's son were admissible as non-hearsay because they were not admitted to prove the truth of the matter asserted but were instead introduced to prove their effect on the listener. The Court of Special Appeals further held that phrases uttered by the defendant were non-hearsay because they were questions rather than statements and a question does not assert any truth. To the extent that the defendant's statements constituted hearsay, they were admissible as statements of a party-opponent.

With respect to the involuntary manslaughter instruction, the Court of Special Appeals held that the trial court did not abuse its discretion by declining to propound a jury instruction on the gross negligence variation of involuntary manslaughter when no evidence was presented to suggest that the defendant was grossly negligent by acting in a manner that created a high risk to, and showed a reckless disregard for, human life.

The Court of Special Appeals further held that the trial court did not abuse its discretion by propounding a concealment of evidence instruction because, based upon the evidence presented, a fact-finder could have concluded that the defendant concealed the victim's remains beneath a shed and encased the remains in concrete. A fact-finder could have reasonably inferred that this behavior suggested consciousness of guilt concerning the crime charged and that the consciousness of guilt implied actual guilt of the crime charged. Accordingly, the Court of Special Appeals held that the concealment of evidence instruction was generated by the evidence presented at trial.

Finally, the Court of Special Appeals held that the trial court did not abuse its discretion by declining to propound a missing evidence instruction regarding the cremation of the victim's remains. The Court noted that the victim's remains had been released to family members by the Office of the Medical Examiner, pursuant to departmental policy, and that the family subsequently cremated the remains. Accordingly, the Court of Special Appeals held that a missing evidence instruction was not generated by the evidence.

Gregory Emilie Smith v. State of Maryland, No. 2653, September Term 2012, filed December 1, 2014. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2014/2653s12.pdf

MOTION TO SUPPRESS – COMMON LAW – THE *HILLARD* TEST – PRONG ONE OF THE *HILLARD* TEST

Facts:

After arresting Appellant Gregory Emilie Smith and reading him his *Miranda* rights, two detectives interviewed Appellant regarding allegations that he committed a sex offense by engaging in anal intercourse with a four-year-old girl. During this interview, one of the detectives explained the difference between "consensual" sex and forced sex and then stated, "*Tell me what the consensual part of it was and we can roll out of this*." Appellant then described multiple occasions on which he engaged in "consensual" anal intercourse with a four-year-old girl.

Before his trial, Appellant moved to suppress this confession, claiming that it was involuntary under Maryland's common law rule prohibiting law enforcement officers from promising or implying that a suspect will gain the advantage of non-prosecution or some other form of assistance in exchange for a confession. The Circuit Court for Montgomery County denied the motion, and after trial, at which the confession was played, a jury convicted Appellant of one count of sexual abuse of a minor, two counts of first-degree sex offense, and one count of second-degree child abuse. This appeal followed, challenging the court's denial of Appellant's motion to suppress.

Held: Affirmed.

The Court of Special Appeals first reviewed Maryland's common law rule prohibiting the admission of confessions as involuntary if they are the product of improper threats, promises, or inducements by the police. The Court articulated the two-part test gleaned from *Hillard v. State*, 286 Md. 145, 153 (1979): (1) whether a police officer or agent of the police force promises or implies to a suspect that he or she will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession; and (2) whether the suspect makes a confession in apparent reliance on the police officer's explicit or implicit inducement.

The appeal concerned prong one of the *Hillard* test. In reviewing this prong specifically, the Court reiterated that this prong is objective and that to determine whether a statement is improper, a court must determine whether "a reasonable person in the position of the accused

would be moved to make an inculpatory statement upon hearing the officer's declaration." *Hill v. State*, 418 Md. 62, 76 (2011). The Court clarified that a threat, promise, or inducement can be considered improper regardless whether it is express or implied, and the "reasonable layperson" inquiry may not be necessary in cases involving an express *quid pro quo*.

