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Watts, J., concurs.

http://www.mdcourts.gov/opinions/coa/2015/86a09ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

Petitioner, Attorney Grievance Commission ("AGC") of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Grason John-Allen Eckel. Bar Counsel alleged that Eckel, as a result of his convictions for assault in the second degree, sexual offense in the fourth degree, and false imprisonment, engaged in professional misconduct, violating Maryland Lawyers' Rule of Professional Conduct ("MLRPC") 8.4(b).

The Court referred the Petition to the Honorable Leah J. Seaton of the Circuit Court for Dorchester County to conduct an evidentiary hearing and make findings of fact and conclusions of law. The hearing judge adopted the Joint Stipulated Findings of Fact and Conclusions of Law ("Joint Stipulation") offered by Eckel and Bar Counsel. Eckel's conviction arose from a physical altercation between Eckel and Tara Cannon that took place in Eckel's law offices. The hearing Judge described the conflicting accounts of the evening, wherein Cannon asserted that Eckel attacked her and Eckel asserted that he merely attempted to prevent Cannon from stealing money. Relying on the criminal court's assessment of the facts, the hearing judge highlighted Eckel's consumption of alcohol that night and his lack of credibility regarding the events that unfolded in his office.

In addition to adopting the Joint Stipulation, the hearing judge made a proposed conclusion of law that Eckel violated MLRPC 8.4(b) and proposed several aggravating and mitigating factors.

Held:

The Court of Appeals conducted an independent review of the hearing judge's conclusions of law, concluding that Eckel violated MLRPC 8.4(b) when he was convicted of assault in the second degree, sexual offense in the fourth degree, and false imprisonment. The Court highlighted that assault in the second degree is a "serious crime" under Maryland Rule 16-701(k). Comparing the facts of this case to those of prior attorney discipline cases, the Court held that indefinite suspension was the appropriate sanction and responded to Eckel's exception to Judge Seaton's factual conclusion that Eckel avoided the issue of whether he had an alcohol or substance abuse addiction by stating that if Eckel applies for reinstatement, his fitness to practice law can be fully evaluated, including any current substance abuse issues. The Court imposed a sanction of indefinite suspension.

Scott Shader, et ux. v. Hampton Improvement Association, Inc., No. 75, September Term 2014, filed May 27, 2015. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2015/75a14.pdf

CIVIL PROCEDURE – OFFENSIVE NON-MUTUAL COLLATERAL ESTOPPEL

REAL PROPERTY – COVENANTS – ABANDONMENT

REAL PROPERTY – COVENANTS – ABANDONMENT – SEVERANCE

Facts:

In 2002, Anna and Scott Shader, Petitioners, purchased real property at 606 East Seminary Avenue in Hampton. 606 East Seminary is composed of Lot 59, a 2.246-acre parcel, and a portion of Lot 75, a 1.457-acre parcel to the north of Lot 59 as depicted on the original 1930 Plat recorded by the Hampton Company. In 2004, the Shaders purported to subdivide their property to create an additional undeveloped parcel with a new address: 606A East Seminary Avenue, and within five years, offered the "new" acreage for sale as separate and buildable.

The Hampton Improvement Association (hereinafter "HIA"), Respondent, contacted the Shaders's real estate agents by letter and noted that Paragraph C, in the Schedule of Restrictive Covenants and Easements recorded by the Hampton Company in 1931, prohibited them from building a second dwelling. Paragraph C provides:

> The land included in said tract except as hereinafter provided shall be used for private residence purposes only and no building of any kind whatsoever shall be erected or maintained thereon except private dwelling houses each dwelling being designed for occupation by a single family and private garages for the sole use of the respective owners or occupants of the plots upon which such garages are erected there shall not be erected or maintained on said tract of land an apartment house or house designed or altered for occupation by more than one family and no more than one dwelling may be erected on a lot.

In 2012, the Shaders filed a complaint for declaratory relief in the Circuit Court for Baltimore County against the HIA seeking a declaration that their property consisted of two separate buildable lots and that the restrictive covenants did not prohibit the building of a home on the second lot. The Shaders moved for summary judgment arguing that they were entitled to judgment as a matter of law as a result of a prior judgment entered against the HIA in *Cortezi, et al. v. Duval Four-A, LLC*, No. C-07-002587 (Cir. Ct. Balt. Cnty. 2008) ("Duval"), in which, they alleged, the HIA was the plaintiff and Paragraph C was not enforced.

The Circuit Court recognized that the Shaders's motion for summary judgment was an application of the doctrine of offensive non-mutual collateral estoppel, in which "a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated

unsuccessfully in another action against a different party." *Welsh v. Gerber Products, Inc.*, 315 Md. 510, 517 n.6, 555 A.2d 486, 489 n.6 (1989). The Circuit Court determined that the issues in *Duval* and the Shaders's case were not identical, and thus, denied the Shaders's motion. The Circuit Court ultimately concluded the restriction in Paragraph C prohibiting the construction of more than one dwelling on a single lot was not waived by abandonment, and subsequently, denied the Shaders's request for declaratory judgment.

The Shaders noted an appeal, arguing that the application of offensive non-mutual collateral estoppel was appropriate and that restriction in Paragraph C prohibiting the construction of more than one dwelling on a single lot was waived by abandonment because there were numerous examples of other buildings built on single lots in the Hampton community. The Court of Special Appeals affirmed.

Held: Affirmed.

The Court of Appeals affirmed. The Court determined that the application of offensive non-mutual collateral estoppel was inappropriate because the instant issues were not identical to those in *Duval*. As the trial court found, *Duval* dealt specifically with "a revision in the subdivision plat that was filed in 1949 that reconfigured some of the original lot lines and created at least two new lots", whereas the Shaders's property consists of one lot from the original 1930 Plat and a portion of another lot that was joined in a single parcel.

The Court also held that the Circuit Court did not err in determining that the HIA did not waive by abandonment the clause restricting the construction of more than one residential dwelling per lot in Paragraph C because there was no evidence adduced at trial of a second dwelling on a single lot. The Court held, additionally, that the HIA's waiver of the clause restricting the construction of a building aside from a residential dwelling on a single lot through the construction of sheds, garages, pool houses and gazebos, may be severed from the remainder of the covenants and did not make the remaining covenants in Paragraph C unenforceable.

William Siam Simpson, III v. State of Maryland, No. 22, September Term 2014, filed April 7, 2015. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2015/22a14.pdf

FIFTH AMENDMENT – ARTICLE 22 OF THE MARYLAND DECLARATION OF RIGHTS – OPENING STATEMENTS

Facts:

Petitioner, William Siam Simpson, III, was charged in a multi-count indictment with crimes in connection with three incidents that occurred at the house where Petitioner's former girlfriend, Jasmine Byers, and her family resided. All three incidents occurred at night. The first incident involved the intentional burning of the detached garage on the property; the second involved the intentional burning of the roof of the house; and the third involved an attempt to set fire to an automobile parked on the driveway. The family informed police that they recognized the masked individual, by reference to his walk, body frame, and posture, to be Jasmine's former boyfriend, Petitioner. The police went to Petitioner's home, where Joy, an accelerant-detecting dog, alerted to the presence of an accelerant both inside and outside of the home.

Petitioner was transported to the police station, where he was advised of and waived his *Miranda* rights. While in police custody, the defendant wrote a statement confessing to setting fire to the Byers' house on three separate occasions.

The prosecutor, in her opening statement, informed the jury that "[Petitioner] himself will tell you, number one, that he burned down that garage[.]" Throughout her opening statement the prosecutor made several other references to what Petitioner would say during trial.

Defense counsel objected, and the court overruled the objection, without comment. Before making his opening statement, defense counsel informed the court that he intended to make an "additional motion" either before or after opening statement. The court asked counsel to proceed directly to opening statement, but after his opening, defense counsel renewed his objection to the prosecutor's opening statement.

The State, in a post-trial hearing on a motion for a new trial, claimed that the prosecutor was holding the written confession in her hand during her opening statement. It was unclear from the record whether that was true, and it was even more unclear whether the jury knew that the prosecutor was holding the written confession.

During its case-in-chief, the State offered into evidence the written confession Petitioner had made to the police. Petitioner elected *not* to testify in the defense case. At the close of all the evidence, the court, at defense counsel's request, included among numerous other jury instructions the following: "The Defendant has an absolute Constitutional right not to testify. The fact that the Defendant did not testify must not be held against the Defendant. It must not be

considered by you in any way or even discussed by you." Jurors found Petitioner guilty of only one of the nine counts before them—attempted second degree arson of the automobile.

