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http://www.mdcourts.gov/opinions/coa/2015/9a14ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On the Attorney Grievance Commission ("the Commission")'s behalf, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Kenneth Haley ("Haley"), Respondent, charging him with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.2(a) (Allocation of Authority Between Client and Lawyer), 1.3 (Diligence), 1.4 (Communication), 1.5(a) (Fees), 1.7(a) (Conflict of Interest), 1.15(a), 1.15(c), and 1.15(d) (Safekeeping Property), 1.16(d) (Terminating Representation), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct that is Prejudicial to the Administration of Justice), 8.4(a) (Violating the MLRPC), and Md. Code Ann., Bus. Occ. & Prof. (1989, 2010 Repl. Vol.) ("BOP") § 10-306 (Misuse of Trust Money).

A hearing judge found the following facts. On May 30, 2007, the Court of Appeals admitted Haley to the Bar of Maryland. In 2010, Haley became a solo practitioner in Columbia, Maryland. Before he performed any legal services, Haley received a flat fee from each of the six clients who ended up filing complaints against him with the Commission. In each case, without his client's consent, Haley deposited the unearned fee into an operating account instead of an attorney trust account.

On June 7, 2012, a client and Haley executed an attorney-client agreement, and the client paid Haley a $2,800 flat fee. Although Haley agreed that he would enter his appearance on the client's behalf, file a supplemental motion to modify custody, and represent the client at the hearing, Haley did not perform any of the tasks. The client attempted to contact Haley, who did not respond. At some point before July 10, 2012, the client and Haley spoke via telephone; the client asked about the case's status; an argument ensued; and Haley hung up on the client. On July 10, 2012, the client terminated the representation and requested a full refund of the fee. On July 31, 2012, the client appeared on her own behalf at the hearing, and did not prevail. After the client filed a complaint against Haley with the Commission, Haley refunded $2,307.56 of the fee.

On October 10, 2011, a client retained Haley to represent him in a child custody case. The client paid Haley a $2,800 flat fee. On February 23, 2012, on the client's behalf, Haley filed a motion to modify custody. Haley and the client appeared at a hearing at which Haley repeatedly disregarded the client's instructions. On or about October 1, 2012, the client terminated the representation. Haley failed to refund the client any of the fee.

On May 17, 2012, a client retained Haley to represent her in an appeal of a ruling on custody. The client paid Haley a $3,000 flat fee. Haley timely filed a "Line, Notice and Leave to Appeal." Between May 17, 2012 and July 2, 2012, the client e-mailed Haley on several occasions to ask about the appeal's status; Haley responded to only one e-mail. On July 2, 2012, the client decided to abandon the appeal and pursue modification of custody instead. Haley failed to timely file a motion to modify custody and failed to refund the client any of the fee.

On March 9, 2012, a client retained Haley to represent him in a matter concerning modification of joint custody and guardianship. The client paid Haley a $2,600 flat fee. The client and Haley met to review a motion to modify that Haley had written; the motion contained several errors, including misspellings of the client's name and incorrect uses of pronouns. Haley filed the motion to modify, which included a certificate of service with an incorrect address for the client's ex-wife. Haley also failed to include with the motion to modify a domestic case information report, as required by Maryland Rule 2-111. The trial court ordered Haley to file a domestic case information report; Haley failed to comply with the order. The trial court dismissed the motion to modify without prejudice. Haley failed to inform the client of the dismissal. The client later terminated the representation. Without the client's consent, and despite having reason to know that the representation had been terminated, Haley filed in the trial court a second motion to modify and an answer to the ex-wife's motion for contempt; Haley did not provide the client a copy of either filing. Thereafter, Haley filed a motion to strike his appearance, but failed to provide the client with five days' written notice of his intent to withdraw, as required by Maryland Rule 2-132. And, Haley failed to refund the client any of the fee.

In 2012, a client retained Haley to represent him in a custody case and informed Haley that he wanted joint legal and shared physical custody of his two children. The client paid Haley a $2,600 flat fee. Haley filed a motion to modify custody stating that the client requested primary physical custody. The children's mother filed a counter-motion to modify custody. Haley failed to appear at a scheduling conference. The client and the children's mother attended a mediation, at which Haley failed to appear; Haley also failed to prepare the client for the mediation. The children's mother moved for sanctions, alleging that Haley's client had made deficient discovery disclosures. Haley had failed to communicate with the client about discovery. Haley failed to appear at a hearing. At another hearing, Haley moved to strike his appearance, which the trial court granted, and the client proceeded self-represented. The trial court: dismissed the motion to modify because of deficient discovery disclosures; granted the counter-motion to modify, thus reducing the client's visitation and increasing his monthly child support payment; and ordered the client to pay attorney's fees for his failure to respond to discovery requests. Haley did not refund the client any of the fee, and failed to provide the client with his file after termination of the representation.

In or about 2011, Haley met a woman, through a dating website, who would become a client. Haley and the woman chatted online and met for dinner on one occasion; Haley and the woman planned, but ended up cancelling, a second date. On February 8, 2012, the woman retained Haley to represent her in a matter concerning an Equal Employment Opportunity Commission ("EEOC") complaint against her former employer. This client paid Haley a $4,500 flat fee. In March 2012, Haley and the client met at Haley's law office to discuss the client's case. Haley took the client to a back room and kissed her. The client immediately objected. On March 23, 2012, Haley failed to appear at a conference with an EEOC investigator; Haley also failed to reschedule the conference. On August 17, 2012, the client telephoned Haley and left a voicemail asking about her case's status. Haley texted the client to state: "I am sorry, I owe you some lips for that. [Yo]u decide where." In a letter dated October 18, 2012, Haley terminated the representation. Haley did not refund the client any of the fee.

The hearing judge concluded that Haley violated MLRPC 1.1, 1.2(a), 1.3, 1.4, 1.5(a), 1.7(a), 1.15(a), 1.15(c), 1.16(d), 8.4(c), 8.4(d), 8.4(a), and BOP § 10-306.

Held:

The Court of Appeals held that clear and convincing evidence supported the hearing judge's conclusions that Haley violated MLRPC 1.1, 1.2(a), 1.3, 1.4(a), 1.5(a), 1.15(a), 1.15(c), 1.16(d), 8.4(c), 8.4(d), 8.4(a), and BOP § 10-306, but not MLRPC 1.7(a), by failing to: deposit unearned fees into an attorney trust account; refund unearned legal fees after the termination of representation; sufficiently and timely respond to reasonable inquiries by clients; and competently and diligently represent his clients' interests.

The Court of Appeals agreed with the Commission that disbarment was the appropriate sanction for Haley's misconduct. Haley engaged in numerous acts of misconduct in representing six clients. In addition to failing to sufficiently and diligently represent his clients' interests, Haley intentionally retained his clients' unearned legal fees after the termination of representation. Such misconduct constituted misappropriation of clients' funds and was an act infected with deceit and dishonesty. There were no mitigating factors, much less compelling extenuating circumstances; to the contrary, Haley's misconduct was aggravated by multiple violations of the MLRPC, prior attorney discipline, a pattern of misconduct, and likelihood of repetition of misconduct. Disbarment was necessary to protect the public from Haley's repeated dishonesty and to deter other lawyers from similar misconduct.

Attorney Grievance Commission of Maryland v. John T. Hamilton, Jr., Misc. Docket AG No. 18, September Term 2013 & Misc. Docket AG No. 3, September Term 2014, filed July 27, 2015. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2015/18a13ag.pdf

ATTORNEY GRIEVANCE – DISCIPLINE – DISBARMENT

Facts:

The Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("PDRA") against Respondent, John T. Hamilton, JR. ("Respondent"). The Petition alleged in one matter violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.15(c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) and (d) (Misconduct); MLRPC 1.1, 1.3, 1.4(a) and (b), 1.15(a) and 8.4(a) and (d) in a second matter; and, MLRPC 1.1, 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.3, 1.4(a) and (b), 1.5(a) (Fees), 1.15(a) and (c), 1.16(d), 8.1(b), and 8.4(a), (b), (c), and (d) in a third matter, as well as Maryland Rule 16-604 and Maryland Code (2000, 2010 Repl. Vol.), Bus. & Occ. Prof. Art., § 10-306 ("BOP § 10-306"). The PDRA alleged that Respondent committed professional misconduct in these matters by: failing to represent competently his clients; failing to appear in court at scheduled proceedings, without timely or adequate explanation; failing to file responses to discovery (resulting in sanctions imposed on his clients); failing to communicate with his clients; failing to deposit funds into an attorney trust account; charging an unreasonable fee; failing to return unearned fees; misrepresenting that he filed paperwork in a case; misappropriating funds; and, failing to respond to Bar Counsel's letters in regard to complaints filed against him.

The case was assigned to a hearing judge to conduct an evidentiary hearing and render findings of fact and recommended conclusions of law with regard to the charges. The hearing judge accepted completely and as his own the proposed facts and conclusions of law presented by Bar Counsel. Respondent did not file exceptions to the hearing judge's findings of facts or conclusions of law. Respondent failed also to offer to the Court of Appeals any recommendation contrary to Petitioner's written recommendation for disbarment and did not appear in front of the Court to argue as to sanction. Relying on Md. Rule 16-759(b)(2)(A), the Court accepted the hearing judge's findings of fact.

Respondent was retained in the first matter by Bryan Manning to represent him in a divorce case. Respondent charged as a fee (and received from) Manning $10,000, which he failed to place into an attorney trust account. Respondent failed to provide timely to Manning's wife or Manning's wife's attorney Manning's responses to the wife's discovery requests, which resulted in sanctions against Manning. After an unfavorable outcome in the initial trial, Respondent failed to

inform Manning about further court hearings and deadlines in his case. Respondent failed also to answer Bar Counsel's letter requesting information about Respondent's representation of Manning.

Respondent was retained in the second matter by Richard DeVincent to represent him in a child custody case. Respondent charged DeVincent $7,500, which fee Respondent failed to deposit into an attorney trust account. Respondent received DeVincent's responses to his wife's discovery requests approximately one week after his wife served them on DeVincent. Respondent failed to file the responses for almost six months, which resulted in sanctions imposed upon DeVincent. Respondent failed to return text messages and phone calls from DeVincent. Respondent failed also to subpoena certain witnesses requested by DeVincent.

Respondent was retained in the third matter by Windy Grauer to represent her in a child custody dispute. Grauer paid respondent $5,000, which fee Respondent failed to put in an attorney trust account. Respondent misrepresented to Grauer that he had filed papers for her, when he had not. Respondent failed also to appear in court at least twice for hearings in Grauer's case. Respondent did little or no work on behalf of Grauer and, as a result, failed to earn the $5,000 fee that he charged her. Respondent failed to return any of this unearned fee. Respondent failed also to provide Grauer a complete copy of her client file upon Grauer's request, and provided only an incomplete file two months later to her counsel. Despite numerous letters and a phone call from Bar Counsel, Respondent failed to answer questions about Grauer's complaint and his representation of her.

Held:

The Court of Appeals concluded that the facts were sufficient to warrant concluding, to a clear and convincing standard, that Respondent violated MLRPC 1.1, 1.2, 1.3, 1.4(a) and (b), 1.5(a), 1.15(a) and (c), 1.16(d), 8.1(b), 8.4(a), (c), and (d), as well as Maryland Rule 16-604 and BOP § 10-306 in his representation of Manning, DeVincent and Grauer.

The facts did not support, however, a conclusion that Respondent violated 8.4(b). Petitioner alleged that Respondent violated MLRPC 8.4(b) because he violated Maryland Code BOP § 10-606(b), which states that a willful violation of BOP § 10-306 amounts to a misdemeanor. Petitioner did not prove, by clear and convincing evidence, that Respondent's actions had the general intent necessary to prove willfulness. As Petitioner was unable to adduce sufficient facts that amount to a criminal act (or an equivalency), the Court concluded that Respondent's misconduct did not violate MLRPC 8.4(b).

Relying on Respondent's numerous and multiple violations of the MLRPC, the Court of Appeals concluded that disbarment from the practice of law in Maryland was the appropriate sanction. This sanction was appropriate in consideration of Respondent's poor communication, incompetent representation, and lack of diligence that resulted in sanctions against his clients. It was also appropriate for Respondent's violations in regard to his failure to return unearned fees

and misappropriation of client funds. Finally, the Court noted that disbarment is always the appropriate sanction for a violation of MLRPC 8.4(c), where the attorney engages in dishonest or fraudulent behavior; i.e., telling Grauer that he filed papers when he had not done so.