The Court then applied this standard to the facts before it. The Court emphasized that the detectives did not offer Appellant an explicit promise in exchange for his confession. Accordingly, the Court's analysis turned to whether the detectives' statements were "implied inducements." First, the Court differentiated the facts before it from those of *Hill v. State*, 418 Md. 62 (2011), wherein a minister confessed to molesting a minor boy during a voluntary interview in response to the detectives' statements that the victim and the victim's mother "did not want to see him get into trouble, but they only wanted an apology." The Court noted that Appellant, in contrast, was under arrest, read his Miranda rights, and advised of the charges against him. These facts, in the context of an implied assertion, the Court found do impact the circumstances relevant to whether a reasonable layperson in the accused's position would have been moved to make an inculpatory statement upon hearing the detectives' statements. Second, the Court agreed with the trial court's conclusion that it is manifestly unreasonable for a person to believe that a four-year-old is capable of consenting to sexual intercourse and, accordingly, that confessing to "consensual" anal intercourse with a four-year-old would yield non-prosecution or leniency in prosecution.

Larry Billy Reece v. State of Maryland, No. 234, September Term 2013, filed December 2, 2014. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2014/0234s13.pdf

OUT-OF-COURT STATEMENTS OF CHILD VICTIM MADE TO PHYSICIAN – CRIMINAL PROCEDURE 11-304 – PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS – PRETRIAL "TAINT" HEARING.

Facts:

Larry Reece, who was 65 years old at the time of trial, was found guilty of various sex offenses involving R.M., who was seven years old. After R.M. reported the abuse to his mother, she took him to the hospital. Initially, he did not tell the doctors what had happened with appellant because he "was crying a lot." It was not until after his mother calmed him down that he could tell the doctors what had happened. R.M.'s oldest sister, J.M., told R.M. to tell the truth. J.M. recorded R.M.'s statements to the doctor at the hospital. She testified that she did so because she wanted the physical evidence.

R.M. did not want to stay at the hospital, and he kept asking to go home. J.M. told her brother to tell the truth. At certain points in the recording, R.M. said "no" to questions about whether R.M. had ever touched any part of appellant with his mouth and whether appellant had ever touched R.M. "where he pooped from." When R.M. responded "no" to those questions, J.M. told him that he needed to tell the truth. R.M. told her that he was answering "no" because he did not want to get appellant in trouble. Eventually, R.M. revealed that appellant had sucked on his testicles and had kissed him on the mouth.

R.M. was referred to Dr. Shukat, a pediatrician with a specialty in child abuse and the medical director of The Treehouse Child Assessment Center. In conducting her examination, Dr. Shukat explained to R.M. that she was a doctor, and it was her job to talk with him and examine him. She asked R.M. open-ended questions about whether he had ever been touched or hurt in a way that he did not like, to which R.M. "stated immediately" that appellant had touched him with his hands and mouth on his penis and testicles. R.M. stated that appellant's penis went into his "butt," and appellant pushed R.M.'s head down toward his genitals and told him to suck his genitalia. R.M. stated that appellant would also perform the same oral manipulations on R.M.'s genitals.

Appellant argued on appeal that the circuit court failed to conduct a proper hearing before calling Dr. Shukat to testify to R.M.'s hearsay statements to her. He also argued that he was entitled to a new trial because the circuit court violated his right to due process by denying his request for a pretrial "taint" hearing. Specifically, he asserted that he should have been permitted to challenge the reliability of R.M.'s testimony, i.e., whether it was the product of suggestion or coercion during the interview process.

Held: Affirmed.

In addressing the admissibility of an out-of-court statement to a physician by a child, who is under the age of 13 and alleged to be a victim of child abuse, the court must determine whether the statement has particularized guaranties of trustworthiness. In doing so, the court must consider each of the factors set forth in Md. Code (2011 Supp.) § 11-304 of the Criminal Procedure Article ("CP"). The court did that here. Because there was evidence to support the court's factual findings, they were not clearly erroneous, and the court properly admitted the minor child's statements to Dr. Shukat.