On appeal to the Court of Special Appeals, the court concluded that there was no violation of the defendant's Fifth Amendment right and affirmed the judgment of conviction.

Held:

The Court looked to the test employed to a closing statement in *Smith II* in determining whether the prosecutor's comments during opening statement concerning what Petitioner "will tell" the jury impinged upon his right to protection from adverse comment on his constitutional right not to testify. With the necessary adjustments of the *Smith* test to the context of opening statement, the test becomes whether the prosecutor's remarks in opening statement were reasonably susceptible of an adverse inference by members of the jury that the defendant's failure to testify would be indicative of the defendant's guilt.

The Court recognized that it could not reasonably expect or assume that the jury, presumably unfamiliar with the nuances of the law, evidentiary rules, and trial procedures, naturally would have inferred from the prosecutor's words that she must be referring to what the evidence will show that Petitioner *had said*, before trial, in one context or another. If anything, it is as or more likely that the prosecutor's remarks in opening statement—that "the defendant himself will tell you" and "he'll tell you why he did it"—regardless of what the prosecutor intended them to mean—were reasonably susceptible of the inference by the jury that Petitioner had an obligation to testify and, if he did not, the jury should view that as evidence of his guilt. Injection of that inference into the case impinged upon Petitioner's right not to testify, thereby violating the Self-Incrimination Clause of the Fifth Amendment, Article 22, and CJP § 9-107.

The Court also held that the prosecutor's statements were not harmless. The Court's review of the State's evidence failed to persuade the Court, beyond a reasonable doubt, that the jury's verdict was in no way influenced by the prosecutor's adverse comment on Petitioner's failure to testify.

The Court did not reach the second question on appeal—whether a police officer could testify, without being qualified as an expert, about his training, handling and observations of the accelerant-detecting dog, Joy, that was used at Petitioner's house. The Court of Special Appeals held that, although the trial court allowed the officer to testify as a non-expert, the error was harmless beyond a reasonable doubt. Petitioner therefore also included in his petition a question challenging that holding of the Court of Special Appeals. In light of the Court's holding on the constitutional issue, which requires a new trial, the Court found it unnecessary to decide whether the court's error in allowing the officer to testify without pre-qualification as an expert was harmless beyond a reasonable doubt.

The Court, therefore, held that the errors in the prosecutor's opening statement, which were not harmless, entitled Petitioner to a new trial.

Lydia G. Wilcox, et al., v. Tristan J. Orellano, No. 77, September Term 2014, filed May 28, 2015. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2015/77a14.pdf

MEDICAL MALPRACTICE ACTIONS – EXPERT CERTIFICATE REQUIREMENT – VOLUNTARY DISMISSAL – LIMITATIONS – SCOPE OF SAVINGS PROVISION

Facts:

Dr. Tristan J. Orellano operated on Lydia G. Wilcox in October 2004 to treat cancer in her right breast. Following the operation, Ms. Wilcox's right breast became infected, requiring additional procedures and delaying her radiation treatment. In June 2008, Ms. Wilcox filed a medical malpractice claim with the Health Care Alternative Dispute Resolution Office ("HCADRO") against Dr. Orellano alleging that he was negligent in failing to diagnose and treat her post-surgical infection. Ms. Wilcox filed a certificate of qualified expert, but failed to attach a report of the attesting expert, as required by statute. The failure to attach an expert report results in the dismissal of a case.

After waiving arbitration, Ms. Wilcox filed a complaint in Howard County, and Dr. Orellano moved to dismiss the complaint for failure to attach an expert report. Prior to a hearing on the motion, Ms. Wilcox filed a voluntary dismissal of her complaint without prejudice. Because an answer had already been filed in the case, Ms. Wilcox was required to obtain the assent of Dr. Orellano in order to file the voluntary dismissal, per Maryland Rule 2-506(a).

In October 2009, approximately a week after the voluntary dismissal, Ms. Wilcox filed a second claim with HCADRO against Dr. Orellano. This claim repeated the allegation that Dr. Orellano was negligent in providing post-operative care, but also alleged that Dr. Orellano was negligent in performing the surgery. Ms. Wilcox timely filed an expert certificate and expert report, waived arbitration, and filed her second complaint, this time in the Circuit Court for Prince George's County.

The Circuit Court dismissed Ms. Wilcox's second complaint as untimely. The Circuit Court concluded that the statute of limitations expired at the latest in March 2009 and that Ms. Wilcox's second complaint, filed in October 2009, was barred by the statute of limitations. The Circuit Court further concluded that the savings provision in Maryland Code, Courts and Judicial Proceedings Article ("CJ"), §5-119(b), which allows a 60 day grace period for refiling a complaint dismissed once for failure to file an expert report, even if the statute of limitations has expired, did not apply because Ms. Wilcox had voluntarily dismissed her first complaint. The Court of Special Appeals affirmed in a reported decision. 217 Md. App. 417, 94 A.3d 127 (2014).

Held: Affirmed.

The Court of Appeals concluded that Ms. Wilcox's claim was barred by the statute of limitations.

CJ §5-119(a)(1) states that the savings provision of CJ §5-119(b) does not apply if the party who commenced the action previously voluntarily dismissed the claim. The issue in this case was whether the phrase "voluntary dismissal by the party who commenced the action" in CJ §5-119(a)(1) encompassed only voluntary dismissals by notice of dismissal prior to the defendant filing an answer, as advocated by Ms. Wilcox, or also encompassed voluntary dismissals effected by stipulation.

The Court considered the plain language of CJ §5-119 and concluded that the savings provision did not apply when a plaintiff has voluntarily dismissed the complaint, including instances in which the Maryland Rules require the plaintiff to obtain the assent of the defendant to effect the voluntary dismissal. Accordingly, Ms. Wilcox could not rely on the savings provision of CJ §5-119(b) because she had voluntarily dismissed her first complaint.

Maryland Rule 2-506(a), which existed at the time CJ §5-119 was considered and enacted, defined the term "voluntary dismissal" to include a notice of voluntary dismissal, filed by the plaintiff before an answer has been filed, and a stipulated voluntary dismissal filed by the plaintiff with the assent of the opposing party. The Court concluded that there was nothing in the statute's language or the legislative history to suggest that this usual definition of "voluntary dismissal" should not apply for purposes of CJ §5-119(a)(1).

The Court stated that even though a party must wait for a circuit court to dismiss a complaint for failure to attach an expert report in order to take advantage of the savings provision of CJ §5-119(b), that result was mandated by the statute's plain language and was preferable to Mr. Wilcox's interpretation, which conditioned the applicability of the savings provision on whether a defendant had filed an answer.

The Court also concluded that there was no support in either the statute's language or the legislative history for Ms. Wilcox's contention that the savings provision applied to medical malpractice claims dismissed for failure to file an expert report, regardless of whether the complaint had been previously voluntarily dismissed.

COURT OF SPECIAL APPEALS

Towanda Kearney et al. v. Wendall France et al., No. 622, September Term 2013, filed April 29, 2015. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2015/0622s13.pdf

CORRECTIONAL OFFICERS' BILL OF RIGHTS (COBR)

CORRECTIONAL OFFICERS' BILL OF RIGHTS – PROCEDURE

CORRECTIONAL OFFICERS' BILL OF RIGHTS – MOTION TO REVISE JUDGMENT – APPELLATE REVIEW

CORRECTIONAL OFFICERS' BILL OF RIGHTS – SHOW CAUSE HEARING – AWARD OF BACK PAY

Facts:

On April 4, 2012, appellant served as a Correctional Officer III (Sergeant) at the Baltimore City Detention Center ("BCDC"), which is a unit of the Maryland State Department of Public Safety. She was the "Officer in Charge" at the receiving area post where detainees in the facility are prepared for transport to different locations. During her shift, a detainee was found unaccompanied in an unauthorized area of the BCDC. This resulted in appellant, among others, being investigated for failing to monitor and account for the detainee. On June 18, 2012, Commissioner France, the appointing authority for BCDC, issued a Notice of Disciplinary Charges (the "Notice"), which gave appellant 15 days to appeal, and if she did not, advised that her failure to appeal "would constitute an election by [her] to accept the imposition of discipline." The COBR limits the time to bring disciplinary charges against an officer to 90 days (in this case until July 3, 2012). See Maryland Code (1999, 2008 Repl. Vol., 2014 Cum. Supp.) § 10-907(a) of the Correctional Services Article ("CS").