Attorney Grievance Commission of Maryland v. Shauntese Curry Trye, Misc. Docket AG No. 34, September Term 2014, filed July 27, 2015. Opinion by McDonald, J.

Harrell and Battaglia, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2015/34a14ag.pdf

ATTORNEY DISCIPLINE – INTENTIONAL MISREPRESENTATION – FRAUDULENT ALTERATION OF DRAFT SETTLEMENT AGREEMENT – DISBARMENT

Facts:

Much of this attorney disciplinary proceeding arose out of Respondent Shauntese Curry Trye's conduct in her divorce from Mr. Trye (where she represented herself for much of the case).

In seeking a loan modification for real property she owned, Ms. Trye intentionally misrepresented the status of the property. Specifically, Ms. Trye represented that her property was owner occupied and not a rental, when in fact, she continued to collect rent from tenants living at the property and stated in court that she planned to continue renting the property.

During her divorce case, Ms. Trye repeatedly failed to comply with the discovery requests of opposing counsel, which resulted in an award of sanctions against her. During a hearing regarding her discovery violations, Ms. Trye knowingly made false statements to the court and to opposing counsel concerning what documents she had subpoenaed from third parties and provided to her husband's attorney. Ms. Trye subsequently failed to attend a court ordered deposition.

In the course of her divorce case, the parties agreed to a settlement agreement regarding property and child custody. However, the night before the agreement was to be signed by the parties, Ms. Trye met with Mr. Trye and presented an agreement to her husband as being the same as that which the parties had previously negotiated. However, Ms. Trye had intentionally altered the consent agreement to provide terms more favorable for herself.

Separate from the divorce proceeding, Ms. Trye made a misrepresentation in a military service affidavit filed with a court.

Finally, Ms. Trye failed to file income tax returns for 2009, 2010, 2012, and 2013.

On August 1, 2014, the Attorney Grievance Commission filed a Petition for Disciplinary or Remedial Action against Ms. Trye. After an evidentiary hearing, the hearing judge concluded that Ms. Trye violated MLRPC 3.2, 3.4(c) & (d), 4.2(a), and 8.4(c) & (d) but that she did not violate 3.3(a)(1) & (4), 4.1(a)(1) & (2).

Held: Disbarment is the appropriate sanction.

Ms. Trye made misrepresentations in four instances. First, she misrepresented the status of her real property in an attempt to obtain a more favorable loan modification. Second, Ms. Trye made false statements to the court and opposing counsel regarding which documents she subpoenaed in her divorce case. Third, she utilized deceitful tactics to induce her husband's signature on a draft settlement agreement. Fourth, Ms. Trye misrepresented the basis of her knowledge in a military service affidavit. Such conduct violated MLRPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice).

Ms. Trye's repeated failure to comply with discovery requests, resulting in an award of sanctions, and her failure to attend a court ordered deposition was a violation of MLRPC 3.2 (duty to expedite litigation). The Court rejected Ms. Trye's argument that MLRPC 3.2 should not apply because she represented herself, reasoning that MLRPC 3.2 aims to expedite litigation in the interest of *all parties* to a proceeding.

Ms. Trye's repeated misrepresentations to the court regarding which documents she subpoenaed violated MLRPC 3.3 (candor toward the tribunal). Ms. Trye also failed to produce discovery materials and failed to attend a court ordered deposition in violation of MLRPC 3.4 (fairness to opposing party and counsel). This dishonest conduct towards opposing counsel also violated MLRPC 4.1 (truthfulness in statements to others).

Ms. Trye's failure to file tax returns in 2009, 2010, 2012, and 2013 violated MLRPC 8.4(d). After admitting that she failed to file her tax returns, Ms. Trye contended that her failure was not "willful" and therefore did not amount to a violation of MLRPC 8.4(d). The Court rejected this argument, noting that, while MLRPC 8.4(b) has a willfulness requirement, MLRPC 8.4(d) does not.

The Commission had alleged that Ms. Trye violated MLRPC 4.2 (communication with person represented by counsel) as she communicated with Mr. Trye regarding the terms of the divorce settlement, despite knowledge that he had retained counsel. However, by the time of the communication, Ms. Trye had also retained counsel and was no longer acting as an attorney in the case. The Court declined to find that Ms. Trye violated MLRPC 4.2, as such a conclusion would jeopardize an attorney, operating as a party represented by counsel, from attempting to settle the case directly with another party, as many principals often do.

The Court concluded that Ms. Trye's pattern of dishonesty and intentional misrepresentations warranted disbarment.

Attorney Grievance Commission of Maryland v. Melodie Venee Shuler, Misc. Docket AG No. 14, September Term 2014, filed June 30, 2015. Opinion by Watts, J.

Battaglia, J., dissents.

http://www.mdcourts.gov/opinions/coa/2015/14a14ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – THIRTY-DAY SUSPENSION

Facts:

On the Attorney Grievance Commission ("the Commission")'s behalf, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Melodie Venee Shuler ("Shuler"), charging her with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.3 (Diligence), 1.4 (Communication), 8.4(d) (Conduct that is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MLRPC).

A hearing judge found the following facts. Kevin Wilson ("Wilson") retained Shuler to represent him as the appellant in an appeal in a civil case. Shuler filed a brief, but failed to appear at oral argument. Shuler had intended to appear at oral argument, but felt too ill to travel that morning. Shuler testified that, on that morning, she telephoned the Office of the Clerk of the Court of Special Appeals to state that she felt too ill to travel that morning and to request that oral argument be rescheduled. Shuler failed to take any further action in Wilson's case. After the Court of Special Appeals affirmed the trial court's judgment in Wilson's case, Shuler failed to inform Wilson that he had not prevailed in the appeal. Before the date on which oral argument was scheduled in Wilson's case, Bar Counsel of the District of Columbia informally admonished Shuler for violating, among others, District of Columbia Rule of Professional Conduct 8.4(d) ("It is professional misconduct for a lawyer to . . . [e]ngage in conduct that seriously interferes with the administration of justice[.]") by failing to appear at a court-ordered mediation and two hearings and by appearing late and unprepared at a third hearing, all within one case other than Wilson's. Shuler engaged in bad faith obstruction of this attorney discipline proceeding. Shuler lacked a dishonest or selfish motive with respect to the MLRPC violations that the Commission charged, and had personal problems in the form of a history of physical illnesses.

The hearing judge concluded that Shuler violated MLRPC 1.3, 1.4, 8.4(d), and 8.4(a).

Held:

The Court of Appeals held that clear and convincing evidence supported the hearing judge's conclusions that Shuler violated MLRPC 1.3, 1.4(a)(2), 8.4(d), and 8.4(a). The Court agreed with the Commission that the appropriate sanction for Shuler's misconduct was a thirty-day suspension from the practice of law in Maryland, with a condition precedent to reinstatement that Shuler satisfactorily demonstrate, by the report of a health care professional or other appropriate evidence, that she is mentally and physically competent to resume the practice of law. Shuler demonstrated a pattern of misconduct; Wilson's was the second case in which Shuler both failed to appear at a court date due to illness and failed to sufficiently ameliorate her failure to appear. Although occasionally missing court dates due to illness may be excusable, doing so repeatedly within a five-month period and without sufficient amelioration is not. Despite having been informally admonished by Bar Counsel of the District of Columbia, Shuler once again missed a court date and failed to ameliorate her failure to appear; the Court needed to protect the public and to impress upon Shuler the importance of remedying failures to appear and managing health issues so that they do not cause violations of the MLRPC. A reprimand would have been insufficient to accomplish these purposes.

Frank D. Scarfield, Sr., et al. v. Peter A. Muntjan, et al., No. 82, September Term 2014, filed July 24, 2015. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2015/82a14.pdf

CIVIL PROCEDURE – JURY DEMAND – MARYLAND RULE 2-325 – WAIVER – REVIVAL

Facts:

In December, 2010, Peter A. Muntjan, representing himself, filed a complaint in the Circuit Court for Baltimore City, alleging one count for Trover and Conversion ("Count I") and another for Invasion of Privacy ("Count II"), against his landlord, Frank D. Scarfield, related to a 2007 ejectment and repossession. Scarfield filed a motion to dismiss Count II, which the Circuit Court granted, on statute of limitations grounds. On October 7, 2011, Scarfield filed his answer to Count I, without requesting a jury trial. Over four months later, in February, 2012, Muntjan filed a jury demand. Then, in April, 2012, he filed an Amended Complaint reasserting Counts I and II and adding a third for Abuse of Process ("Count III"), including a jury demand.

Scarfield filed a motion to dismiss Counts II and III for failure to state a claim and moved to strike the jury demand, arguing that an amended complaint is not a pleading under Maryland Rule 1-202, and, thus, because Maryland Rule 2-325 requires that a jury demand be filed within 15 days after service of the last pleading filed, Muntjan's jury demand filed with his Amended Complaint was ineffective. The Circuit Court observed that an amended complaint is a pleading but that permitting a plaintiff to amend a complaint to demand a jury trial at any time would defeat the "orderly process" laid out in Rule 2-325 (a) and (b). The court concluded that the only new count—Abuse of Process—was related to the same events as Count I and that Muntjan could not revive the jury demand for the previous counts in this way because it would permit Muntjan to resurrect the demand he had already waived. The Circuit Court also dismissed Counts II and III for failure to state a claim.

The Court of Special Appeals unanimously held that the Circuit Court correctly dismissed Count III but erred in dismissing Count II for Invasion of Privacy on statute of limitations grounds. The divided panel held that the Circuit Court erred in denying Muntjan's jury demand. Restricting itself to the Circuit Court's reasoning in denying the jury demand, the Court of Special Appeals held that because the Amended Complaint raised a new issue, Muntjan was entitled to a remand for a jury trial. Dissenting as to the jury demand, Judge Rodowsky reasoned that Count III did not present a claim at law triable of right, and Rule 2-325 did not come into effect.

Held: Reversed.

The Court first clarified that an amended complaint is a pleading, relying on its case law and Rule 2-341. Turning to whether the new demand for a trial by jury, filed with the Amended Complaint containing only a defective new count, was sufficient to revive a previously waived jury demand, the Court observed that the term triable of right by a jury traditionally has referred to whether an action was triable by a jury at common law, often reducing to a distinction between actions at law—triable by a jury—and actions at equity—triable by a court. But, the Court reasoned, it has not limited itself to considering whether the new count raised was actionable at law or equity. At times, the determining factor is whether the new count was only duplicative of previous counts. Because Muntjan's only new count raised in his Amended Complaint—Count III—was dismissed for failure to state a claim, it did not present a claim triable of right. Thus, it could not support a jury demand independently much less provide the springboard to allow other counts to piggyback on its jury demand. Moreover, to permit parties to revive a waived jury demand with a demand included with an amended complaint, even when no new counts state a claim upon which relief could be granted, would strip Maryland Rule 2-325 of any causal efficacy, and the Court does to not construe the Maryland Rules in a way that would lead to an absurd reading or render a Rule nugatory.

Willie Mae Ford, et al. v. Antwerpen Motorcars Ltd., et al., No. 68, September Term 2014, filed June 29, 2014. Opinion by Greene, J.

Battaglia and McDonald, JJ., concur.

http://www.mdcourts.gov/opinions/coa/2015/68a14.pdf

CODE OF MARYLAND REGULATIONS ("COMAR") 11.12.01.15A – VEHICLE SALES CONTRACT

Facts:

This case arose from Petitioners', Willie Mae Ford and Rashad Earle Beale, purchase and finance of an automobile from Respondent, Antwerpen Motorcars Ltd. ("Antwerpen"), on April 24, 2010. On the same day, Petitioners executed both a Buyer's Order—which sets forth the purchase price—and a Retail Installment Sales Contract ("RISC")—which contains the financing terms of the purchase.