In addressing the admissibility of the minor child's testimony, the circuit court properly determined that a separate pretrial "taint" hearing, to assess whether there had been improper interviewing techniques, was not required. Rather, the credibility of the minor child was a matter falling squarely within the province of the jury. Whether improper interviewing techniques were employed in questioning a witness and whether that affected the witness' credibility are issues for the trier of fact to resolve. Because appellant was permitted to present evidence at trial that the minor child's memory had been tainted by interviews, the lack of a pretrial "taint" hearing did not violate appellant's due process rights.

The circuit court properly determined that the State was not limited in its proof at trial to the time period alleged in the indictment.

In Re: Guardianship of Zealand W. and Sophia W., No. 1280, September Term 2013, filed October 29, 2014. Opinion by Salmon, J.

http://www.mdcourts.gov/opinions/cosa/2014/1280s13.pdf

FAMILY LAW – INFANTS

Infants: A circuit court has no authority to terminate a paternal relationship other than through a decree of adoption or guardianship under Title 5, Subtitle 3 of the Family Law Article.

FAMILY LAW – GUARDIAN AND WARD

Guardian and Ward: A circuit court judge is not authorized under section 13-702 of the Estates and Trusts Article to appoint a third party as a temporary or permanent guardian of the person of a minor child if: 1) one or more of the minor's parents is living; and 2) the living parent(s) do not consent to the appointment.

Facts:

This guardianship case involved Zealand W. (born September 9, 2000) and Zealand's sister, Sophia W. (born January 11, 2003). Susan W. is the mother of Zealand and Sophia. On September 20, 2012, David W., the father of Zealand and Sophia, died in Montgomery County, Maryland. Five days after David W's death, his first cousin, Conway Tattersall, filed a guardianship action in Montgomery County. Mr. Tattersall alleged that Susan W. was unfit to be the guardian of her children and that the Circuit Court for Montgomery County had a right to appoint a guardian of the person of both Zealand and Sophia pursuant to Md. Code (2011 Repl. Vol.), Estates & Trusts Article, section 13-702(a) which provides, in relevant part:

> (a) *General Rule* - If neither parent is serving as guardian of the person and no testamentary appointment has been made, on petition by any person interested in the welfare of the minor, and after notice and hearing, the court may appoint a guardian of the person of an unmarried minor.

Mr. Tattersall contended that section 13-702(a) allowed the court to appoint a guardian because neither parent was serving as guardian of the children and no testamentary appointment had been made. Susan W. contended that section 13-702(a) did not grant the circuit court "subject matter" jurisdiction to appoint a guardant of the person of her minor children because, after the death of David W., she, as a matter of law, was serving as the guardian of the person of the children. In support of her position, Susan W. primarily relied upon the case of *In re: Adoption/Guardianship Tracy K.*, 434 Md. 198 (2013).

Mr. Tattersall also alleged that Susan W. was not "an appropriate person to have custody" or to care for her children because (1) she lives with her parents in West Virginia; (2) she has had

"long periods of unemployment in the past;" (3) she has a "lengthy history of serious neglect of the minor children;" and (4) she "has a long-standing history of alcoholism and bulimia."

Over Susan W.'s protest, the circuit court appointed a married couple, who were friends of the children's father, to be temporary co-guardians of the person of Zealand W. and Sophia W. About two-and-one-half months later, the court appointed Mr. Tattersall, who, at that time, was temporarily living in Rockville, Maryland, as the substitute temporary guardian of the person of the minor children. The order provided that the children's maternal grandparents would be given certain visitation rights with their grandchildren, but that Susan W. would be granted no rights of visitation, although she was allowed to have telephone contact with the children twice weekly.

On January 16, 2013, the court appointed Darrin Wolfe and his wife, Hilary Wolfe, who resided in Durham, North Carolina, as temporary co-guardians of the minor children. That order was consented to by the maternal grandparents and all other parties except for Susan W.

On July 19, 2013, Susan W., represented by new counsel, filed a motion to dismiss the case based on (1) failure to state a claim upon which relief can be granted, and (2) lack of subject matter jurisdiction.