Appellant was on leave from June 12, 2012 until July 6, 2012. Efforts to provide her with the Notice, including telephone, certified mail, and attempted hand-delivery of the Notice, failed. Certified letters were sent to two different addresses on file with the Department. Neither was received by appellant and both were returned as "Not Claimed by Addressee." According to appellees, an effort was made to provide her with a copy of the Notice and related paperwork when she returned on July 6, but she refused to accept it. No further attempts were made to provide her with the Notice. Appellant denied receiving the Notice and refusing to accept and

sign for it. She worked her normal shifts after she returned until August 28, 2012. When she did file an appeal, she was issued a final order of termination on August 28, 2012.

Appellant filed a Petition to Show Cause on September 27, 2012, along with a separate Petition for Judicial Review under CS § 10-906(a). The Petition to Show Cause alleged violations of the COBR, more specifically, that she had not been provided the charges and notice as required under CS § 10-908(b) and that as a result she had been denied her "COBR rights to notice and to a hearing before a hearing board."

In their response to the Petition, the Department and Commissioner France again set forth the attempts to provide appellant with notice beginning on June 26, 2012, but contended that appellant "was not entitled to a hearing before a hearing board because she did not file an appeal of the Notice within 15 days after receiving the charges as required by CS § 10-908(c)."

A hearing in the circuit court was held on February 6, 2013, and an Order dated March 20, 2013, was issued by the court. The court found: (1) that the appellant was entitled to procedural due process; (2) that the testimony that appellant had refused to sign and acknowledge receipt of the charges upon her return to work was not based on personal knowledge of the Warden or supported by any documentary evidence; and (3) that "posting the Statement of Charges at [appellant's] home under these circumstances does not rise to the level of notice contemplated under CS § 10-908." Therefore, appellant was "entitled to exercise her rights under CS § 10-908(c)" and the matter, without reference to either reinstatement or back pay and benefits, was "remanded to the [Department] for further proceedings consistent with [the] order."

The Department reinstated appellant on April 12, 2013, but refused her request for back pay. On April 15, 2013, appellant filed a Motion for Revision of the March 20, 2013 Order, requesting an order expressly awarding back pay. The court denied the Motion for Revision because of the "nature of the relief requested" in appellant's petition for Judicial Review and at the February 6, 2013 hearing, but stated that the denial was "made without prejudice to the [appellant's] ability to seek appropriate relief following the resolution of the administrative hearing."

Held:

In regard to a correctional officer's resort to the courts, the COBR, which has its "roots" in the Law Enforcement Officers' Bill of Rights, "establish[es] exclusive procedures for the investigation and discipline of a correctional officer for alleged misconduct." CS § 10-902. CS § 10-906 provides for the filing of a show cause why rights under the COBR "should not be granted . . . at any time before the beginning of a hearing by the hearing board," which is in the nature of an equitable proceeding. Judicial review is also available after the hearing and a final administrative order, but that is a different action that provides a different and more deferential review. CS 10-911(a); Maryland Rule 7-202. Because CS § 10-906 is the appropriate and exclusive procedure for enforcing *prehearing* rights for correctional services officers, the denial of the timely filed Motion for Revision in a circuit court is a final appealable judgment.

When a correctional officer is terminated without the benefits of the COBR, the show cause court has the authority to order back pay and benefits under CS § 10-906. When a correctional officer has been denied his or her rights under the COBR and is reinstated, back pay and benefits should also be awarded because there can be no change in employment status until a correctional officer's rights under the COBR are exercised. Appellant requested a general prayer for relief in her petition; therefore, she was entitled as a matter of law to reinstatement, back pay, and benefits. Once the show cause court was made aware that appellant had been reinstated, it was an abuse of discretion not to award back pay and benefits.

Jamal Marcus Page v. State of Maryland, No. 2730, September Term 2013, filed April 30, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/2730s13.pdf

MARYLAND RULE 5-404(b) – THREEFOLD DETERMINATION FOR ADMISSIBILITY – SPECIAL RELEVANCE

Facts:

Appellant Jamal Marcus Page stood trial for the attempted first-degree murder of Rubearth Nichols. At trial, Mr. Nichols testified that on June 7, 2013, Appellant, wearing a camouflage jacket, shot him six times and then ran away. Mr. Nichols also testified that two weeks before this shooting, he got into an argument with Appellant over money, and Appellant attempted to shoot him, but his gun jammed. Mr. Nichols's wife testified that she saw a man in a camouflage jacket shoot Mr. Nichols and then took off running. Testimony from various law enforcement officers reflected that a canine track indicated a positive hit on an apartment nearby the crime scene. When the police entered that apartment, Appellant was present, and the search of the apartment ultimately revealed a camouflage jacket containing a handgun. Ballistics evidence indicated that the cartridge casings from the scene were fired from the same handgun found in the apartment. The jury ultimately convicted Appellant of attempted second-degree murder and related offenses.

Held: Affirmed.

On appeal, Appellant challenged the circuit court's admission of the prior assault as an exception to Maryland Rule 5-404(b). The Court of Special Appeals began by explaining that Rule 5-404(b) is a rule of exclusion, based on the policy rationale that "other crimes" may only show that the defendant is of "bad character" and confuse the jury. Other crimes evidence may be admissible, however, if it is substantially relevant to a contested issue, i.e. motive, intent, or identity, and is not offered simply to prove that the defendant has a propensity to commit crime.

The Court reiterated that in order for "other crimes" evidence to be admissible, the circuit court—in its role as the evidentiary sentry post—must conduct a threefold determination. First, the circuit court must find that it is relevant to the charge aside from propensity to commit crime, and the appellate court reviews this determination de novo. Second, the circuit court must be persuaded that the other crime occurred by the clear and convincing standard, and then the appellate court determines whether the evidence was sufficient to support the circuit court's finding. Third, the circuit court must weigh the necessity for and probative value of the evidence against any unfair prejudice, and then the appellate court reviews this determination for abuse of discretion.

Applying this three-step review to the facts before it, the Court of Special Appeals concluded that the prior assault in this case was of special, heightened relevance to the subsequent shooting in that the prior incident indicates that the second shooting likely occurred because of both the money dispute and because Appellant's prior attempt to shoot Nichols *failed*. It also countered Appellant's position that he was not the shooter by demonstrating that *Appellant*—and not some other unidentified individual—had motive and intent to commit the shooting. Next, the Court concluded that Mr. Nichols's testimony would be sufficient under a clear and convincing standard to persuade the circuit court that the prior assault occurred. Last, the Court found no abuse of discretion in the circuit court's conclusion that the evidence was more probative than unfairly prejudicial.

Appellant also challenged the circuit court's delivery of the flight instruction as to his consciousness of guilt. The Court repeated the established standard that a flight instruction is warranted when four inferences may be drawn from the evidence: 1) that the behavior of the defendant suggests flight; 2) that the flight suggests a consciousness of guilt; 3) that the consciousness of guilt is related to the crime charged or a closely related crime; and 4) that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime. Two witnesses testified that they saw the shooter—one who specifically identified the shooter as Appellant—to have run away, as opposed to walk away, from the shooting immediately after it occurred. The Court concluded that there was sufficient evidence upon which to warrant the delivery of the instruction, and the circuit court did not abuse its discretion.

Harry Easter v. State of Maryland, No. 1178, September Term 2013, filed May 27, 2015. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2015/1178s13.pdf

ADMISSION OF EXPERT TESTIMONY – RULE 5-702 – RELIABILITY OF VEHICLE AIR BAG CONTROL MODULES.

Facts:

Harry Easter, appellant, drove his sport utility vehicle ("SUV"), at a speed of approximately 89 miles per hour, into the rear of another vehicle. Appellant struck the car with such force that the two rear-seat occupants were ejected through the rear window of the car and killed. The driver also was killed when the car struck a tree. The front seat passenger survived, but he sustained a fractured back, a fractured pelvis, an ankle injury, a concussion, and other serious and debilitating injuries.