In relevant part, the Buyer's Order provided that "Buyer(s) (also referred to as "You") and Dealer agree that if any Dispute arises, the Dispute will be resolved by binding arbitration[.]" The Buyer's Order further provided that "[t]he front and back of this buyer's order, along with other documents signed by You in connection with this order, comprise the entire agreement between the parties affecting this purchase." Petitioners' signatures appear directly below the language contained in the Agreement to Arbitrate.

The RISC, which sets forth the terms of the financing agreement between Petitioners and Antwerpen, does not include an agreement to arbitrate. Specifically, the RISC provides that "You, the Buyer (and Co-Buyer, if any), may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract." Following the various financing terms contained in the agreement, the RISC provides, in relevant part, that "[t]his contract along with all other documents signed by you in connection with the purchase of this vehicle, comprise the entire agreement between you and us affecting this purchase." Petitioners' signatures are located two sentences after this provision.

The parties' dispute concerned the existence of an agreement to arbitrate contained in the Buyer's Order and, in particular, whether multiple documents signed during the purchase and finance of the vehicle (i.e. the Buyer's Order and RISC) may be read together as constituting the entire agreement between the parties to a vehicle sales contract in light of COMAR 11.12.01.15A. COMAR 11.12.01.15A, which Petitioners' termed the "Single Document Rule," provides that "[e]very vehicle sales contract or agreement shall be evinced by an instrument in writing containing all of the agreements of the parties." Petitioners, directing the Court to the use of the singular term "an instrument," averred that "[t]his means that, even if a contract in

other situations might be comprised of several documents, in a car sale in Maryland COMAR requires all the terms of the contract must be contained in one document, or 'instrument.'"

Held:

The adoption of COMAR 11.12.01.15A has not supplanted Maryland's longstanding common law contract principles permitting the construction or reading of multiple documents together to comprise the entire agreement between the parties. *Rourke v. Amchem Prods., Inc.*, 384 Md. 329, 354, 863 A.2d 926, 941 (2004); *Rocks v. Brosius*, 241 Md. 612, 637, 217 A.2d 531, 545 (1966). The two documents before this Court, the Buyer's Order and the Retail Installment Sales Contract ("RISC"), reviewed and signed by Petitioners on the same day during the purchase and finance of a vehicle, indicate an intention that the documents be construed together as part of the same transaction, i.e., the purchase and finance of an automobile. Thus, the arbitration clause in the Buyer's Order controls a dispute over an alleged breach of the RISC.

Contrary to Petitioners' labeling of COMAR 11.12.01.15A as the "Single Document Rule," the term "single" is absent from the language. Nor is there any indication in the Court's jurisprudence that, as a result of the use of the singular term "an instrument," a vehicle sales contract may not, as a matter of law, incorporate multiple documents by reference. To the contrary, the mere use of a singular term such as "an instrument" or "a contract," does not prevent the application of the principles in *Rocks* and *Rourke*.

Dwayne Steven Spence v. State of Maryland, No. 7, September Term 2014, filed July 27, 2015. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2015/7a14.pdf

CONSTITUTIONAL LAW – FOURTH AMENDMENT – SEARCH INCIDENT TO ARREST

CONSTITUTIONAL LAW – FOURTH AMENDMENT – GOOD FAITH DOCTRINE

Facts:

Petitioner sought suppression of text messages found on his cellphone at the time of his arrest, which the State ultimately used in convicting him of several drug-related offenses.

Petitioner was under investigation for an armed robbery. A police sergeant ordered Petitioner out of a bedroom. As he exited the bedroom, Petitioner had in his hand a cell phone and was using it. The sergeant ordered Petitioner to sit down, and as Petitioner sat down, he continued using the phone. He was then asked to place the phone on an end table, which he did.

While searching the bedroom from which Petitioner had exited, officers found marijuana, drug paraphernalia, and a small digital scale. Petitioner was then placed under arrest. The sergeant decided to search the cell phone Petitioner had been using when he walked out of the bedroom and saw text messages linking Petitioner to both the robbery and drug sales. The sergeant then seized the phone, and the police later obtained a warrant to search the data in the cell phone.

The court denied the motion to suppress the drug-related text messages that were read at the time of Petitioner's arrest and the additional text messages that were produced later as the result of the search warrant. The court ruled that the warrantless search of the cell phone was a reasonable search incident to arrest under the Fourth Amendment.

Petitioner appeared before the court and waived his right to a jury trial. The court accepted Petitioner's waiver, stating that it was "freely and voluntarily given." Petitioner was tried at a bench trial, and sentenced.

Petitioner appealed the judgment of conviction to the Court of Special Appeals and, while the case was pending in that court, filed a petition for writ of certiorari, which the Court granted. The Court then stayed all proceedings in this case until the United States Supreme Court issued its decisions in *Riley v. California* and *United States v. Wurie*. On June 25, 2014, the Supreme Court issued a consolidated opinion in those two cases. *Riley v. California*, 134 S. Ct. 2473 (2014).

Held: Affirmed

The Supreme Court held in *Riley v. California*, 134 S. Ct. 2473 (2014), that the warrantless search of data on an arrestee's cell phone incident to a lawful arrest is unreasonable, and therefore in violation of the Fourth Amendment. Applying the *Riley* decision to this case, the Court of Appeals held that the officer's search of Petitioner's cell phone at the time of his arrest violated his Fourth Amendment rights.

The Court went on, however, to apply the good faith doctrine to the sergeant's conduct. Under the good faith doctrine, courts will generally not suppress evidence where law enforcement officers acted in objectively reasonable reliance on binding precedent at the time of the search. Here, the Court held that the officer who searched Petitioner's cell phone did so in reasonable reliance on *United States v. Robinson*, 414 U.S. 218 (1973), which was binding precedent in Maryland at the time of Petitioner's arrest. Under *Robinson* and its Maryland progeny, the search of Petitioner's cell phone would have been lawful as a search incident to arrest. Accordingly, the Court held that Petitioner is not entitled to suppression of the cell phone evidence.

Petitioner argued that the during his jury trial waiver, the court did not announce on the record a finding that Petitioner's waiver was made "knowingly and voluntarily," as required by Rule 4-246(b). Petitioner argued that the court's violation of Rule 4-246(b) required reversal of the judgment of conviction. In *Nalls v. State*, 437 Md. 674, 693-94 (2014), and *Szwed v. State*, 438 Md. 1, 5 (2014), the Court held that in order to preserve for appellate review a claim of non-compliance with Maryland Rule 4-246(b), the defense is required to object at the time of the waiver inquiry.

Petitioner, by failing to object at the time the court accepted his waiver of his right to a jury trial, failed to preserve his claim of error for this Court's review. The Court, therefore, did not consider the claim.

Ronald Sinclair v. State of Maryland, No. 43, September Term 2014, filed July 27, 2014. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2015/43a14.pdf

CRIMINAL PROCEDURE – MANDATORY PRETRIAL MOTIONS – WAIVER

CONSTITUTIONAL LAW – SEARCH AND SEIZURE – SEARCH INCIDENT TO ARREST – CELL PHONES

Facts:

Thomas Gaines owned a Dodge Charger with custom wheel rims. On April 29, 2010, he was carjacked at a gas station while refueling that car. One man approached him and offered him marijuana, and when he declined, that man held a gun to his side while another man searched him, taking his cell phone, keys, and cash. The two carjackers drove off in the Charger. The gas station clerk witnessed the carjacking and called 9-1-1. An officer arrived on the scene and took statements from Mr. Gaines and the station attendant.

The next day, Mr. Gaines and his girlfriend spotted his Charger parked in a strip mall and alerted a nearby police officer. Mr. Gaines also saw Ronald Sinclair, the petitioner, in a barber shop at the strip mall, and recognized him as one of the men who stole his car the previous night. The same officer who responded at the gas station arrived at the strip mall and waited at a distance with Mr. Gaines for Mr. Sinclair to leave the barber shop.

When Mr. Sinclair exited the barber shop and got into another car, the officer stopped that car and ordered its occupants to the curb. Mr. Gaines again identified Mr. Sinclair as the carjacker, and Mr. Sinclair was placed under arrest. A search of Mr. Sinclair revealed cash, bags of suspected cocaine, and a cell phone.

The arresting officer opened the cell phone and saw that its screen saver was a picture of a custom wheel rim and fender that exactly matched the stolen car. He then navigated to the phone's pictures and saw a duplicate of the screen saver picture, and a properties screen showing that the picture had been sent on "4/30/10" at "7:00…"

Less than a week after Mr. Sinclair's arraignment, an assistant public defender entered his appearance in this case. The same day, he filed a one-page "omnibus" motion seeking a broad range of relief, including suppression of all evidence obtained in violation of the Fourth Amendment. The State responded with a letter stating that the omnibus motion did not comply with Maryland Rule 4-252(e). The State also disclosed in discovery that it had cell phone evidence.

Mr. Sinclair's attorney then filed a line withdrawing all motions "without prejudice." The scheduled motions hearing was marked "moot" and cancelled. Several months later, new

counsel entered his appearance for Mr. Sinclair, and suggested to the court that he might file motions. The court scheduled a motions hearing, but prior to the hearing there was another notation that motions were withdrawn, although no motions had been filed. The second motions hearing was also cancelled as moot.

On the morning of trial, while the jury was on its way to the courtroom, Mr. Sinclair's attorney raised a motion *in limine* to suppress the State's cell phone evidence. He proffered that, when Mr. Sinclair was arrested, the officer opened the flip phone and scrolled through the phone for pictures. He cited cases from Ohio and Colorado holding that warrantless cell phone searches incident to arrest violate the Fourth Amendment. The State responded that it was unprepared because it had no notice of the motion, and time for filing motions had passed, but that an opinion from the Fourth Circuit Court of Appeals upheld warrantless cell phone searches incident to arrest. The trial court denied the motion and proceeded to trial. The State admitted pictures of all three cell phone images at trial.

A jury found Mr. Sinclair guilty of several offenses related to the armed carjacking, theft, and cocaine and weapons possessions. Mr. Sinclair appealed. On appeal, the State argued that Mr. Sinclair did not preserve his Fourth Amendment argument, but the intermediate appellate court disagreed. However, the court held that the cell phone search was permissible.

Mr. Sinclair filed for *certiorari* to the Court of Appeals, and the State filed a cross-petition on the waiver issue. While *certiorari* was pending, the Supreme Court issued its opinion in *Riley v. California*, __ U.S. __, 134 S.Ct. 2473 (2014), holding that the search incident to arrest exception to the warrant requirement did not include cell phone searches; therefore, absent some other exception, officers are required to obtain a warrant to search cell phones.

Held:

The Court of Appeals held that Mr. Sinclair waived his suppression argument; regardless, the cell phone pictures were properly admitted, even under *Riley v. California*. The first picture fell within the plain view doctrine, and admission of the other two pictures constituted harmless error.

The Court first addressed the State's claim that Mr. Sinclair did not preserve his suppression argument.

The Court of Appeals held that Mr. Sinclair did not preserve his motion to suppress when he filed an omnibus motion that was timely but did not meet the specificity requirements of Rule 4-252, withdrew that motion "without prejudice," and did not raise the issue or ever offer the specific arguments required under Rule 4-252 until the morning of trial, almost seven months later.

In order to provide guidance for future cell phone cases in light of *Riley*, however, the Court addressed the merits of Mr. Sinclair's claim. The Court found that *Riley* allows officers to inspect the physical aspects of cell phones for officer safety, and to power off cell phones for evidence preservation. This inspection would logically include opening a flip phone such as the

one in this case. In this case, the officer opened the flip phone and immediately saw a picture of a custom wheel rim in plain view. Under the plain view doctrine, the officer legally had possession of the phone, legally viewed the screen when he opened it, and immediately recognized the picture as a match with Mr. Sinclair's stolen car. Therefore, the first picture was admissible.

The Court held the other two pictures – a duplicate of the screen saver photo and the properties screen – were also admissible under the doctrine of harmless error. Admission of the second picture was harmless because it was a duplicate of properly-admitted evidence, namely, the first picture. Admission of the third picture was also harmless error. The third photo's only significance was that its date matched the date Mr. Sinclair was found near the car. Although the defense attorney tried to connect it with attempting to sell the car, the prosecution never made that connection. The Court was confident beyond a reasonable doubt that, in light of the victim's repeated positive identification and the other evidence in the case, the jury verdict would have been the same absent the third picture.