In a memorandum in support of the motion to dismiss, Susan W.'s counsel maintained that in the subject case the answer to the question of whether the court had the right to appoint a guardian of the person of a minor child under section 13-702 of the Estates and Trusts Article depended on whether, at the time of the appointment, "neither parent is serving as guardian." Counsel for movant contended that Susan W. was serving as guardian of her children. Her counsel relied, *inter alia*, on an interpretation of section 13-702 of the Estates & Trusts Article by the Attorney General of Maryland, 77 OP. Atty. Gen. 41, 44 (March 20, 1992).

Counsel for Susan W. further pointed out that Md. Code (2012 Repl. Vol.), Family Law Article ("FL") § 5-203(a)(2)(i) provides that a parent becomes "the sole natural guardian of the minor child if the other parent . . . dies."

Mr. Tattersall, by counsel, and the Best Interest Attorney, filed oppositions to the motion to dismiss. Both Mr. Tattersall and the Best Interest Attorney argued that section 13-702(a) of the Estates & Trusts Article, did give the court subject matter jurisdiction in this case. They argued as follows:

> Here, although only one parent is deceased[,] for at least the past six years the surviving parent, Susan [W], has repeatedly been denied custody of her children and has only been granted supervised visits with her children. She therefore has not been *responsible for* or acted as the caretaker for her children without supervision for six years. Under these extreme facts, the statutory requirement that "neither parent is serving as guardian of the person" is met, and therefore the Court has the authority to grant guardianship in this matter.

The circuit court, on September 25, 2013, denied Susan W.'s July 19, 2013 motion to dismiss.

Susan W. filed an interlocutory appeal from, *inter alia*, an order holding her in contempt for failure to obey certain orders concerning payment of an expert appointed by the court.

Held: Vacated and remanded.

Judgments vacated; case remanded to the Circuit Court for Montgomery County, Maryland.

Section 13-702 of the Estates & Trusts Article, allows the court to appoint a guardian of the person of a minor "[i]f neither parent is serving as guardian of the person and no testamentary appointment has been made . . . ." Here, no testamentary appointment was made - nor could a valid appointment have been made by David W. because Susan W. was alive at the time of his death.

Section 5-203(b) of the Family Law Article ("FL") provides: "The parents of a minor child, as defined in Article 1, § 24 of this Code: (1) are jointly and severally responsible for the child's support, care, nurture, welfare and education; and (2) have the same powers and duties in relation to the child."

FL, section 5-203(a) reads as follows:

> (a) *Natural guardianship*. – (1) The parents are the joint natural guardians of their minor child.
>
> (2) A parent is the sole natural guardian of the minor child if the other parent;
>
> (i) dies;
>
> (ii) abandons the family; or
>
> (iii) is incapable of acting as a parent.

(Emphasis supplied).

The Court of Special Appeals held that it was clear from the language used in FL, section 5-203 that Susan W. was, as of the date David W. died: 1) responsible for her children; and 2) their natural guardian.

Susan W.'s rights as a parent have never been terminated pursuant to title 5, subtitle 3 of the Family Law Article. Under such circumstances, section 13-702 of the Estates & Trusts Article gave the court no authority to appoint a guardian of the person of Susan W.'s children.

The court noted that if, at the time of David W.'s death, Mr. Tattersall, or anyone else, had grounds to believe that Susan W. was not a fit person to have custody of her children, the matter

should have been brought to the attention of the Department of Health & Human Services for Montgomery County, so that that Department could attempt to prove, pursuant to FL, section 5-301 *et seq*., that Susan W.'s parental rights should be terminated and that the Department should be appointed the childrens' guardian.

The court also concluded that the circuit court was not authorized, under section 13-702 of the Estates & Trusts Article to appoint a third party as a temporary or permanent guardian of the person of either Zealand or Sophia when (1) the children's mother is alive; (2) mother's parental rights have never been terminated; and (3) no testamentary appointment has been made.