Corporal Frank Carson, a member of the Prince George's County Police Department and an accident reconstructionist for 15 years, investigated the collision. He testified as an expert witness in crash data retrieval and air bag control module analysis. Corporal Carson explained that the air bag control module determines whether a vehicle's air bag should deploy by measuring "deceleration and time." Analogizing to a parachute that opens on impact, which is not helpful, he noted that an air bag must be deployed prior to impact to be effective. The module attempts to predict when a collision is imminent by measuring the severity of rapid decelerations.

With respect to the collision in this case, as part of the investigation, Corporal Carson removed the air bag control module from appellant's SUV. He attached the module to a "special interface," and then attached that to a computer running a particular program. He then was able to retrieve the data from the module and download the information from the module to his computer. Software on his computer then produced "a readable formatted report" of the data retrieved from the module. The method he used to retrieve the data is "accepted within the scientific community of reconstructionists."

Corporal Carson testified that he had investigated 175 fatal motor vehicle collisions, including cases in which air bag control modules and crash data retrievals had been involved. With respect to his opinion regarding the reliability and accuracy of "crash data retrieval," Corporal Carson stated that, in his experience as an accident reconstructionist, "air bag control modules are very accurate, especially if they're involved in cases in the direction they're designed to sense," meaning forward and backward decelerations. He stated that National Traffic Safety Administration ("NTSA") studies have shown that the modules were accurate to "between a half and two miles an hour, in most cases."

Corporal Carson then discussed the data retrieved from the air bag control module. He testified that, one second prior to the crash, the vehicle was going 89 miles per hour, the brake was not applied, and the air bag did not deploy.

Appellant was convicted of three counts of manslaughter by vehicle, one count of causing a life threatening injury while operating a motor vehicle under the influence of alcohol, driving under the influence of alcohol, reckless driving, speeding, and other related offenses. On appeal, appellant argued that the court erred in permitting the State's expert to offer testimony relating to the data acquired from the air bag control module of appellant's vehicle where the State failed to establish the accuracy and validity of the methodology used to acquire that data.

Held: Affirmed.

An expert's opinion must be based on an adequate factual basis. The circuit court did not abuse its discretion in determining that "black box" data derived from the air bag control module of appellant's SUV was sufficiently reliable to support the expert's testimony.

Tyshon Leteek Jones v. State of Maryland, No. 2475, September Term 2013, filed April 29, 2015. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2015/2475s13.pdf

CRIMINAL LAW – DOUBLE JEOPARDY – REQUIRED EVIDENCE TEST

Facts:

Tyshon Jones, appellant, was accused of having participated in the robbery, shooting, and killing of Julian Kelly and charged with multiple offenses, including second-degree murder *with the intent to inflict serious bodily harm*. A jury found Jones not guilty of first-degree murder, second degree murder *with the intent to inflict serious bodily harm*, armed robbery, and robbery, but was unable to reach a verdict as to the charges of first-degree felony murder and the use of a handgun in the commission of a felony or a crime of violence. After the circuit court granted a mistrial as to those two charges, the State requested that the court rule that second-degree felony murder *based on first-degree assault* was a charge "pending" against Jones for which he could be prosecuted at a retrial. Over Jones's objection, the circuit court so ruled, finding that second-degree felony murder *based on first-degree assault* was a "viable" charge as it arose "out of the facts of this case" and because Jones had "not been acquitted" of it or of the underlying offense of first degree assault. Consequently, the court declared that "double jeopardy would not bar the prosecution" of Jones on the charge of second-degree felony murder *based on first-degree assault*.

Held: Reversed.

Under the "required evidence test," two offenses are to be treated as the same offense for double jeopardy purposes, and thus successive prosecutions are barred, where only one offense requires proof of an additional fact so that all elements of one offense are present in the other. In the case at bar, Jones was acquitted of the offense of second-degree murder *with the intent to inflict serious bodily harm*, and the State wished to retry him for the offense of second-degree felony murder *based on first-degree assault*. Both offenses require proof that the defendant's intentional conduct caused the victim's death and that the defendant's conduct was so dangerous to life that it made death a foreseeable result. But only one of these offenses— second-degree felony murder *based on first-degree assault*—goes on to require proof of a fact that the other offense—second-degree murder *with the intent to inflict serious bodily harm*—does not. Specifically, second-degree felony murder *based on first-degree assault* requires proof that the defendant committed or attempted to commit the felony of first degree assault, either by causing or attempting to cause serious physical injury to another or by committing an assault with a firearm. To prove all of the elements of second-degree felony *murder based on first-degree assault*, the State must first prove all the elements of second-degree murder *with the intent to*

inflict serious bodily harm, and thus the offenses must, under the required evidence test, be deemed to be the same for double jeopardy purposes.

In Re Gary T., No. 464, September Term 2014, filed April 6, 2015. Opinion by Wilner, J.

http://mdcourts.gov/opinions/cosa/2015/0464s14.pdf

CRIMINAL LAW – CONSPIRACY – IMPEACHMENT

Facts:

The Circuit Court for Prince George's County, sitting as a Juvenile Court, found appellant delinquent by reason of conduct which, if committed by an adult, would constitute second degree assault. The assault victim was A. Fofana, who left personal his cell phone on a nearby bench while he played basketball. Noticing his cell phone gone and three individuals walking away, Fofana ran up to them and demanded his cell phone. He testified that appellant punched him on the head, leaving him bloody and dazed. A photo admitted at trial showed the injury to Fofana's face. The appellant claimed self-defense, but the court believed Fofana, largely because appellant's version was inconsistent with the nature of Fofana's injury.

The sole issue on appeal arose from appellant's attempt to impeach Fofana's credibility by showing that four months after the incident and four months before trial, Fofana had been convicted on a guilty plea of conspiracy to distribute marijuana. The question involved whether conspiracy is relevant to credibility to be admissible for impeachment purposes. Relying largely on this Court's decision in *Wallach v. Board of Education*, 99 Md. App. 386, 637 A.2d 859 (1994), the court concluded that conspiracy to distribute marijuana was not an impeachable offense. The court also expressed doubt that, based on the admitted evidence, "it's going to be that probative." On those bases, the court sustained an objection to the proffered evidence.

This appeal ensued.

Held: Affirmed

The court ruled that whether a conviction for conspiracy constitutes an impeachable offense for purposes of Md. Rule 5-609 depends on the objective of the conspiracy. If the crime that the witness conspired to commit would qualify as an impeachable offense, the conviction for conspiracy to commit that crime will as well. Distribution of CDS, under *State v. Giddens*, 335 Md. 205, 642 A.2d 870 (1994), is an impeachable offense; therefore, conspiracy to commit that offense is as well. The judgment was nonetheless affirmed based on the trial court's conclusion that the evidence was not probative and, therefore, its probative value would not outweigh prejudice to the victim or State.

In Re Kevin T., No. 460, September Term 2014, filed April 30, 2015. Opinion by Eyler, James R., J.

http://www.mdcourts.gov/opinions/cosa/2015/0460s14.pdf

CRIMINAL LAW – GANGS

Facts:

The Circuit Court for Prince George's County, sitting as a juvenile court, found appellant to be involved in the delinquent acts of second-degree assault and participation in a criminal gang. The principal issue on appeal was whether the evidence was legally sufficient to sustain the finding of participation in a criminal gang under section 9-804(a) of the Criminal Law Article.

Appellant, a high school student, and two of his friends, attacked Austin R., another student, yelling "Salvatrucha." School security personnel broke up the fight. At the delinquency proceeding, Sergeant George Norris testified as an expert. He testified that "Salvatrucha" was a reference to a gang known as MS-13 and that appellant was associated with that gang.

Held: Reversed in part and affirmed in part.

The evidence was legally insufficient because there was no evidence that members of MS-13 actually committed or attempted to commit two or more acts of specified criminal conduct as required by the following sections: 9-804(a)(1) (a person may not participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity); 9-801(d) (defining pattern of criminal gang activity as being involved in the commission of two or more underlying crimes); and section 9-801(f) (listing the specific underlying crimes).