Quioly Shikell Demby v. State of Maryland, No. 11, September Term 2014, filed July 27, 2015. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2015/11a14.pdf

CONSTITUTIONAL LAW – FOURTH AMENDMENT – SEARCH INCIDENT TO ARREST

CONSTITUTIONAL LAW – FOURTH AMENDMENT – GOOD FAITH DOCTRINE

Facts:

On May 24, 2012, Corporal Leonard Nichols, a Maryland State Police officer assigned to the Caroline County Drug Task Force, received information about a potential drug deal involving a golf cart and other vehicles at a park in Caroline County. The corporal and an undercover police officer arrived at the scene where they observed a golf cart parked next to another vehicle. Petitioner, Quioly Shikell Demby, was sitting in the passenger's seat of the vehicle.

The corporal approached the vehicles, informed the occupants why he was there, and asked them if they were in possession of anything illegal. Petitioner said that he had pills and presented an unlabeled prescription bottle containing 11 pills. Corporal Nichols knew from his experience that seven of the pills were oxycodone and the other four were oxycodone acetaminophen.

Corporal Nichols arrested Petitioner and, along with other officers who had by then arrived as backup, searched the vehicle in which Petitioner had been sitting. During the search, police officers noticed a cell phone emitting sounds from the dashboard of the vehicle. Petitioner admitted that the phone was his. Corporal Nichols opened the phone and read the most recent text messages, which he understood to be from senders looking to buy pills from Petitioner. The corporal took possession of the cell phone and subsequently obtained a warrant to search the data within the phone. Execution of the warrant uncovered the same messages that the corporal observed at the time of the arrest, along with additional data.

Petitioner sought suppression of the cell phone evidence seized from him at or about the time of his arrest. He argued that the evidence was seized in violation of his Fourth Amendment rights because the search of a cell phone, unlike other reasonable searches incident to arrest, does not further officer safety or prevent the destruction of evidence. The State responded that the search of the cell phone was a valid search incident to arrest because the search was cursory—the text messages were apparent immediately upon opening the phone.

After a suppression hearing, the circuit court denied the motion to suppress, ruling that the search of the cell phone was a valid search incident to arrest. The court ruled that, in the alternative, even if the search was unreasonable, the evidence obtained from the search was admissible by application of the inevitable discovery exception to the exclusionary rule. Petitioner was tried by way of an agreed statement of facts and convicted.

Petitioner filed timely an appeal before the Court of Special Appeals. We issued a writ of certiorari on our own motion and then stayed the proceedings pending the United States Supreme Court's decision in *Riley v. California* and *United States v. Wurie*.

Held: Affirmed.

The Supreme Court held in *Riley v. California*, 134 S. Ct. 2473 (2014), that the warrantless search of data on an arrestee's cell phone incident to a lawful arrest is unreasonable, and therefore in violation of the Fourth Amendment. Applying the *Riley* decision to this case, the Court of Appeals held that the corporal's search of Petitioner's cell phone at the time of his arrest violated his Fourth Amendment rights.

The Court went on, however, to apply the good faith doctrine to the corporal's conduct. Under the good faith doctrine, courts will generally not suppress evidence where law enforcement officers acted in objectively reasonable reliance on binding precedent at the time of the search. Here, the Court held that the officer who searched Petitioner's cell phone did so in reasonable reliance on *United States v. Robinson*, 414 U.S. 218 (1973), which was binding precedent in Maryland at the time of Petitioner's arrest. Under *Robinson* and its Maryland progeny, the search of Petitioner's cell phone would have been lawful as a search incident to arrest. Accordingly, the Court of Appeals held that Petitioner is not entitled to suppression of the cell phone evidence.

Jerrod M. Peterson v. State of Maryland, No. 13, September Term 2014, filed July 27, 2015. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2015/13a14.pdf

CRIMINAL PROCEDURE – CROSS-EXAMINATION – RIGHT OF CONFRONTATION – STANDARD OF APPELLATE REVIEW

CRIMINAL PROCEDURE – CROSS-EXAMINATION – FACTUAL FOUNDATION, PROFFERS, AND PRESERVATION OF ISSUE

CRIMINAL PROCEDURE – CROSS-EXAMINATION – EXPECTATION OF STATE WITNESS OF BENEFIT FROM TESTIMONY WITH RESPECT TO PENDING CHARGES

CRIMINAL PROCEDURE – CROSS-EXAMINATION – MENTAL HEALTH STATUS

CRIMINAL PROCEDURE – CROSS-EXAMINATION – MAXIMUM SENTENCE FACED BY STATE'S WITNESS PRIOR TO ENTERING INTO PLEA AGREEMENT WITH PROSECUTION

EVIDENCE – ATTORNEY-CLIENT PRIVILEGE – CRIMINAL LAW

Facts:

In March 2009, Calvin Rose introduced his neighbor, petitioner Jerrod Peterson, to his friend Domonique Gordon. About one week later, Mr. Peterson and Mr. Gordon met outside the house where Mr. Rose was living for an arranged drug transaction. Mr. Gordon, who brought fake ecstasy pills, was in his car with a friend named James McLaurin. Mr. Peterson arrived on foot with his acquaintance Thomas Hughes, planning to steal the pills instead of paying for them.

Mr. Hughes and Mr. Rose stayed outside the car while Mr. Peterson entered the back seat. A physical struggle broke out inside the car, and someone brandished a gun. Mr. Hughes ran to Mr. Peterson's side of the car to try stopping the fight. Mr. Rose ran inside the house, heard a gunshot on his way, and called 9-1-1.

The first shot killed Mr. Gordon in the driver's seat. Mr. McLaurin tried to run from the passenger seat of the car, but was shot in the leg. Mr. Hughes and Mr. Peterson fled the scene to the vehicle that brought them into the neighborhood, about a block away from the shooting.

At trial, the main question was whether Mr. Peterson or Mr. Hughes fired the gunshots. The jury heard testimony suggesting that Mr. Peterson was the shooter from Mr. Rose, his sister who had witnessed the shooting from the second-story window of the house, Mr. Hughes, and Mr. McLaurin, whose injuries were not fatal. The defense extensively cross-examined the State's witnesses and presented its own witnesses: an expert to suggest that the fatal gunshot could have

come from Mr. Gordon's back or side, several character witnesses in support of Mr. Peterson, and the lead detective in the investigation of Mr. Gordon's death. The trial court allowed most of Mr. Peterson's cross-examination, but limited him in several areas. Mr. Peterson attempted to call Mr. Hughes' appointed attorney to testify about Mr. Hughes' proffer session with the prosecution, but the court would not permit that testimony on the grounds of attorney-client privilege.

A jury convicted Mr. Peterson of first degree felony murder and related charges. The Court of Special Appeals affirmed in an unreported opinion, and the Court of Appeals granted *certiorari* to consider two questions: whether the trial court violated Mr. Peterson's constitutional rights of confrontation by limiting cross-examination in three areas, and whether the attorney-client privilege protected Mr. Hughes' attorney from testifying regarding proffer sessions between Mr. Hughes and the State prior to Mr. Hughes accepting a plea agreement.

Held: Affirmed.

The Court of Appeals affirmed the rulings below, finding no Sixth Amendment violation in the trial court's limitations on cross-examination. The Court also held that attorney-client privilege did not protect Mr. Hughes' attorney from testifying about the proffer sessions, but that her testimony would have been cumulative and the error was harmless.

The Court first addressed Mr. Peterson's claims that the trial court violated his constitutional confrontation rights. The Court noted that a defendant has the right on cross-examination to reach a "threshold level of inquiry" into a witness's potential biases and motivation to testify falsely. Otherwise, a trial court has broad discretion to limit cross-examination. The Court declined Mr. Peterson's invitation to adopt a two-tiered system of review that included reviewing some limitations on cross-examination under a *de novo* standard.

The first area of limitation that Mr. Peterson raised was questioning Mr. Rose about charges that were pending against him in Maryland and Virginia, as well as an agreement he signed with the State of Virginia to act as a confidential informant. Mr. Peterson sought to show that Mr. Rose had an expectation of benefit regarding the pending charges, in exchange for his testimony in Mr. Peterson's case.

The trial court, stating that "pending charges are not admissible," did not allow that area of cross-examination. The Court of Appeals held that, while the trial court was technically correct, Mr. Peterson actually sought to use the evidence of pending charges to show that Mr. Rose expected to benefit with respect to those charges as a result of testifying against Mr. Peterson. That line of questioning would have been permissible. However, Mr. Peterson's various piecemeal proffers to the trial court did not effectively present that argument to the trial court, or preserve it for appellate review.

Even had he preserved the issue, Mr. Peterson did not present a sufficient factual foundation to ask a question about expectation of benefit. When the Court allowed that inquiry in prior cases,

the factual foundation included, for example, an agreement with the prosecution or dismissal or postponement of charges after testifying. Here, Mr. Peterson presented no direct or circumstantial evidence to show that Mr. Rose had any reason to expect a benefit from testifying against Mr. Peterson.

The Court also held that the otherwise-extensive cross-examination of Mr. Rose reached the constitutionally-required threshold level of inquiry into Mr. Rose's potential bias and motive to testify falsely.

The Court also affirmed the trial court's limitations on cross-examination of Mr. Hughes. Prior to signing the plea agreement with the prosecution, Mr. Hughes faced the same charges as Mr. Peterson, including first degree murder. Under the plea agreement, Mr. Hughes would testify truthfully against Mr. Peterson and the State would recommend a sentence of twenty years incarceration, with all but eight years suspended.

The trial court allowed in-depth cross-examination about Mr. Hughes' plea agreement, but prevented Mr. Peterson from asking about the exact sentences Mr. Hughes would have faced, in order to keep the jury from knowing the sentences Mr. Peterson faced if convicted. The Court of Appeals held that the trial court was within its discretion to limit that questioning, in light of the prejudicial effect and the otherwise lengthy cross-examination of Mr. Hughes. Mr. Peterson's cross-examination gave the jury a full picture of how significant Mr. Hughes' deal was.

Finally, the trial court limited Mr. Peterson's cross-examination of Mr. Hughes regarding hallucinations Mr. Hughes reported in the year after he was arrested in connection with this case. The Court noted first that Mr. Peterson's ground for presenting the hallucinations at trial was to probe Mr. Hughes' *perception* of the events on the night of the shooting. On appeal, Mr. Peterson argued that the hallucinations were relevant to Mr. Hughes' *memory* of that night, a theory not argued at trial. Therefore, Mr. Peterson did not preserve the issue on appeal.

Even were the issue preserved, Mr. Peterson's initial proffer included a 3-page report showing a Risperdal prescription and a note one year after the shooting that Mr. Hughes was no longer experiencing hallucinations. He wanted to use the report to question Mr. Hughes' perception of events on the night of the shooting, and the trial court denied his request. After Mr. Hughes finished testifying and the jury left the room, Mr. Peterson introduced a fourth page of the report showing a check mark next to "hallucinations" within a week of Mr. Hughes' arrest. The trial court allowed the fourth page to be attached to the report for identification, but Mr. Peterson did not re-visit his argument or recall Mr. Hughes in light of the new evidence.

Given that record, the Court of Appeals held that the trial court acted within its discretion in limiting cross-examination about Mr. Hughes' alleged hallucinations.

The Court's final discussion addressed the trial court's ruling that Mr. Hughes' attorney could not testify about proffer sessions between Mr. Hughes and the State prior to Mr. Hughes signing the plea agreement. The Court ruled that the trial court erred in finding the attorney's testimony protected by attorney-client privilege. Mr. Peterson sought details about the meetings

themselves – the types of questions asked of Mr. Hughes, and whether they were detailed, for example.

Under Wigmore's eight-part definition of attorney-client privilege previously adopted by this Court, those communications were not protected: they were not confidential or legal advice provided to Mr. Hughes by his attorney, and they took place in front of the opposing party in Mr. Hughes' case. The State argued that the proffer sessions were similar to conversations between an attorney, client, and potential expert witness – the presence of the third party does not waive attorney-client privilege. The Court disagreed, noting that conversations with the opposing party were not comparable and not protected.

The Court also noted that attorney-client privilege is not identical with the ethical obligation to maintain confidentiality under the Maryland Lawyers' Rules of Professional Conduct 1.6(a). Information that is confidential under the Rule may still be admissible as evidence in a trial.