Finally, the court ruled that because the circuit court did not have the authority to appoint a guardian under section 13-702 of the Estates and Trusts Article, the circuit court erred when it: (1) ordered Susan W. to pay a third party $5,000 to make a determination as to whether someone, other than Susan W., should be the guardian of the children; and (2) holding Susan W. in contempt for failing to make the $5,000 payment.

Ramon Granados v. Scott Nadel, et al., No. 242, September Term 2013, filed December 16, 2014. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2014/0242s13.pdf

MORTGAGES – RIGHT TO FORECLOSE – CONDITIONS PRECEDENT

MORTGAGES – RIGHT TO FORECLOSE – STATUTORY INTERPRETATION

MORTGAGES – FORECLOSURE BY ACTION – ERROR AND REVERSAL

Facts:

Appellant, Mr. Ramon Granados, obtained a loan secured by his principal residence on November 20, 2006, in an amount of $688,950 from FNMC, a division of National City Bank. In 2009, Mr. Granados defaulted on the loan. He endeavored to participate in loan modification, but after making late payments, the lender filed a notice of intent to foreclose ("Notice" or "NOI"). Shortly after filing a foreclosure action, the lender dismissed the case without prejudice. Almost one year after the NOI was issued, Jeffrey Nadel and Scott Nadel, as substitute trustees for the current noteholder ("Appellees," "Trustees," or "lender"), filed a second foreclosure action. The Trustees did not send Mr. Granados a new NOI before filing the second foreclosure action, relying instead on the NOI issued prior to the first foreclosure action, and prior to the intervening changes in the statute governing notice requirements for residential foreclosures.

In the intervening period, the General Assembly substantially changed the requirements for the notice of intent to foreclose that lenders were required to provide borrowers. See House Bill 472, ch. 485 (2010). For example, NOIs issued after July 1, 2010 must include the telephone numbers and internet addresses for government and nonprofit resources and a statement recommending housing counseling services. The NOI must be accompanied by a loss mitigation packet that includes: options for loan modification or alternative loan payment plans; ways to simplify relinquishment of the property, such as through short sale or deed in lieu of foreclosure; and ways to lessen the harmful impact of foreclosure on the borrower. The General Assembly also mandated expanded mediation opportunities for borrowers. *See* Maryland Code (1974, 2010 Repl. Vol., 2010 Supp.), Real Property Article ("RP"), § 7-105.1(c).

The General Assembly intended the new law to be applied prospectively, and stated that it "may not be applied or interpreted to have any effect on or application to any order to docket or complaint to foreclose on residential property filed before the effective date [July 1, 2010] of this Act." House Bill 472, ch. 485, § 8 (2010). An advisory issued by the Commissioner of Financial Regulation indicated that valid NOIs already issued would not become automatically invalid under the new law. See Commissioner of Financial Regulation, "*Interim Guidance on Implementation of House Bill 472 Compliance Relating to Notice of Intent to Foreclose*," Advisory Notice, May 5, 2010.

Before the Circuit Court for Prince George's County and on appeal, Mr. Granados challenged the foreclosure proceeding on the ground that the substitute trustees, when filing their Order to Docket Foreclosure in February 2011, relied on an NOI used in a previously dismissed foreclosure proceeding, without updating its content. The Trustees argued, relying on the Commissioner's advisory, that the NOI sent to Mr. Granados prior to the first foreclosure proceeding could be used as valid notice for any subsequent foreclosure proceeding because the General Assembly intended the intervening changes to the notice requirements to apply prospectively and not to NOIs that had already been issued. Mr. Granados argued in response that the intent of the Commissioner's advisory was to grandfather valid NOIs during a transitional period after the new law took effect for those foreclosure proceedings already underway, not for proceedings that have since been dismissed.

Held: Reversed and Remanded.

The Court of Special Appeals, after reviewing the legislative history and purpose of the 2010 amendments to the foreclosure law, held that the 2010 amendments to the foreclosure law were not intended to grandfather NOIs that operated as notices for foreclosure proceedings that have since been dismissed. NOIs do not remain valid once a prior foreclosure case is dismissed and where the notices do not contain the proper content. Thus, under the circumstances of this case, the Trustees were required to issue a new and updated NOI between the dismissal of the first foreclosure proceeding and the institution of the second that contained all of the information required by Section 7-105.1 as amended before filing an order to docket.