Andrew J. Pyon v. State of Maryland, No. 897, September Term 2014, filed April 6, 2015. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2015/0897s14.pdf

FOURTH AMENDMENT – SEIZURE OF THE PERSON - POLICE/CITIZEN ENCOUNTERS – CONSENSUAL ENCOUNTER

Facts:

Shortly after midnight on December 14, 2013, Officer Sally Kimmett of the Howard County Police Department received a dispatch call regarding "drug activity in the area" of 6518 Overheart Lane. The call made reference to two black males in a Toyota Corolla. It also referenced a gray Honda SUV. Officer Kimmet arrived at the indicated location within 10 minutes of receiving the call. At that time she did not see two black males or a Toyota Corolla. She did see a gray Honda SUV, though it was unoccupied. She then noticed another Honda nearby which was "kind of a hybrid" and "may have been an SUV," which was parked with its engine off. Thinking that "perhaps the caller got it wrong," Officer Kimmett positioned her marked police cruiser cater-corner to the rear of the Honda, thereby blocking to some degree any potential egress. She then approached the driver's side of the Honda. The driver stepped out and Officer Kimmett requested his driver's license, which he provided. She then noticed the appellant in the passenger seat of the vehicle. Outnumbered, she instinctively called for back-up. Officer James Wintjen responded to the scene some minutes later. To this point, Officer Kimmett had not perceived any indication of illicit activity, drug related or otherwise. Officer Kimmett approached the passenger side of the vehicle and requested the appellant's driver's license or other form of identification. As the appellant provided his license to Officer Kimmett, she detected the odor of raw marijuana emanating from the passenger compartment of the vehicle. She ordered the appellant out of the car. Both Officer Kimmett and Officer Wintjen conducted a warrantless search of the Honda and recovered what was later determined by a laboratory report to be 3.37 grams of marijuana from the glove compartment. The trial court denied appellant's motion to suppress the marijuana and on May 28, 2014, the appellant was convicted following a bench trial in the Circuit Court for Howard County of the unlawful possession of less than 10 grams of marijuana. He was ordered to pay a fine of $500. The appellant appealed, challenging the denial of his motion to suppress and arguing that the evidence was insufficient to support the conviction for possession of marijuana.

Held: Reversed.

The primary inquiry for this appeal is whether or not the Fourth Amendment was even implicated by the interactions between Officer Kimmett and the appellant. And, if it was, it was not satisfied. The record puts beyond dispute that, prior to detecting the odor of marijuana,

Officer Kimmett lacked any basis for believing that a crime had been committed or was about to be committed with respect to the appellant or the vehicle in which he was a passenger.

As articulated in *Swift v. State*, 393 Md. 139, 899 A.2d 867 (2006), there are three levels on which a police-citizen encounter may occur. These are: (1) an arrest, (2) an investigative stop, and (3) a consensual encounter. The first two levels of police-citizen encounter implicate the Fourth Amendment and trigger its requirements of probable cause and reasonable suspicion respectively. The third level, a consensual encounter (or "mere accosting"), does not implicate the Fourth Amendment and does not require any attendant level of suspicion whatsoever. Understandably, it is the State's position on appeal that the interaction between Officer Kimmett and the appellant was of this latter variety, and that the appellant's compliance with the officer's direction was voluntary and consensual. We are not persuaded.

The hallmarks of a consensual encounter are the absence of coercion or restraint of liberty. A mere accosting is egalitarian and not authoritarian. In such circumstances the citizen is free to ignore the officer and walk away. If the citizen does not feel free to do so, the encounter, by definition, loses its character as a voluntary and consensual one. We find, considering the totality of the circumstances, that a reasonable person in the position of the appellant would not have felt free to leave between the time that Officer Kimmett parked her police cruiser cater-corner to the Honda and the moment she detected the odor of marijuana. We note the following factors: the blocking of the Honda by the police cruiser, the time and place of the encounter, the presence of multiple officers, the request for driver's license, the per se intimidation of a traffic stop, the lack of advisement as to the appellant's right to leave, and the officer's call for back-up.

We conclude that the appellant was subjected to a Fourth Amendment seizure of his person without the required Fourth Amendment justification, that the smell of raw marijuana was therefore fruit of that poisonous tree, and the physical evidence should have been suppressed.

Robert Armstrong White v. State of Maryland, No. 912, September Term 2012, filed April 28, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/0912s12.pdf

SPEEDY TRIAL – TRIGGERING DATE – DISTRICT COURT PROCEEDINGS – DETAINERS

SPEEDY TRIAL – TRIGGERING DATE – DISTRICT COURT PROCEEDINGS – THE MACDONALD STANDARD

CONSTITUTIONAL LAW – RIGHT TO CONFRONTATION – TWO-WAY VIDEO CONFERENCE – *MARYLAND V. CRAIG*

Facts:

The Montgomery County Police Department re-opened two cold cases after DNA testing revealed that Appellant Robert Armstrong White's DNA matched the DNA profile extracted from the forensic evidence in both cases. The cases involved the rapes of two separate women on two separate occasions in 1979. Due to the passage of time, one witness—Jeanne Hostetler, the serologist who did the original analysis of the forensic evidence—suffered nerve damage to her back and was prohibited by her doctor to fly to testify at Appellant's trials. After holding hearings conducted outside the jury's presence, the circuit court decided that Ms. Hostetler was unavailable to travel and permitted her testimony via two-way video conference (Skype and WebEx) in lieu of physically appearing in court. Appellant was ultimately convicted of both rapes.

Held: Affirmed.

The Court of Special Appeals first addressed Appellant's argument that the State violated his rights to a speedy trial under (1) the Intrastate Detainer Act ("IDA"), (2) Maryland Rule 4-271 (also known as the *Hicks* rule), and (3) the United States and Maryland Constitutions. First, the Court held that the IDA was not violated because the first district court statement of charges was nol prossed within 120 days as required by the IDA. Second, the Court held that the State brought Appellant to trial within 180 days of his first appearance in the circuit court as required by Rule 4-271, and clarified that only circuit court—not district court—proceedings trigger the *Hicks* clock. Third, the Court held that Appellant's constitutional right to a speedy trial was not violated after balancing the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). Most notably, as to the triggering date for the "length of delay" factor, the Court concluded that, under the good faith standard applied to the government's dismissal of charges announced in *United States v. MacDonald*, 456 U.S. 1 (1982), the speedy-trial clock did not begin to run in this case until the filing of the second statement of charges and detainer.

Next, the Court addressed Appellant's contention that the circuit court's admission of Ms. Hostetler's testimony via two-way video conference violated his constitutional right to confrontation. The Court began by reviewing the seminal case on the use of video-conferencing in *Maryland v. Craig*, 497 U.S. 836 (1990). The Court concluded that the standard announced by the Supreme Court in *Craig*—that one-way video-conferencing may be used so long as the medium used is reliable, furthers an important public policy, and the trial court made a fact-specific finding of necessity for the procedure—is also applicable to two-way video conferencing.

Applying the *Craig* standard to the facts before it, the Court concluded that the use of Skype and WebEx in this case was sufficiently reliable and preserved the basic elements of confrontation based on the facts of this case. The Court further concluded that the combined public policy justifications of resolving cold cases and simultaneously protecting the physical well-being of a significant witness were sufficient under *Craig* to warrant the absence of Ms. Hostetler's in-court testimony. The Court emphasized that this was not a case in which the witness was merely unwilling to travel; instead, Ms. Hostetler's doctor prohibited her from traveling due to the nerve condition in her back. Finally, the Court determined that the circuit court properly engaged in a fact-specific inquiry into the necessity of the two-way video conferencing based on the facts before it by holding two hearings and did not err in finding Ms. Hostetler to be unable to travel due to her nerve condition.

Last, the Court declined to review Appellant's argument that the prosecutor made improper statements during closing argument because Appellant not only failed to object at the time the statements were made in the circuit court, but also failed to request plain error review on appeal. The Court noted, however, that the statements did not deny Appellant his fundamental right to a fair trial as to warrant the extraordinary remedy of plain-error review in any event.

Guy Nimro v. Jane W. Holden, Personal Representative of the Estate of Dan Westland, No. 5, September Term 2014, filed February 27, 2015. Opinion by Rodowsky, J.

http://www.mdcourts.gov/opinions/cosa/2015/0005s14.pdf

ESTATES AND TRUSTS – NONCLAIM STATUTE – LIMITATION ON PRESENTMENT OF CLAIMS – ADVERSE POSSESSION

Facts:

This appeal presents, as a matter of first impression, the issue of whether an action to quiet title by reason of adverse possession, brought against the personal representative of an Estate as record title holder of the contested property, constitutes a "claim" for the purposes of Maryland's nonclaim statute which limits the time frame for bringing claims against an Estate. §8-103(a) of the Estates and Trusts Article, Maryland Code (1974, 2012 Repl. Vol.). Failure to bring subject claims against the estate within the prescribed time period extinguishes the claim. Here, the appellant filed an action to quiet title against the personal representative of an Estate over seven years after the death of the decedent. The circuit court granted summary judgment in favor of the Estate, concluding that appellant's claim of title by way of adverse possession was time-barred by §8-103(a).