However, the Court held that the content of Mr. Hughes' attorney's testimony would have been of little probative value, as well as being cumulative with testimony provided by a detective who was present at the sessions. Therefore, the trial court was again within its discretion to prohibit that testimony.

Derrick Arthur Counts v. State of Maryland, No. 65, September Term 2014, filed July 27, 2015. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2015/65a14.pdf

CRIMINAL LAW – ELEMENTS OF THEFT – PRETRIAL NOTICE TO DEFENDANT – MARYLAND RULE 4-204

Facts:

Derrick Counts, Petitioner, was arrested in connection with the burglary of an apartment in Columbia, Maryland. The State charged Petitioner in a five-count indictment with burglary and related crimes. Relevant here, Count Four charged that Petitioner "did steal property of [the victims] having a value of less than $1,000 . . . ."

On the morning of trial in the Circuit Court for Howard County, as the parties were waiting for the jury panel to be brought into the courtroom, the prosecutor informed the court that the prosecutor had a "minor housekeeping measure." The prosecutor asked the court to amend Count Four from theft of "less than a thousand" to "theft of at least a thousand but less than [$]10,000." Defense counsel objected, noting that the amendment changed the offense from a misdemeanor to a felony, and changed the possible incarceration from 18 months to ten years of imprisonment. The State responded that the elements of the charged offense stayed the same, and that only the penalty changed. The court allowed the amendment to the indictment.

While the jury did not find Petitioner guilty of first degree burglary, it found him guilty of fourth degree burglary, theft of goods having a value of at least $1,000, and theft of goods valued under $100.

On appeal to the Court of Special Appeals, Petitioner raised the single contention that the trial court had erred in permitting the amendment of Count Four. The intermediate appellate court held, in an unreported opinion, that the trial court had not erred and affirmed the judgment of conviction.

Held: Reversed

The issue in this case is whether the trial court erred in permitting the State, over Petitioner's objection, to amend Count Four of the charging document by substituting theft of property "with a value of at least $1000 but less than $10,000" for "theft of property with a value of less than $1000." Amendment of a charging document is governed by Maryland Rule 4-204. The purpose of this Rule is to prevent any unfair surprise to defendants and their counsel.

The Court determined that the amendment of Count Four of the indictment, raising the amount of the value of the stolen goods from less than $1,000 to at least $1,000, changed the character of the offense charged. The amount of value of the property (or services) stolen is an element of felony theft. The Court held that, if the State seeks to have the defendant convicted of one or another specific grade of felony theft, the State must allege and prove that the value of the property stolen is an amount that is at or more than the threshold value for that grade of felony charged.

The Court then held that a change in the charging document to alter or add an element changes the character of the offense charged and is thereby impermissible absent the consent of the defense. The trial court violated Rule 4-204 in permitting the State, over Petitioner's objection, to amend the charging document so as to change the character of the offense by inserting an element that, before the amendment, the State did not have to prove to the jury. That violation was prejudicial per se, entitling Petitioner to reversal of the felony theft judgment of conviction and a remand to the Circuit Court for entry of a judgment of conviction and sentence on the originally charged misdemeanor of theft of property valued at less than $1,000.

State of Maryland v. Kerryann N. Smith, No. 47, September Term 2014, filed July 13, 2015. Per Curiam Opinion.

http://www.mdcourts.gov/opinions/coa/2015/47a14.pdf

PETITION FOR WRIT OF ERROR CORAM NOBIS – MD. CODE ANN., CRIM. PROC. (2001, 2008 REPL. VOL., 2014 SUPP.) § 8-401 – APPLICABILITY TO PENDING CORAM NOBIS PETITIONS

PETITION FOR WRIT OF ERROR CORAM NOBIS – PRIOR FAILURE TO MOVE TO WITHDRAW GUILTY PLEA OR SEEK RELIEF PURSUANT TO THE POST CONVICTION PROCEDURE ACT – NON-WAIVER OF THE RIGHT TO SEEK CORAM NOBIS RELIEF

PETITION FOR WRIT OF ERROR CORAM NOBIS – VOLUNTARINESS OF GUILTY PLEA – MARYLAND RULE 4-242

Facts:

In 2003, Respondent, who is not a U.S. citizen, pleaded guilty to conspiracy to distribute marijuana in the Circuit Court for Montgomery County. During the hearing, the court advised Respondent of the trial rights she was waiving by pleading guilty and asked her questions regarding her plea. Respondent answered that she was pleading guilty freely and voluntarily, she was satisfied with the help of her attorney, and she understood that pleading guilty may affect her immigration status. The State then proffered facts in support of Respondent's guilty plea. The court sentenced Respondent to six months' incarceration, all suspended, and one year of supervised probation.

On January 10, 2012, Respondent attempted to enter the United States from Canada, where she was detained by the U.S. Department of Homeland Security ("DHS"). DHS initiated removal proceedings based on Respondent's 2003 conviction for conspiracy to distribute marijuana.

Thereafter, Respondent filed in the Circuit Court for Montgomery County a petition for coram nobis relief, arguing that her guilty plea was not knowing and voluntary because she was not advised of the elements of the crime to which she pleaded guilty. Due to the defective guilty plea, Respondent argued that she was now suffering the severe collateral consequence of removal from the United States. In its answer to Respondent's petition, the State argued that Smith waived her right to file a petition for coram nobis relief because she had not filed either an application for leave to appeal the conviction or a petition for post-conviction relief. The State also argued that Respondent's guilty plea was knowing and voluntary.

During the pendency of Respondent's petition, Maryland Code (2014 Supp.), § 8-401 of the Criminal Procedure Article ("CP § 8-401") took effect, which provides that "[t]he failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for

writ of error coram nobis." After a hearing, the coram nobis court denied Respondent's petition. According to the court, Respondent waived her right to seek coram nobis relief by failing to apply for leave to appeal, despite having been advised of the right to do so. Furthermore, the court ruled that Respondent's guilty plea was knowing and voluntary because Respondent was advised of the charges against her and the basic elements of those charges.

Respondent appealed the court's decision, and in an unreported decision the Court of Special Appeals reversed the judgment. The intermediate appellate court held that CP § 8-401 applies retrospectively to Respondent's pending coram nobis petition and, therefore, Respondent did not waive her right to seek coram nobis relief by failing to file an application for leave to appeal her guilty plea. The Court of Special Appeals further held that Respondent's guilty plea was not knowing and voluntary because the record did not "reflect that the nature of the charge or the elements of the crime were explained to [Respondent] when she entered her plea[.]"

Held: Judgment of the Court of Special Appeals Vacated with Directions to Affirm the Judgment of the Circuit Court for Montgomery County.

The Court of Appeals held that Respondent did not waive her right to seek coram nobis relief because CP § 8-401 applies retrospectively to Respondent's coram nobis petition. According to the Court, CP § 8-401 is both procedural and remedial and, therefore, it falls under the exception to the Court's long-held presumption that a statute operates prospectively from its effective date. The Court also held that Respondent did not waive her right to coram nobis relief by failing to move to withdraw her guilty plea or to file for post-conviction relief. Because Respondent did not waive previously her right to claim that her plea was not knowing and voluntary, she was entitled to pursue a writ of error coram nobis.

The Court of Appeals held, however, that Respondent's guilty plea was knowingly and voluntarily made, and that testimony from Respondent's counsel concerning having advised Respondent prior to the guilty plea of the nature of the charges against her was admissible at the coram nobis hearing for the purpose of determining whether Respondent pled guilty "voluntarily, with understanding of the nature of the charge" within the meaning of Maryland Rule 4-242(c). The Court held that, upon review of the totality of the circumstances, the circuit court was correct in determining that Respondent understood the nature of the charges; Respondent's plea was knowing and voluntary; and the circuit court was correct in denying Respondent's request for coram nobis relief.

Dontae Preston v. State of Maryland, No. 80, September Term 2014, filed July 27, 2015. Opinion by Harrell, J.

http://www.mdcourts.gov/opinions/coa/2015/80a14.pdf

CRIMINAL LAW – JURY INSTRUCTIONS – "WITNESS PROMISED BENEFIT"

Facts:

On the evening of 14 March 2009, Dontae Preston ("Preston"), Keon Barnes ("Barnes"), and Katrina Harrell ("Harrell") attended an ill-fated co-ed "pajama party" at the home of Nichelle Payton ("Payton") at 1907 N. Pulaski Street in Baltimore City. Shortly after the party got underway, Barnes was shot and killed on the premises. No gun was recovered, and none of the seven shell casings recovered from the scene tested positive for fingerprints. Preston was charged with murder in the first degree, use of a handgun in the commission of a felony and crime of violence, and illegally carrying a handgun.

Two of the partygoers testified as eyewitnesses at Preston's trial in the Circuit Court for Baltimore City. Harrell testified that she saw, from the passenger seat of her parked car, Barnes lying on the steps, with Preston standing over him holding a gun with "fire [coming] from it." After identifying Preston from a photo array weeks after the shooting, Harrell identified also Preston in court as the individual that shot Barnes.

Payton testified that she heard gunshots while she was inside her home. She looked out her bedroom window, and saw Barnes lying on the porch steps while Preston went to his car and left the scene. Some number of days after the murder, Preston came to Payton's house and knocked on the door. She was home, looked out the window, and saw Preston, but did not answer the door because she was scared. Sometime after this event, Payton called Detective Michael Moran, told him that she "was scared to stay there," and asked to be moved.

Defense counsel attempted to establish through cross-examination that Payton cooperated fully with the State only because the police agreed to move her to free, protective housing for several months prior to trial, although she testified that her experience in temporary protective housing "d[id] not cause [her] to come in here and say something [she] otherwise wouldn't." Much time was spent determining what information she volunteered to investigating detectives prior to trial and when it was volunteered vis a vis when the protective housing was sought and granted. On the night of the murder, Payton accompanied homicide detectives to the police station, but told them simply that she hosted the party and named the guests in attendance (and accordingly no written statement was sought or taken from her at that time). Payton was interviewed a second time, one or two days later, but no additional substantive information was given or obtained.

Payton identified later Preston in a photo array as having attended her party that night, and reported that she saw him go to his car after Barnes was shot. She gave also a taped statement to

the police detailing what she saw on the evening of Barnes's death. Payton testified on direct examination that when she provided her statement to the police and identified Preston in the photo array, the police had not moved nor promised yet to move her into protective housing.

The Baltimore City State's Attorney's Office paid ultimately $13,530 to relocate Payton (with $400 of moving expenses facilitating the transition into—but not out of—temporary housing) for a period of 7–8 months prior to trial.

Defense counsel requested that Maryland Criminal Pattern Jury Instruction (2nd ed. 2012, 2013 Supp.) ("MPJI-Cr") 3:13, "Witness Promised Benefit" ("Jury Instruction 3:13"), be read to the jury. Jury Instruction 3:13 provides: "You may consider the testimony of a witness who [testifies] [has provided evidence] for the State as a result of [a plea agreement] [a promise that he will not be prosecuted] [a financial benefit] [a benefit] [an expectation of a benefit]. However, you should consider such testimony with caution, because the testimony may have been influenced by a desire to gain [leniency] [freedom] [a financial benefit] [a benefit] by testifying against the defendant." The trial judge declined to give the requested particularized credibility instruction, but instead gave Jury Instruction 3:10, the MPJI-Cr general credibility instruction.

The jury convicted Preston of first-degree murder, use of a handgun in the commission of a crime of violence, and wearing, carrying, and transporting a handgun. The trial judge sentenced Preston to incarceration for life (for the murder), with a consecutive term of incarceration for twenty years (for the use of the handgun) and a concurrent term of incarceration for three years (for the carrying conviction). Preston appealed to the Court of Special Appeals, which affirmed. *Preston v. State*, 218 Md. App. 60, 96 A.3d 800 (2014).

Preston and the State filed petitions for writ of certiorari for consideration of the following question (along with four others that, because of the Court's answer to the first, it did not reach): "Is protective housing provided to a witness in a first degree murder case the type of "benefit" contemplated by the "witness promised benefit" pattern instruction?" *Preston v. State*, 440 Md. 461, 103 A.3d 593 (2014).

Held: Affirmed.