After concluding that a new NOI was necessary, the Court of Special Appeals then considered whether the failure to provide a new NOI was harmless error. In this case, the NOI did not name the current secured party or the loan servicer, nor did it contain contact information for someone authorized to perform loan modification as of the time the order to docket was filed. Distinguishing this case from *Shepherd v. Burson*, 427 Md. 541 (2012), the Court of Special Appeals concluded that the omission of a new NOI was not harmless error.

Bernando Rene Flores v. Maryland-National Capital Park and Planning Commission et. al., No. 1239, September Term 2013, filed December 2, 2014. Opinion by Raker, J.

http://www.mdcourts.gov/opinions/cosa/2014/1239s13.pdf

TAX-PROPERTY ARTICLE–TAX SALES–SURVIVAL OF LAND USE RESTRICTIONS

Facts:

The Circuit Court for Prince George's County declared that a dedication appearing in the plat describing Bernando Rene Flores' property was binding upon him and his heirs, successors and assigns. When the original owner of Flores' land sought to subdivide his property, Flores' parcel was created in order to satisfy a condition that the M-NCPPC imposed on subdivision approval. The property was designed to serve as a green space buffer between industrially zoned and residential properties. The plat describing Flores' property contained an "Owner's Dedication" stating that the property was "to be and remain a permanent green space buffer into perpetuity . . . ." When Flores sought to develop his property, he was unable to obtain the necessary permits because of the dedication. He sought a declaratory judgment that the owner's dedication was not binding on him because it had been extinguished when the property was sold at a tax sale to Flores' predecessor in interest.

The circuit court granted summary judgment to the M-NCPPC and Prince George's County and declared that the dedication was binding on Flores and his heirs, successors and assigns.

Held: Affirmed.

A provision in § 14-844(b) of the Tax-Property Article of the Annotated Code of Maryland states that, although a tax sale generally vests an "absolute and indefeasible" title in the purchaser, "easements of record and any other easement that may be observed by an inspection of the property to which the property is subject" survive tax sales. The Court of Special Appeals interpreted this exception to apply to dedications of land to public use, including dedications that restrict the development of land but do not result in the public entering the land or actively using it. The Court noted that, by definition, a dedication creates an easement for public use. The Court found that based on the plain language of the provision dedications survive tax sales. The Court also emphasized the important role that the M-NCPPC and the counties play in planning Maryland communities. If a tax sale could defeat any restriction that they imposed on the development of land, it would defeat the very purpose of subdivision planning and dedications of land to the public use.

Timothy Brooks, et al. v. Roger Jenkins, et ux., No. 1499, September Term 2012, filed December 16, 2014. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2014/1499s12.pdf

GROSS NEGLIGENCE – SUBMISSION TO THE JURY

TORT DAMAGES – DAMAGE TO A PET

TRESPASS TO LAND – IMMUNITY FROM SUIT

COMMON-LAW TRESPASS

Facts:

Defendant law enforcement officers went to the plaintiffs' property to serve an arrest warrant on their son. As Mr. Jenkins went to put his dogs away, his Labrador Retriever approached one of the police officers, Deputy Brooks. Ostensibly fearing for his safety, the Deputy shot at and wounded the dog, whose treatment ultimately cost approximately $15,000. The Jenkinses left the home to take the dog to the vet, and the officers proceeded to enter the house and serve the warrant, taking the plaintiffs' son into custody. The plaintiffs each sued Deputy Brooks for gross negligence and the injuries to the dog, and they sued both officers for trespass.