Held: Reversed.

Appellant contends that he is not bringing a claim against the Estate proper. Rather, he is seeking a ruling of good title to *his* property which, if such title be established, is not an asset of the Estate. The appellee, however, argues that no interest in realty that arose by adverse possession or prescription can survive, if the title to the realty devolves into a testamentary estate, unless the holder of the adverse interest timely files a claim per §8-103(a).

In resolving the dispute, two distinctions must be made. The first is that a judicial declaration of title by adverse possession does not create the title as of the declaration but rather is the judicial *recognition* of the legal consequence of a state of facts that took effect at an earlier date. Title through adverse possession is acquired on the expiration of the twentieth year, a transfer that occurs by operation of law and without any need for a judicial determination. *Trustees of Broadfording Church of the Brethren v. Western Md. Ry. Co.*, 262 Md. 84, 277 A.2d 776 (1971). Therefore, assuming that appellant can prove facts giving rise to title by adverse possession, or an easement by prescription, that vested in him before the decedent's death, the question becomes whether §8-103(a) reaches such interests.

Answering this question necessitates the second distinction between actions that stem from an obligation on the part of the decedent, monetary or otherwise, that existed prior to his or her

death (in personam), and those actions which are founded on a claim of title to specific property held by the decedent (in rem). Where the title or ownership of specific property is alleged to have been fully acquired by an adverse possession before the decedent's death, the assertion of that right is not a claim against the estate within the reach of §8-103(a). This conclusion is in keeping with the rationale of other jurisdictions and the policy of the Uniform Probate Code.

Jason Pulliam v. Jill Irene Pulliam, No. 2426, September Term 2013, filed April 29, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/2426s13.pdf

PENSION BENEFITS – LAW ENFORCEMENT OFFICERS' PENSION SYSTEM – DEFERRED RETIREMENT OPTION PROGRAM

Facts:

Appellant Jason Pulliam is a law enforcement officer employed by the Maryland Transportation Authority Police Force. During divorce proceedings in the Circuit Court for Harford County, Appellant and his then-wife, Appellee Jill Irene Pulliam, agreed, as reflected in the consent judgment entered, that she would receive one half of the marital share of his Law Enforcement Officers' Pension System ("LEOPS") pension. The parties disputed whether, pursuant to their consent judgment, a voluntary Deferred Retirement Option Program ("DROP") benefit is part of Husband's pension plan and properly included in Wife's eligible domestic relations order ("EDRO"). The circuit court concluded that Husband's LEOPS pension plan encompassed the DROP benefits and entered the EDRO reflecting the same.

Held: Affirmed.

The Court of Special Appeals first concluded that the parties' consent judgment—stating that Appellee would receive one half of the marital share of Appellant's entire pension—was unambiguous, because a reasonable person in the parties' position would have intended the word "pension" to encompass whatever benefits constitute that pension as a matter of law.

The Court then turned the question of whether DROP benefits are part of an LEOPS pension or whether they constitute a separate benefit. After reviewing the DROP statute—Maryland Code (1993, 2009 Repl. Vol. & 2013 Supp.), State Personnel & Pensions Article, § 26-401.1—in detail, the Court highlighted three aspects of the statute that, together, were key to its analysis. First, an LEOPS member is officially considered a "retiree" once he or she elects to participate in DROP. Second, the DROP benefits constitute the member's *normal service retirement benefit*, in that the member receives the normal service retirement allowance that he or she would have received upon termination of employment as of the effective date of his or her participation in the DROP. Third, by electing to participate in the DROP, the member stops accruing creditable service to be used for computing the pension payment. If he becomes eligible and elects to participate in the DROP, which halts the accrual of years of service, Appellant would lower the number of years to be used for computing his basic allowance and, therefore, would reduce his monthly basic allowance payments that he would receive—and Appellee would share in—upon termination of his employment.

Based on these features, the Court held that DROP benefits are part of the pension as a matter of law. The Court found this conclusion to be consistent with the Court of Appeals decision of *Dennis v. Fire & Police Employees Retirement System*, 390 Md. 639 (2006), which concluded that the Baltimore City DROP benefits were part of the pension afforded by that system based on the Internal Revenue Service's treatment of the DROP benefits as such.

The Court rejected Appellant's argument that the DROP benefits should be treated like survivor benefits, which a divorcing spouse must specifically negotiate to receive. The Court held that unlike survivor benefits, which address *to whom* retirement payments will go in the event of death, the DROP simply provides an alternative avenue for the member *to begin receiving* the same basic allowance that the member would have received had he or she retired on the start date in the DROP.

Reliable Contracting Company, Inc., v. Maryland Underground Facilities Damage Prevention Authority, No. 752, September Term 2014, filed April 30, 2015. Opinion by Graeff, J.

Arthur, J., concurs.

http://www.mdcourts.gov/opinions/cosa/2015/0752s14.pdf

SEPARATION OF POWERS – PU § 12-135 – PU § 12-113(e) – PU § 12-102 – SG § 10-1001 – CIVIL PENALTIES

Facts:

Washington Gas filed a Notice of Probable Violation with the Maryland Underground Facilities Prevention Authority (the "Authority"), appellee. It named Reliable Contracting Company, Inc., appellant, as the contractor who allegedly violated PU § 12-124(a), by failing to call Miss Utility's one-call system prior to excavating, and PU § 12-127(e), by disregarding clear evidence that underground facilities were present at that location. After the Authority researched the allegations, it notified Reliable by letter of its conclusion that Reliable did violate those statutory provisions. The Authority also advised Reliable that a fine of $2,000 would be assessed for the violation of PU § 12-124(a), as well as a fine of $1,000 for the violation of PU § 12-127(e). The Authority indicated that the latter fine would be waived if Reliable participated in damage prevention training.

At the subsequent hearing, the only person who appeared on behalf of Reliable was counsel, who did not rebut any of the Authority's findings, but instead, challenged the constitutionality of the enabling statute. Counsel argued that "the Authority's oversight and sanctioning authority constituted an impermissible delegation of judicial functions, and a violation of separation of powers principle[s]." Counsel also contended that the relevant statutory language contained no enumerated safeguards or guidance to assess fines and penalties, but instead, the broad statutory language gave the Authority unfettered discretion to impose a fine up to $2,000 for a violation.

Following the hearing, the Authority issued a written decision. Stating that Reliable's failure to appear to give testimony was construed as an admission of guilt, the Authority decided that the recommended fines would be assessed. The Authority advised Reliable that it could accept the action taken by the Authority and pay the fines, or it could request judicial review in the circuit court.

Reliable petitioned for judicial review. After a hearing, the court issued a written decision affirming the decision of the Authority.

The court initially addressed, and rejected, Reliable's argument that PU § 12-135 violated the Maryland Constitution by vesting plenary judiciary powers in the Authority to adjudicate cases involving violations of the Miss Utility statute. The court also rejected Reliable's argument that

the Miss Utility statute violated the Maryland Constitution by vesting the Authority with "unrestricted, unbridled discretion" to assess penalties.

Held:

Section 12-135 of the Public Utilities Article, which gives the Authority power to impose a civil penalty for a violation of the Miss Utility statute, is not an unconstitutional delegation of judicial power. Delegation to an administrative agency of adjudicatory functions is in harmony with the principle of separation of powers provided that there is an opportunity for judicial review of the agency's final determination.

Section 12-113(e) of the Public Utilities Article provides that a person aggrieved by a decision of the Authority has an opportunity for judicial review. Accordingly, because the court has the opportunity to review the Authority's decision and render a final decision, the delegation of quasi-judicial adjudicatory power to the Authority is not unconstitutional.

The statute is not unconstitutional for failure to give the Authority guidance in how to assess the amount of penalty imposed. Section 10-1001 of the State Government Article sets specific statutory standards and guidelines for the Authority to consider in exercising its discretion in imposing a penalty. In assessing a civil penalty, the Authority should consider: (1) the severity of the violation for which the penalty is to be assessed; (2) the good faith of the violator; and (3) any history of prior violations.