The Court of Appeals concluded that reasonable protective housing (such as that provided to Payton) does not constitute a "benefit" within the meaning of Jury Instruction 3:13.

Because Jury Instruction 3:13 does not define the term "benefit," the Court imported and applied common and well-established principles of statutory interpretation to determine the meaning of the word. The Court discussed various dictionary definitions of the word "benefit" ("[t]he advantage or privilege something gives; the helpful or useful effect something has," "[p]rofit or gain," "an act of kindness," "something that promotes well-being," a "useful aid," or "an advantage or profit gained from something"), but concluded that those definitions were overbroad so as to lead to absurd results.

As the term "benefit" appears at the end of a list of possible variants in Jury Instruction 3:13, the Court next considered those variants as an aid in seeking the appropriate meaning of the term. The Court interpreted the word "benefit," in the context of Jury Instruction 3:13, to mean something akin to a plea agreement, a promise that a witness will not be prosecuted, or a monetary reward or other form of direct, *quid pro quo* compensation or inducement.

The Court could find no legislative history (or its equivalent) associated with the MPJI-Cr, and found the accompanying "Comment" to Jury Instruction 3:13 (and the cases referenced therein) inapposite to the discrete question of whether reasonable protective housing constitutes a "benefit" within the meaning of Jury Instruction 3:13.

In light of the dearth of Maryland case law discussing Jury Instruction 3:13, the Court turned to the decisions of other states and federal courts to inform its consideration of whether reasonable protective housing should be seen as a "benefit" within the meaning of Jury Instruction 3:13, but could find no reported case dealing squarely with the question. The Court examined closely cases arising from the United States Court of Appeals for the Fifth, Sixth, and Ninth Circuits (*United States v. Partin*, 552 F.2d 621 (5th Cir. 1977), *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984), and *United States v. Holmes*, 229 F.3d 782 (9th Cir. 2000)), Massachusetts (*Massachusetts v. Connor*, 467 N.E.2d 1340 (Mass. 1984) and *Massachusetts v. McGee*, 4 N.E.3d 256 (Mass. 2014)), and Illinois (*Illinois v. McInnis*, 411 N.E.2d 26 (Ill. App. 1980)), among others.

The Court of Appeals left for future reviewing courts to discern the outer boundaries of what else constitutes the contours of what fits within the phrase "reasonable protective housing." The Court suggested that "reasonable" protective housing implies that there is some rough correlation between a witness's ordinary living arrangements and those provided to a witness while they are in protective housing.

Larry Cooper v. Melissa Rodriguez, et al., No. 87, September Term 2014, filed July 24, 2015. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2015/87a14.pdf

GROSS NEGLIGENCE – IMMUNITY – MARYLAND TORT CLAIMS ACT, MD. CODE ANN., STATE GOV'T (1984, 2014 REPL. VOL.) § 12-101 TO 12-110 – COMMON LAW PUBLIC OFFICIAL IMMUNITY – SPECIAL RELATIONSHIP EXCEPTION – GROSS NEGLIGENCE EXCEPTION

Facts:

In the early morning hours of February 2, 2005, inmate Kevin G. Johns, Jr. ("Johns") murdered fellow inmate Philip E. Parker, Jr. ("Parker"), in plain sight of other inmates and correctional officers, while the two were traveling together on a prison transport bus with thirty-four other inmates and five correctional officers. In the Circuit Court for Baltimore City ("the circuit court"), Parker's parents, Respondents, sued, among others, the State of Maryland and the five individual correctional officers who staffed the prison transport bus, including Larry Cooper ("Cooper"), Petitioner, the Officer in Charge during the bus ride.

At trial, the following evidence was adduced. During the trip, Johns got up from his seat, reached over the seat in front of him, hooked his arm around Parker's head from behind, pulled Parker's head over the back of the seat, and began choking Parker with his arm. Eventually, Johns released Parker, thinking that Parker was dead. At some point, another inmate, who was sitting next to Parker, got up from his seat and moved to a vacant seat across the aisle, leaving the space next to Parker empty. Although it was a violation of policy for inmates to get up and move around the bus, none of the five correctional officers took any action. After the initial choking, Parker started to move and snore or breathe heavily. Johns got up, moved into the seat next to Parker, and began choking Parker again. During the attack, Johns pulled down on Parker's head while Parker tried to push up, and Johns held Parker's head while turning his body toward the aisle of the bus, "trying to snap [Parker's] neck off." Johns said, among other things, "this is what I do best." Johns cut Parker's neck with a razor blade that had been smuggled onto the bus, and Parker yelled loudly. After the second round of choking, Johns stuffed Parker's limp body between the two seats. There was blood on top of the back of the seat and Johns was covered in a large amount of blood. This brutal two-part attack occurred approximately seven and one-quarter feet from where Cooper was seated in the rear elevated officers' cage, yet Cooper—who was required to be "alert and observant at all times" claimed not to have witnessed the occurrence.

The jury returned verdicts in one officer's favor, finding that the officer had not been negligent, and in Respondents' favor against Cooper, three other officers, and the State. The jury found the other three officers negligent; that Cooper was grossly negligent; and that the other officers' negligence and Cooper's gross negligence were the proximate causes of Parker's death. Cooper

and the three officers filed a motion, seeking judgment notwithstanding the verdict as to the jury's finding that Cooper had been grossly negligent, and judgment notwithstanding the verdict as to the liability of the individual correctional officers. The circuit court granted the motion by striking the jury's finding of gross negligence as to Cooper and ordering that a finding of negligence be entered and by determining that the correctional officers were immune from liability under common law public official immunity and the Maryland Tort Claims Act ("MTCA"), Md. Code Ann., State Gov't (1984, 2014 Repl. Vol.) § 12-101 to 12-110.

Respondents appealed and the State appealed, and the Court of Special Appeals affirmed in part and vacated in part the judgments of the circuit court. The Court of Special Appeals held that the circuit court erred in striking the jury's finding of Cooper's gross negligence and in concluding that Cooper was immune from liability. Specifically, the Court of Special Appeals held that the circuit court erred in ruling that there was no special relationship between Cooper and the inmates and that, because Cooper owed a duty arising out of a special relationship with the inmates in his custody, Cooper was not entitled to common law public official immunity. Cooper petitioned for a writ of *certiorari*, and the Court of Appeals granted the petition.

Held: Affirmed.

The Court of Appeals held that the circuit court erred in striking the jury's finding that Cooper acted with gross negligence. The Court concluded that, when viewed in its totality and in the light most favorable to Respondents, the evidence was sufficient to support the conclusion that Cooper, as the Officer in Charge, failed to fulfill the duty to ensure Parker's safety and acted with reckless disregard for Parker's life. Indeed, the evidence was sufficient to support the conclusion that Cooper, who claimed to have not seen or heard the attack occurring right in front of him, and who testified that he was unaware of several policies meant to ensure inmates' safety, was "so utterly indifferent to the rights of others that he act[ed] as if such rights did not exist." *Barbre v. Pope*, 402 Md. 157, 187, 935 A.2d 699, 717 (2007) (citations omitted).

The Court of Appeals held that, because Cooper acted with gross negligence, he was not entitled to immunity under the MTCA.

The Court of Appeals concluded that the special relationship exception, rather than being a limitation on common law public official immunity, is a limitation on the public duty doctrine; in other words, the existence of a special relationship does not prevent the application of common law public official immunity. The Court of Appeals held that the Court of Special Appeals erred in concluding that, because a special relationship existed between Cooper and the inmates, and because the relationship gave rise to a duty which was breached, the circuit court erred in finding that Cooper was entitled to common law public official immunity.

The Court of Appeals, nonetheless, held that the Court of Special Appeals was correct in concluding that Cooper was not entitled to common law public official immunity, not because Cooper owed a duty arising out of a special relationship with the inmates in his custody, but

rather because entitlement to common law public official immunity is limited by gross negligence; *i.e.*, gross negligence is an exception to common law public official immunity.

The Court of Appeals held that, in accordance with the dictates of Article 19 of the Maryland Declaration of Rights, gross negligence is an exception to common law public official immunity; in other words, if a public official's actions are grossly negligent, the public official is not entitled to common law public official immunity. The Court of Appeals stated that to hold otherwise would effectively leave a void in liability, leaving plaintiffs, such as Respondents, without a remedy for a public official's gross negligence.

The Court of Appeals explained that, in cases of gross negligence, where immunity exists under both the MTCA and common law common law public official immunity, the State would liable for negligence, a public official would be liable for malice, but neither the State nor the public official would be liable for gross negligence—stated otherwise, there would be no remedy for the public official's gross negligence. Such a result could lead to potentially disconcerting consequences, including giving a public official and the State an incentive to avoid liability by arguing that the public official acted with gross negligence, and requiring the plaintiff to argue in response that the public official was merely negligent or malicious.

The Court of Appeals concluded that holding that gross negligence is an exception to common law public official immunity is consistent with the reasoning underlying the MTCA because one of the core principles of the MTCA is that the State is immune from liability for the gross negligence of State personnel, while allowing State personnel to be liable for gross negligence. The Court of Appeals noted that it would be an illogical result to not accord Cooper immunity under the MTCA, but provide immunity as a public official.

The Court of Appeals determined that, because public official immunity is a common law doctrine, it is entirely appropriate for the Court to define its contours. The Court of Appeals stated that, although under the MTCA (and in other instances), the General Assembly has expressly waived sovereign or governmental immunity—and it was appropriate for the General Assembly to have acted in this regard—immunity pursuant to common law public official immunity is not a matter that requires action by the General Assembly. Instead, the Court has authority under the Maryland Constitution to change the common law. The Court of Appeals observed that common law public official immunity is a principle developed through case law by the Courts of this State and, thus, the General Assembly would not be charged with determining whether gross negligence is an exception to common law public official immunity absent codification of public official immunity. The Court of Appeals concluded that, because the courts are the keepers of the common law, and because the Maryland Constitution instills within the Court the ability to determine the common law, holding that gross negligence is an exception to common law public official immunity neither ran afoul of the Maryland Constitution nor invaded the province of the General Assembly.

The Court of Appeals determined that Cooper, having acted with gross negligence, was not entitled to immunity under common law public official immunity.

COURT OF SPECIAL APPEALS

Reza Mostofi v. Midland Funding, LLC, et al., No. 1084, September Term 2014, filed July 2, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/1084s14.pdf

DEBTOR AND CREDITOR – RES JUDICATA

FAIR DEBT COLLECTION PRACTICES ACT – COLLATERAL ESTOPPEL

Facts:

Reza Mostofi unsuccessfully contested a small claims action brought against him by Midland Funding, LLC, and its subsidiary, Midland Credit Management, Inc. to collect on consumer credit card debt. Mr. Mostofi argued at the District Court for Montgomery County, and later at a *de novo* proceeding at the Circuit Court for Montgomery County, that Midland Funding could not prove that it owned his debt, and to the extent that he owed money to any entity, Midland had misstated the principal balance. Mr. Mostofi found no success at either court, but rather than appeal, he instituted a separate action at the circuit court. He claimed—citing *Finch v. LVNV Funding LLC*, 212 Md. App. 748 (2013)—that the judgment against him was void because Midland Funding and Midland Credit had lacked standing. He also claimed that because Midland Funding, Midland Credit, and their attorneys pursued the debt collection action fully aware that they lacked standing, and intentionally misstating the amount owed, they had violated the Fair Debt Collection Practices Act, the Maryland Consumer Debt Collection Act, and the Maryland Consumer Protection Act. The circuit court ruled that Mr. Mostofi's claims were barred by *res judicata* and collateral estoppel.

Held: Affirmed.

The Court of Special Appeals held that *res judicata* barred Mr. Mostofi's collateral attack on the judgment in the small claims action. Though *Finch* had held that a void judgment could be attacked at any time, the Court's prior holding in *Tucker v. Tucker*, 35 Md. App. 710 (1977), precluded collateral attack on jurisdictional grounds where jurisdiction had been fully litigated in the underlying case. Because Mr. Mostofi had raised the issue of standing in the small claims action, and the circuit court had ruled against him, he could not collaterally attack the judgment on jurisdictional grounds.