Following a jury trial, the jury found *first* that Deputy Brooks was liable to Mr. and Mrs. Jenkins for economic damages incurred in treating the dog's wounds, and it awarded each of them $10,000 for veterinary expenses. (The trial court later reduced this award to a total of $7,500 pursuant to Md. Code (1974, 2013 Repl. Vol.), § 11-110 of the Courts & Judicial Proceedings Article, which caps recovery for tortious injury to pets.) *Second*, the jury awarded the Jenkinses $100,000 each against Deputy Brooks for the non-economic damages they suffered based on his shooting the dog. *Last*, it awarded each of them $100,000 against each of the officers (such that this portion of the award totaled $400,000) based on the trespass to the property.

Held:

The Court of Special Appeals affirmed the non-economic damages award against Deputy Brooks for a total of $200,000; it affirmed the trial court's decision to reduce the economic damages award to a total of $7,500 to the Jenkinses; and it reversed the award of (a total of) $400,000 to the couple for trespass and remanded for entry of nominal damages. With respect to the shooting of the dog, the Court held that the trial court properly submitted the case to the jury based on a question of fact about whether the police officer acted in a grossly negligent manner. The jury had before it testimonial and videotape evidence that could reasonably have led to a finding that the officer acted with reckless indifference when he shot the dog, and that indifference could

give rise to a gross negligence finding. The Court also held that the trial court properly *declined* to apply the cap imposed by CJ § 11-110 to the gross negligence award of $200,000—thereby allowing the plaintiffs to keep the full non-economic damages award. The court was correct in interpreting CJ § 11-110 to apply only to economic damages for injury to a pet, given its legislative history, which demonstrated the legislative intent to limit specifically the recovery of medical expenses.

Finally, the Court of Special Appeals held that both police officers were immune from suit for a claim that they had violated the constitutional rights of the plaintiff-landowners, where the plaintiffs failed to demonstrate that they acted with actual malice or gross negligence. The plaintiffs also were not entitled to recover on a common-law trespass claim, where the officers did not act with any deliberate intent to trespass, when they had come to plaintiffs' property for the purpose of executing a lawfully valid arrest warrant, and the plaintiffs failed to show any damage to the property.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated December 1, 2014, the following attorney has been indefinitely suspended by consent:

SEAN A. VARNADO

*

By an Order of the Court of Appeals dated October 21, 2014, the following attorney has been disbarred by consent, effective December 5, 2014:

MARILYN D. DIMAS

*

By a Per Curiam Order of the Court of Appeals dated December 10, 2014, the following attorney has been disbarred:

DAVID PETER BUEHLER

*

By an Order of the Court of Appeals dated December 15, 2014, the following attorney has been disbarred by consent:

CHARLES JEFFREY BROIDA

*

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

JOSEPH FRANCIS McBRIDE

*

By an Order of the Court of Appeals dated December 17, 2014, the following attorney has been indefinitely suspended:

ESTHUS CHRISTOPHER AMOS

*

By an Order of the Court of Appeals dated December 17, 2014, the resignation of

WILLIAM FRANCIS O'BRIEN

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

*

By an Order of the Court of Appeals dated December 18, 2014, the following attorney has been disbarred by consent:

THOMAS WILLIAM PLIMPTON

*

By an Opinion and Order of the Court of Appeals dated December 18, 2014, the following attorney has been indefinitely suspended:

RONALD CLAUDE BRIGERMAN, JR.

*

By an Opinon and Order of the Court of Appeals dated November 19, 2014, the following attorney has been suspended for six months, effective December 19, 2014:

SANDRA LYNN RENO

*

This is to certify that the name of

MITCHELL ALAN GREENBERG

has been replaced upon the register of attorneys in this State as of December 20, 2014.

*

By an Opinion and Order of the Court of Appeals dated December 22, 2014, the following attorney has been indefinitely suspended:

JOHN M. GREEN

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JUDICIAL APPOINTMENTS

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In the election held November 4, 2014, **THOMAS RAYMOND SIMPSON, JR.** was elected to the Circuit Court for Charles County. Judge Simpson was sworn in December 11, 2014.

*

In the election held November 4, 2014, **SCOTT LAWRENCE ROLLE** was elected to the Circuit Court for Frederick County. Judge Rolle was sworn in on December 15, 2014.

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