Greentree Series V, Inc. v. C. Larry Hofmeister, Jr., et al., No. 1246, September Term 2013, filed April 29, 2015. Opinion by Salmon J

http://www.mdcourts.gov/opinions/cosa/2015/1246s13.pdf

REAL PROPERTY – JUDICIAL SALE

Facts:

In 2007, Joseph A. Wheeler signed a $320,000 promissory note that was secured by a deed of trust. That deed of trust encumbered property located at 10 River Drive, Severna Park, MD (hereinafter "the Property"). The grantors of the deed of trust were Negar Wheeler and Joseph Wheeler. Payments were not made when due on the note and as a consequence the Substitute Trustees, on behalf of Wells Fargo, the holder of the promissory note, filed a foreclosure action in the Circuit Court for Anne Arundel County. The terms of the sale, as set forth in a newspaper advertisement that was published in Anne Arundel County prior to the sale, read, in pertinent part, as follows:

A deposit of $33,000.00 will be required at the time of sale . . . [b]alance of the purchase price is to be paid in cash within ten (10) days of the final ratification of sale[.] . . . If payment of the balance does not take place within ten days of ratification, the deposit will be forfeited and property will be resold at the risk and expense of the defaulting purchaser.

A public sale of the Property was held by the Substitute Trustees on June 30, 2011. Greentree's bid of $172,000 was the highest received. Greentree then gave the Substitute Trustees a deposit in the amount of $33,197, which was $197 more than required. The sale was ratified by the Circuit Court for Anne Arundel County on August 29, 2011. Greentree, however, failed to settle on the Property within ten days as required, and as a consequence, Wells Fargo and the Substitute Trustees filed a "Petition to Order Resale of Property at Defaulting Purchaser's Sole Cost and Expense."

An order was docketed on February 10, 2012, which directed that the Property "shall be resold at the risk and expense of" Greentree. That order also provided that "the deposit monies in the amount of $33,197 be and hereby forfeited."

The Property was sold for the second time at public auction on April 12, 2012. Greentree's bid of $244,000 was the highest received. Greentree put down a second deposit, this time in the amount of $35,000, which was $10,000 more than the amount required in the advertisement that immediately preceded the resale. The second sale was ratified by the Circuit Court for Anne Arundel County on June 14, 2012 and on October 25, 2012, Greentree finally went to settlement. The auditor filed a "corrected amended audit" in which he stated that expenses incurred by the Substitute Trustees as a result of the resale totaled $15,591.35. He ruled that the $33,197 deposit should be returned to Greentree and that the second deposit of $35,000 be credited to Greentree.

The Substitute Trustees and Wells Fargo filed exceptions to the corrected amended auditor's report. The circuit court, in a written opinion, noted that by virtue of Greentree's failure to go to settlement initially, the Substitute Trustees had incurred additional expenses in the amount of $15,591.35 and interest on the debt had increased by $17,788.26, which was calculated at $61.98 per day. Therefore, "the total cost" of having to resell the Property was $33,379.61 ($17,788.26 + $15,591.35), which was considerably less than the $72,000 [$244,000 less $172,000] additional monies realized from the second sale.

The circuit court reversed the decision of the court auditor and ruled that Greentree was not entitled to a credit for the $33,197 deposit.

Held: Reversed.

Md. Rule 14-305(g) provides:

> Resale. If the purchaser defaults, the court, on application and after notice to the purchaser, may order a resale at the risk and expense of the purchaser or may take any other appropriate action.

(Emphasis added.)

The Court of Special Appeals interpreted Md. Rule 14-305(g) as meaning that after a default the court could: A) order a resale at the cost and expense of the purchaser, or B) order a forfeiture of the deposit but it could not order both A and B.

The Court further ruled that the terms of the newspaper ad could not be enforced as a contract because, as written, the provisions of the ad constituted a penalty and therefore could not be upheld as a valid liquidated damage clause. The Court also held that the doctrine of unclean hands did not prohibit Greentree from asking for a return of the $33,197 deposit because its failure to go to settlement the first time merely constituted a breach of contract and, for purposes of the unclean hands doctrine, could not be characterized as either fraudulent, illegal, or unlawful conduct.

Susan Buckingham, Co-Personal Representative of John D. Buckingham, et al. v. Jeffrey B. Fisher, et al., Substitute Trustees, No. 2416, September Term 2013, filed May 27, 2015. Opinion by Friedman, J.

http://www.mdcourts.gov/opinions/cosa/2015/2416s13.pdf

SALES OF PROPERTY – MOTION TO STAY OR DISMISS FORECLOSURE SALE – PLEADING STANDARD

SALES OF PROPERTY – MOTION TO STAY OR DISMISS FORECLOSURE SALE – SUFFICIENCY OF PLEADING A FORGERY DEFENSE

SALES OF PROPERTY – MOTION TO STAY OR DISMISS FORECLOSURE SALE – SUFFICIENCY OF PLEADING A DEFENSE BASED ON DEFECTIVE NOTICE

Facts:

John and Elizabeth Buckingham, husband and wife, owned and resided at a property in Bethesda, Maryland. In 1997, the Buckinghams purportedly executed a refinance deed of trust with Virginia Commerce Bank, securing a $600,000 debt. The deed of trust was modified on several occasions over the following years until November 2010, when the Buckinghams defaulted on the loan payments. Elizabeth Buckingham died in 2011 before a foreclosure action was initiated. John Buckingham died in 2012, shortly after Jeffery Fisher, and others, were appointed as substitute trustees by Virginia Commerce Bank and commenced a foreclosure action. Richard and Susan Buckingham were subsequently joined to the foreclosure action as co-representatives of John Buckingham's estate.

A foreclosure sale was scheduled for December 19, 2013. On December 18, 2013, Richard and Susan Buckingham filed a Motion to Stay Sale of Property and Dismiss Foreclosure Action, pursuant to Maryland Rule 14-211. They sought a temporary stay of the sale and dismissal of the foreclosure action, alleging that Elizabeth Buckingham's signature on the 1997 deed of trust was a forgery, and that the notice of sale was defective. The circuit court held an emergency hearing the day it was filed and denied the motion without scheduling an evidentiary hearing on the merits of the asserted defenses.

Held: Affirmed

Under Maryland Rule 14 211, a party moving to stay or dismiss a foreclosure sale must plead a defense with particularity to be entitled to an evidentiary hearing on the merits. Particularity means that each element of a defense must be asserted and accompanied by some level of factual and legal support. General allegations will not be sufficient to raise a valid defense requiring an evidentiary hearing on the merits.

To challenge the validity of a lien based on forgery, a party must show that there was (1) a false making or material alteration, (2) with intent to defraud, (3) of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. The Buckinghams' motion alleged the first and third elements of a forgery claim, in that they have claimed that Elizabeth's signature on the deed was false. The Buckinghams, however, failed to assert—with particularity or without—the intent to defraud element of forgery. In the absence of any allegation and some evidentiary support for the existence of an intent to defraud, the Buckinghams failed to allege with particularity the grounds for their motion, and, as a result, it was properly denied without an evidentiary hearing.

Maryland Rule 14-210(a) requires a foreclosing party prior to sale to publish notice of the time, place, and terms of the sale. The notice must contain a description of the property that is sufficient to enable an ordinary person to identify the property and seek further information. A notice that does not meet these requirements can provide a valid defense to the right to foreclose. Maryland Rule 14-211 requires that both the "factual *and legal*" bases of a defense be stated with particularity. The Buckinghams' motion did not allege that the Trustees' notice failed to meet any requirements of Rule 14-210(a). Although the Buckinghams pointed out certain inconsistencies in the notice, they failed to allege with particularity the legal grounds pursuant to which the trial court could determine that the notice would prohibit the Trustees from proceeding with the foreclosure sale. Thus, the circuit court properly declined to hold an evidentiary hearing on the merits.

Len Stoler, Inc. v. Tracy L. Wisner, No. 490, September Term 2014, filed May 28, 2015. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2015/0490s14.pdf

STATUTES – CONSTRUCTION OF UNCLEAR OR AMBIGUOUS STATUTE OR LANGUAGE – PURPOSE AND INTENT – DETERMINATION THEREOF

CONSUMER CREDIT – PARTICULAR BUSINESSES OR TRANSACTIONS

AUTOMOBILES – CONTROL, REGULATION, OR USE IN GENERAL – SALE OR TRANSFER

Facts:

Appellee, Tracy Wisner, purchased a 2011 Lexus from appellant, Len Stoler, Inc., ("LSI"), an automobile dealer, for $51,867.50. Appellee financed part of the transaction through Toyota Credit Motor Corporation. The sales contract included an itemized list of all charges including: a $4.00 charge for taxes paid to government agencies; a $220.00 charge for government registration fees; and a $50.00 charge for government certification of title fees.