The Court further held that collateral estoppel barred the facts underlying Mr. Mostofi's Fair Debt Collection Practices Act and related state claims. The circuit court had found definitively in the small claims action that Midland Funding had standing, and that Mr. Mostofi had owed the amount alleged. Because the basis of Mr. Mostofi's claims were contrary to these findings, he was barred from asserting his claims.

Advance Telecom Process, LLC v. DSFederal, Inc., No. 1371, September Term 2014, filed July 30, 2015. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2015/1371s14.pdf

ENFORCEABILITY OF CONTRACTS – TEAMING AGREEMENTS – MUTUAL ASSENT

Facts:

Advance Telecom Process, LLC ("Advance"), appellant, a Virginia limited liability company and a certified Small Disadvantaged Business 8(a) Contractor, filed an eight-count complaint against DSFederal, Inc., appellee, a Maryland corporation and a woman-owned SBA 8(a) Contractor, also certified by the U.S. General Services Administration as an 8(a) STARS Contractor, alleging that DSFederal unlawfully terminated a Teaming Agreement between the parties.

The Complaint characterized the relationship between Advance and DSFederal as including "the parties' execution of any and all Teaming Agreement(s), subcontract(s), and/or any and all required necessary documentation for the purpose of obtaining and working on the sole-source contract of the proposed project that [Advance] had submitted to USCIS-DHS." DSFederal agreed and contracted with Advance to "jointly develop and submit a bid to USCIS-DHS for said project." Based on the contractual relationship between the parties, Advance submitted DSFederal's name to USCIS-DHS as the 8(a) STARS contractor for the project.

Advance and DSFederal worked together to complete all applicable requirements of the pre-bid solicitation. Sometime after submitting the bid, DSFederal was awarded a sole-source GWAC by the USCIS-DHS to develop and implement the two projects based on the "combined efforts of the parties." Thereafter, the Complaint alleges, DSFederal "constructively terminated" Advance, despite a clause in the Teaming Agreement requiring mutual termination.

In its motion to dismiss, DSFederal argued that the Complaint failed to state a cause of action for breach of contract, and therefore, it should be dismissed with prejudice. In support, it argued that the "Teaming Agreement is nothing more than an agreement to negotiate open issues in good faith to reach a contractual objective within an agreed framework," i.e., it was an agreement to agree, rather than a valid and enforceable contract. After a hearing, the court granted DSFederal's motion to dismiss, agreeing with DSFederal that the Teaming Agreement was "an agreement to agree," and therefore, it was not an enforceable contract.

Held:

The terms of a teaming agreement are enforceable only if the parties demonstrate mutual assent, i.e., the intent to be bound and definite terms. Here, although there is some language in the

Teaming Agreement suggesting an obligation by DSFederal to issue a subcontract to Advance, the Teaming Agreement, read as a whole, indicates that the parties intended, not a binding obligation to issue a subcontract, but rather, as in *Cyberlock Consulting, Inc., v. Info. Experts, Inc.*, 939 F. Supp. 2d 572, 579 (2013), *aff'd,* 549 Fed. Appx. 211 (4th Cir. 2014), an agreed framework for negotiation of a future subcontract. The contract provided that, if a contract was awarded to DSFederal, the parties would negotiate in good faith a subcontract agreement. This provision, as well as the provision stating that approval of the contemplated subcontract by the client may be required, makes clear that there was no binding agreement in place. Rather, it is clear from the terms of the Teaming Agreement that the parties envisioned that future negotiations were required before an enforceable subcontract would be executed. Because the Teaming Agreement left material terms for future negotiation, it constituted an agreement to agree on a future subcontract, and there was no enforceable requirement that DSFederal issue a subcontract to Advance.

Crystal Hayslett Randall v. State of Maryland, No. 1879, September Term 2013, filed July 1, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/1879s13.pdf

CRIMINAL LAW – JURISDICTION

Facts:

In 2009, Alma Matthews Lynch, a Maryland resident, passed away leaving a will devising, among other things, real property located in Arizona to her residuary estate. Appellant Crystal Hayslett Randall, an Arizona resident, served as co-personal representative of the estate. Appellant filed a "proof of authority" with the appropriate Arizona court, which gave Appellant the power to act on behalf of the estate in Arizona pursuant to the authority issued by the State of Maryland. Appellant sold the Arizona property, failed to account for the proceeds of that property in the Maryland estate, failed to properly distribute the proceeds to beneficiaries, and kept the vast majority of the proceeds for herself. She was ultimately charged with theft and embezzlement by a grand jury in Montgomery County. Due to apparent uncertainty regarding Appellant's Arizona address, the State took over two years to try Appellant following her indictment. The Circuit Court for Montgomery County denied Appellant's motion to dismiss for lack of a speedy trial. During her trial, the circuit court also denied Appellant's motion for acquittal based on the lack of jurisdiction to prosecute the charges against her. The jury ultimately convicted Appellant of theft and embezzlement, and she appealed.

Held: Affirmed.

The Court of Special Appeals first held that the State did not violate Appellant's constitutional right to a speedy trial by taking over two years to try her following her indictment. The Court began by explaining that the two-year delay triggered the test applied by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 529-30 (1972) requiring the analysis of four factors: the length of the delay, the reasons for the delay, the assertion of the speedy-trial right, and prejudice. As to the reasons for the delay, the Court explained that the State has a duty to procure a defendant's presence for trial, and in executing that duty, the State must act with "reasonable diligence." *Doggett v. United States*, 505 U.S. 647 (1992). Most notably, because there was confusion regarding Appellant's Arizona address and because the State acted reasonably to resolve this confusion, the Court concluded "reason for delay factor" did not weigh in favor of Appellant. Weighing the particular circumstances of this case; namely, a delay caused largely by the failure of the Maricopa County Sheriff's Office to serve the warrant in Arizona followed by Appellant's own efforts to fight extradition, coupled with the lack of demonstrated prejudice in this case, the Court held that the circuit court did not err in denying Appellant's motion to dismiss.

Next, the Court addressed Appellant's argument that the circuit court of Maryland did not have territorial jurisdiction to prosecute the crimes charged against her, because the crimes, as charged, occurred in Arizona. The Court of Special Appeals rejected this argument, relying on the "duty to account" theory espoused in *Wright v. State*, 339 Md. 339, 406 (1995), wherein the Court of Appeals held that jurisdiction over a theft offense exists Maryland if the defendant was subject to a duty to account for the property in Maryland. After reviewing Maryland probate law, the Court explained that although Maryland statutory law does not explicitly require a personal representative to account for proceeds from the sale of foreign real property in the Maryland estate accounting, a personal representative may still be required to account for the proceeds of the sale if the state in which the foreign real property was located did not require an accounting for the proceeds there. The analysis therefore hinged on Appellant's actions in Arizona. The Court held that where a personal representative does not open an ancillary proceeding in Arizona, but instead sells a resident decedent's foreign real property cloaked with the authority issued by the State of Maryland and accepted by the State of Arizona, the personal representative was required to account for the proceeds in Maryland, not in Arizona.

Last, the Court addressed Appellant's argument that the circuit court erred in permitting the testimony of Linda Hawkins, the Deputy Register of Wills. The Court concluded that the circuit court erred in admitting the testimony of Ms. Hawkins, because her testimony about why proceeds were required to be brought back into the Maryland estate was based on her experience and training, not that of a lay witness. However, we concluded that this error was harmless, because her testimony related to the State's theory of jurisdiction, not to the elements of the crimes of theft and embezzlement. Indeed, Appellant did not dispute at trial that she failed to properly account for the proceeds; instead, she disputed the intent with which she did so.

David Brightwell v. State of Maryland, No. 2735, September Term 2012, filed July 1, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/2735s12.pdf

CRIMINAL PROCEDURE – VERDICT – HEARKENING – NO REQUIREMENT OF VERBAL RESPONSE BY JURY

Facts:

In 1996 appellant was convicted of seventeen criminal offenses arising out of his participation in a gas station robbery. Appellant was sentenced to fifty years' incarceration, and his convictions were affirmed on appeal. On August 15, 2012, appellant filed a motion to correct an illegal sentence, claiming that the jury at his trial was never polled and "did not hearken to its verdict." The circuit court denied appellant's motion.

Held: Affirmed.

At appellant's trial, the clerk took the verdict by having the jury foreperson state in open court the verdict of the jury as to each count, followed by the clerk repeating each such verdict and then at the end saying:

> Ladies and gentlemen of the jury, harken to your verdict as the court hath required of you, your foreman says that you find the defendant guilty. And so say you all.

The transcript does not reflect any response from the jury. The transcript states only:

> THE COURT: All right. [State's Attorney] do you have any record on [appellant]?

Finally, defense counsel did not request that the jury be polled.

The Court of Special Appeals observed that in the absence of a demand for a poll, a hearkening is required for the proper recordation of a verdict and, if the jury is not polled and does not hearken to its verdict, the sentence that corresponds to the unannounced verdict is illegal. Regarding the proper procedure for hearkening, the Court relied on *Givens v. State*, 76 Md. 485, 486-87 (1893), wherein the Court of Appeals stated that "after the verdict is rendered by the jury and read in open court, it is the duty of the clerk to direct the jury to hearken to their verdict as the court hath recorded it, and if none of the jury express their dissent the verdict stands as recorded." (Quotations omitted).

In the instant case, the Court concluded that there was a proper hearkening of the verdicts against appellant. Each verdict was announced to the jury as recorded by the clerk, at the conclusion of

which the jury was asked if they all agreed. The lack of any response from the jury did not invalidate the hearkening, because a member of the jury must affirmatively express his or her dissent. Moreover, based on the comments of the trial court, and the silence of defense counsel, the jurors probably expressed their agreement in a non-verbal way. Therefore, the Court held that appellant's sentences were not illegal.

Jarmal Johnson v. State of Maryland, No. 425, September Term, 2014, filed July 1, 2015. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2015/0425s14.pdf

CRIMINAL LAW – MOTION TO REVISE SENTENCE PURSUANT TO MARYLAND RULE 4-343(b) – APPEALABILITY

Facts:

In March 1992, police officers executed a search and seizure warrant at an apartment on Baker Street in Baltimore City. When the officers entered the premises, Johnson fired an automatic weapon in their direction. After firing several rounds, Johnson's gun jammed. His attempts to clear the jam were unsuccessful, yet Johnson refused to obey a command to put the gun down until the officers fired shots near his feet.

The police seized large amounts of heroin and cocaine from the apartment. Based on this incident, in one indictment, Johnson was charged with attempted murder, common law assault, unlawful wearing, carrying, or transporting a handgun, and use of a handgun in the commission of a felony or crime of violence. In another indictment, Johnson was charged with various controlled dangerous substance ("CDS") offenses.

In September 1992, following a jury trial, Johnson was acquitted of attempted murder, but found guilty of one count of assault with intent to murder, common law assault, two handgun offenses, multiple CDS offenses, and wearing, carrying, and transporting a firearm in relation to drug trafficking. The following month, in an unrelated case, another jury sitting in the Circuit Court for Baltimore City convicted Johnson of second-degree murder and the use of a handgun in the commission of a crime of violence. The same judge presided over both trials. Johnson was ultimately sentenced to an aggregate term of 160 years' imprisonment.

In 2008, Johnson filed a motion to correct an illegal sentence under Md. Rule 4-345(a) claiming that his sentence for assault with intent to murder was illegal because that specific offense was not included in the indictment. Ultimately, the Court of Appeals agreed with Johnson and vacated his conviction and sentence for assault with intent to murder. *Johnson v. State*, 427 Md. 356, 380 (2012). The Court refused, however, to also vacate Johnson's conviction for the use of a handgun in the commission of a felony or crime of violence, observing that "the record shows the factual and legal predicate" for that offense. Id.

In 2014, Johnson filed a *pro se* motion, pursuant to Md. Rule 4-345(b), requesting that the circuit court exercise it revisory power over his sentences due to fraud, mistake, or irregularity. Specifically, he claimed that his "trial and decision making was impaired" by the "illegal conviction" for assault with intent to murder and that the sentencing court impermissibly relied upon that offense in imposing the balance of his sentences. Johnson requested a new trial, a new

sentencing hearing, and "new plea agreement offer." The circuit court denied the motion. This appeal followed. The State moved to dismiss Johnson's appeal, arguing that a motion to revise pursuant to Md. Rule 4-345(b) is not appealable.