Appellee later filed a putative class action lawsuit against LSI alleging that out of the $220 in government registration fees LSI had charged her, it had improperly collected two fees, a $24 excise tax allowance and a $20 electronic titling fee, in violation of the Credit Grantor Closed End Credit Provisions ("CLEC"). LSI moved for summary judgment, asserting that it was authorized by the Transportation Article to collect both fees. Appellee filed a cross motion for summary judgment and the circuit court held a hearing on both motions on March 26, 2014. Following arguments by both parties, the court adjourned to review two cases brought to its attention, *Biggus v. Ford Motor Credit Co*., 328 Md. 188 (1992) and *Ford Motor Credit Co., v. Roberson*, 420 Md. 649 (2011). The hearing resumed on April 23, 2014 and, following additional arguments, the court granted appellee's motion for partial summary judgment, and denied LSI's motion for summary judgment, ruling that the CLEC prohibited LSI from charging appellee either the $20 electronic titling fee or the $24 charge for collecting excise taxes.

Held: Reversed.

The Court of Special Appeals held that the retention of the excise fee and the collection of the electronic titling fee are both permitted by the Transportation Article. Specifically, as to the excise tax allowance, the Court concluded that Com. Law § §12-1005 governs fees and charges and the excise tax allowance is not a fee or a charge under the meaning of the statute. Regarding the electronic titling fee, while Com. Law §12-1005(d) prohibits the collection of the fee, Transportation Article §13-610 expressly permits it. Applying various principles of statutory

construction, the Court held that Transportation Article §13-610 controls and permits the collection and retention of the electronic titling fee.

Return to ToC

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated May 1, 2015, the following attorney has been disbarred by consent:

JOHN KIRBY BURKHARDT

*

By a Per Curiam Order of the Court of Appeals dated May 8, 2015, the following attorney has been disbarred:

DENNIS ALAN VAN DUSEN

*

By an Order of the Court of Appeals dated May 11, 2015, the following attorney has been indefinitely suspended by consent:

ANTONIO AQUIA

*

By a Per Curiam Order of the Court of Appeals dated May 11, 2015, the following attorney has been disbarred:

GERALD ISADORE KATZ

*

By an Order of the Court of Appeals dated May 11, 2015, the following attorney has been disbarred by consent:

ANTHONY RAYNARD McDANIEL

*

By an Order of the Court of Appeals dated May 13, 2015, the following attorney has been suspended:

GILBERT BABER

*

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By a Per Curiam Order of the Court of Appeals dated May 13, 2015, the following attorney has been disbarred:

JOHN T. HAMILTON, JR.

*

By an Opinion and Order of the Court of Appeals dated May 22, 2015, the following attorney has been indefinitely suspended:

GRASON JOHN-ALLEN ECKEL

*

UNREPORTED OPINIONS

	Case No.	*Decided*
Champion, Hasan v. State	2197 **	May 1, 2015
Wesley, Gary Alexander, Sr. v. State	0814	May 1, 2015
Bennett, Cornell A. v. State	0184 *	May 1, 2015
Smith, Gerald v. State	0160	May 1, 2015
Leach, Brandon Antwon v. State	2305 *	May 1, 2015
Lewis, Steven Maurice v. State	2632 **	May 1, 2015
Crippen, Jarron Lamar v. State	2487 *	May 1, 2015
Tower Oaks Blvd. v. Virginia Commerce Bank	1463 *	May 1, 2015
Williams, Lamar Maurice v. State	0854	May 1, 2015
Brown, Carl H. v. Comm'n on Common Ownership	0326	May 1, 2015
Rose, Matthew B. v. Williams	0531	May 4, 2015
Blumberg, Albert v. Md. Board of Physicians	0211	May 4, 2015
Garner, Zachariah v. Garner	2395 *	May 4, 2015
Williams, Cash v. Bd. Of Educ., Prince George's Co.	1318 *	May 4, 2015
Mentzer, Dale Michael v. State	0885	May 4, 2015
Caudill, Joseph Dwayne v. State	0447	May 4, 2015
Ong, Lye Huat v. State	0446	May 4, 2015
Edwards, Freddie v. State	2514 *	May 4, 2015
Griffin, Michael v. State	2518 *	May 4, 2015
In re: William H.	0334	May 4, 2015
Oldham, Corinthia L. v. King	1093	May 6, 2015
Nowak, G. Philip v. Webb	2403 *	May 6, 2015
Gregg, Donte v. State	2027 *	May 6, 2015
Veasey, Jonathon Thomas v. State	1460	May 6, 2015
Woodward, Chena v. State	0174	May 6, 2015
Hollingsworth, Brandon Clay v. State	0942	May 6, 2015
Barnes, Joseph v. State	1309 **	May 6, 2015
Evans, Sherry v. City of Rockville	0936	May 7, 2015
Ghadry, Samar v. Penson Financial Services	1808 **	May 7, 2015
Sheppard, Darius v. State	0409	May 7, 2015
Taylor, Anthony Levi v. State	2449 *	May 7, 2015
In re: Julieana G. D.	1842	May 7, 2015

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Poochikian, Nayiri K. v. Poochikian	0498	May 8, 2015
In re: Dany G.	1096	May 11, 2015
Tallmadge, Donald P. v. K-C Building Ass'n of Bowie	0701	May 12, 2015
In re: Tae'za W.	0768	May 12, 2015
Coleman, Trevin Drew v. State	0969	May 12, 2015
Coleman, Edwin v. Residential Credit Solutions	0806	May 13, 2015
Harper, Michael v. Smith	0433	May 13, 2015
Onewest Bank Group v. Prime Venturers	0209	May 13, 2015
Van Dusen, Dennis v. Prywes	0043	May 13, 2015
Harrison, Melissa Greene v. Sheroke	0925 *	May 13, 2015
Seal, David Glenn v. State	1430	May 13, 2015
Tshibaka, Cimenga M. v. Watt	1047	May 19, 2015
Smith, Myishia v. Rowhouse, Inc.	0993	May 19, 2015
Khan, Mohammed Aslan v. Burson	0254	May 19, 2015
Ballard, Timothy Marshall v. State	0198	May 19, 2015
In re: Adoption/G'ship of Emilee G., et al.	1841	May 19, 2015
Conway, Terrell P., Sr. v. State	1102	May 20, 2015
Davis, Dallas v. State	0324	May 20, 2015
Gaskins, Timothy v. State	1356 ***	May 20, 2015
2720 Sisson St., LLC v. Brethren Mutual Insurance	1013	May 20, 2015
Lucas, Calvin, Jr. v. State	1999	May 20, 2015
Neale, Kindall D. v. State	1406	May 20, 2015
Williams, Martinez v. State	2669 *	May 20, 2015
Malveo, Alvin v. State	2343 *	May 20, 2015
State v. Renfro, Michael	0865	May 20, 2015
In re: Tyrone B.	1307	May 20, 2015
Hackley, Wendell Reginald v. State	0608	May 20, 2015
McCoy, Donielle v. State	0820	May 21, 2015
Wilson, Deandre v. State	0129	May 21, 2015
McCrea, Elias v. State	1831 *	May 21, 2015
Butcher, Duc T. v. Rosenberg	0805	May 21, 2015
Davis, Larry v. State	0157	May 21, 2015
Williams, Janice D. v. Bd. Of Appeals, DLLR	0776 *	May 21, 2015
Brockington, Damian v. State	1177	May 21, 2015
Pereira, Mary Aniera v. Singh	0707	May 21, 2015
In re: Makayla E, Rebecca C., & Laura P.	1598	May 21, 2015
Sweitzer, Philip J. v. State	0582	May 26, 2015
Williams, Tavon v. State	0401	May 26, 2015

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Matthews, Marian v. Ward	0756	May 26, 2015
Lexington Square v. Mayor & Council of Baltimore	0724	May 26, 2015
Lyons-Owens, Theolinda v. Md. Aviation Admin.	1776 *	May 26, 2015
In re: Tristan N.	2302	May 26, 2015
Ghazzaoui, Ramez v. Taylor	2710	May 28, 2015
Sampson, Sonja R. Harrell v. Shelton	1473	May 29, 2015