Held: State's motion to dismiss denied. Judgment of the circuit court affirmed.

The State asserted that, because Johnson did not pursue his claim of fraud, mistake, or irregularity in a post-conviction proceeding, the appeal was barred by the Post Conviction Procedure Act. See Md. Code (1974, 2013 Repl. Vol.), § 6-408 of the Courts and Judicial Proceedings Article ("CJP"); Md. Code (2001, 2008 Repl. Vol., 2014 Supp.), § 7-107(b)(1) of the Criminal Procedure Article ("CP"). The Court of Special Appeals denied the State's motion to dismiss, holding that Md. Rule 4-345(b) is not a statutory remedy. The Court emphasized that the statute cited by the State as a "source" of Rule 4-345(b), that is, CJP § 6-408, was not even enacted until years after the Maryland Rules provided that a court retains revisory power over criminal judgments in case of fraud, mistake, or irregularity. The Court of Special Appeals analyzed the cases of *Hoile v. State*, 404, Md. 591 (2008); *State v. Kanaras*, 357 Md. 170 (1999); and *Costello v. State*, 237 Md. 464 (1965), and determined that a motion to revise pursuant to Md. Rule 4-345(b) is appealable.

With respect to the merits, the Court of Special Appeals held that the trial court did not err by imposing an aggregate sentence of 160 years' imprisonment. The Court held that the sentencing court did not err by considering the subsequently vacated conviction for assault with intent to murder when sentencing Johnson on the remaining charges. The Court noted that the conviction for assault with intent to murder was not vacated because it was untrue, but rather because that offense was not specifically charged in the indictment and the indictment was never amended to include it. The Court observed that sentencing judges are permitted to consider criminal conduct of a defendant even if there was no conviction, as well as uncharged or untried offenses. Accordingly, the Court held that the trial court did not err in denying Johnson's Rule 4-345(b) motion to revise his sentences.

Efrain Taylor v. State of Maryland, No. 494, September Term 2014, filed July 30,2015. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2015/0494s14.pdf

CRIMINAL LAW – SEARCH AND SEIZURE – VEHICLE SEARCH – SEARCH INCIDENT TO ARREST

Facts:

Around 1:00 a.m. on March 1, 2013, Cambridge Police Officer Chad Mothersell observed a SUV vehicle traveling southbound on Phillips Street at what appeared to be a high rate of speed. The officer followed the vehicle and soon after, noticed that it failed to stop at a stop sign. Mothersell turned on his emergency lights, the SUV stopped, and he pulled up behind it.

Mothersell approached the vehicle, in which appellant Efrain Taylor was the only occupant, and asked him for his driver's license. He detected some odor of alcohol beverage on Taylor's breath and observed that the driver's speech was slurred and hard to understand. His eyes were bloodshot and glassy. The officer asked Taylor where he was before he started driving. Taylor replied that he had been at a bar in Cambridge.

At that point, Mothersell asked Taylor to step out of the vehicle so that the officer could administer "standardized field sobriety tests: the horizontal gaze nystagmus, the nine-step walk-and-turn and the one-legged stand." The officer determined that these were not done successfully.

Mothersell placed Taylor under arrest for suspicion of driving under the influence. By that time, Mothersell's back-up, Officer Carroll, arrived at the scene and conducted a search of the vehicle to locate any alcohol or open containers. The search of the console turned up a clear plastic baggy containing several knotted bags of powder cocaine.

After Taylor was charged with various drug, alcohol, and traffic offenses, he moved to suppress the cocaine evidence, asserting it was seized in violation of the Fourth Amendment to the U.S. Constitution. The Circuit Court for Dorchester County denied the motion and Taylor was later convicted. He appealed.

Held: Affirmed.

The Court of Special Appeals affirmed and rejected Taylor's Fourth Amendment contentions. The Court relied on *Arizona v. Gant*, 556 U.S. 332, 343 (2009), where the U.S. Supreme Court said that a police officer may conduct a vehicle search incident to a lawful arrest when it is "reasonable to believe" evidence related to the crime of arrest might be found there. This

"reasonable to believe" inquiry is the same as the "reasonable suspicion" standard for a stop and frisk, the Maryland Court said.

Applying this standard, the Court pointed to the officer's experience with inebriated motorists; his reasonable belief a DUI arrestee would often have alcoholic beverages in his vehicle; the temporal nexus between alcohol consumption and inebriation; the fact that Mothersell never observed Taylor drinking outside of the vehicle; and the fact that the presence of open alcoholic beverage containers in a vehicle is a means of proving DUI in Maryland. Accordingly, Mothersell had reason to believe that Taylor would have alcoholic beverages in his vehicle and thus, the search was justified.

John Riggins a/k/a Sean Riggins v. State of Maryland, No. 1128, September Term 2013, filed May 27, 2015. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2015/1128s13.pdf

CRIMINAL PROCEDURE – STATE'S OBLIGATION TO PROVIDE DISCOVERY – MD RULE 4-263

CRIMINAL PROCEDURE – INSPECTION OF A WITNESS'S PRIOR WRITTEN STATEMENT – DUE PROCESS

Facts:

Baltimore police officers responded to a complaint that a man was selling drugs in a vacant home. When the officers arrived at the house, they observed Riggins standing in the doorway. When Riggins saw the police, he attempted to flee. This resulted in a physical altercation during which Riggins was struck with a baton. Three officers were involved in the mêlée, one of whom was Officer Moorer. Riggins was charged with disarming a police officer, resisting arrest, and second degree assault.

The Baltimore City Police Department requires its officers to prepare "use of force" reports when the officer uses physical force in an encounter with a member of the public. The Police Department maintains these reports in the officer's personnel file, and does not disclose the documents to third parties. Moorer prepared a use of force report after Riggins's arrest.

Defense counsel first raised the issue of disclosure of the use of force reports during pre-trial discovery. The prosecutor informed defense counsel that she did not have access to that information. The prosecutor advised defense counsel that "[t]he proper way" to obtain the use of force reports was to subpoena the Police Department. The prosecutor also informed defense counsel that the use of force reports are "part of the personnel file and are not routinely disclosed."

Defense counsel then served subpoenas on the Department. The Department's response did not include any use of force reports. Defense counsel did nothing more to obtain the use of force reports until the first day of trial, in the Circuit Court for Baltimore City.

At that point, defense counsel requested that the court conduct an *in camera* examination of the use of force reports. The trial court declined to undertake such review on the grounds that it was untimely. Riggins was convicted of all charges.

On appeal, Riggins contended that the trial court erred in declining to order the prosecutor to disclose the use of force report.

Held: Vacated and remanded.

A defendant in a criminal case has a due process right to inspect written witness statements in the actual or constructive possession of the prosecutor, which is related to, but independent of, a defendant's right to criminal discovery. *Leonard v. State*, 46 Md. App. 631, 637-38 (1980), *aff'd,* 290 Md. 295 (1981). "When confronted with the actual testimony of a critical witness and the knowledge that the witness has given a prior statement bearing on a material issue in the case," the right to inspect that statement protects the defendant's right to confront the witness. *Id*. at 637–39.

Md. Rule 4-263(d) requires a prosecutor to disclose to the defendant all written statements of a State's witness that relate to the offense charged. This obligation extends to prior written statements by police officers. The trial court and the prosecutor mistakenly distinguished the disclosure obligations of the State's Attorney from those of the Baltimore City Police Department. That the use of force reports were in the physical possession of the Department did not obviate the State's responsibility to disclose them. "[O]rdinarily the police are an arm of the prosecution, for purposes of the *Jencks/Carr* analysis, and, thus, a disclosure requirement applicable to the prosecution applies to them as well." *Robinson v. State*, 354 Md. 287, 304 (1999) (citing *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure.")).

When a police department refuses to disclose a written report made by a police officer/witness on the basis that the statement is part of the officer's personnel file, the trial court, and not the prosecutor or the police department, is to determine whether the document in question is subject to disclosure. Md. Rule 4-263(m); *Fields v. State*, 432 Md. 650 (2013). Accordingly, the prosecutor should have attempted to obtain any use of force reports concerning appellant's arrest. If the Department asserted that the documents were confidential, the prosecutor should have referred the matter to the court. *See* Md. Rule 4-263(m)(1)-(2). It is evident from the case law and the language of the rule that neither the prosecutor nor the Department can make a unilateral decision to refuse disclosure. *See* Md. Rule 4-263(g)(1)(B).

State of Maryland v. Cynthia Keller-Bee, No. 1110, September Term 2014, filed July 6, 2015. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2015/1110s14.pdf

APPEAL AND ERROR – DECISIONS REVIEWABLE – FINALITY OF DETERMINATION – INTERLOCUTORY AND INTERMEDIATE DECISIONS

JUDGES – RIGHTS, POWERS, DUTIES, AND LIABILITIES – LIABILITIES FOR OFFICIAL ACTS

Facts:

On April 16, 2010, appellee, Cynthia Keller-Bee, appeared in the District Court for Hartford County regarding a show cause order in which a civil judgment had been obtained against her. The District Court dismissed the show cause order when the creditor-plaintiff failed to appear. On January 20, 2011, the District Court issued a Body Attachment, pursuant to a motion for contempt by the creditor-plaintiff, based on the allegation that appellee failed to appear for the April 16, 2010 court date.

On January 27, 2011, appellee was briefly detained and released on her own recognizance. Following an inquiry, appellee was notified by the District Court clerk's office that the body attachment had been improperly issued.

On December 27, 2013, appellee filed a two-count lawsuit in the Circuit Court for Baltimore City against the State of Maryland. The first count alleged negligence on the part of the courtroom clerk who presented the body attachment to the District Court judge. The second count claimed violations of appellee's constitutional rights under Article 24 of the Maryland Declaration of Rights. The State filed a motion to dismiss, asserting absolute judicial immunity. Following a hearing, the circuit court denied the motion to dismiss.

The State noted an appeal pursuant to the collateral order doctrine. Appellee moved to dismiss the State's appeal, which this Court denied.

Held: Reversed.

The Court of Special Appeals held that the circuit court erred in denying the State's motion to dismiss. First, the Court concluded that the circuit court's denial of the State's motion was appealable pursuant to the collateral order doctrine. Second, the Court determined that the courtroom clerk who presented the body attachment to the District Court judge was performing a judicial act within the scope of her/his employment and therefore, a judicial officer that was afforded absolute judicial immunity.

Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al., No. 939, September Term 2014, filed July 2, 2015. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2015/0939s14.pdf

CRITICAL AREA PROTECTION PROGRAM – VARIANCE STANDARDS – UNWARRANTED HARDSHIP AND PRESUMPTION OF NONCONFORMANCE

Facts:

Roy T. Schwalbach is the owner of a subdivided residential property located within the Atlantic Coastal Bay Critical Area. Schwalbach built a residence and other improvements along a road at the southern boundary of the property. The northern portion of the property consists of two unimproved lots bordering an unnamed tributary of the Sinepuxent Bay. The northern lots are covered entirely by tidal marsh.

Schwalbach planned to construct a pier or walkway that would extend 180 feet across the marsh, to connect the improved portion of the property to a proposed dock past the shoreline. He obtained a tidal wetlands license from the Maryland Department of the Environment and an authorization from the U.S. Army Corps of Engineers. Schwalbach then applied for a variance from local critical area regulations to permit him to construct a pier or walkway in excess of 100 feet. He submitted expert testimony from a surveyor and an environmental consultant, as well as the authorizations from the other agencies that had reviewed the project.

The Worcester County Board of Zoning Appeals determined that, as a result of the layout of the property, denying the variance request would result in an undue hardship. Finding that the application satisfied all of the applicable variance standards, the Board granted the application.

Assateague Coastal Trust, a non-profit environmental advocacy agency, petitioned for review of the Board's decision. After the Circuit Court for Worcester County upheld the decision, Assateague Coastal Trust appealed.

Held: Affirmed.

A critical area variance may not be granted unless the local jurisdiction finds that the applicant has satisfied each one of the individual variance provisions. The local zoning authority presumes that the development activity subject to the variance application does not conform with the general purpose and intent of the critical area program. The applicant bears the burden of proof and burden of persuasion to overcome this presumption as to each of the variance provisions.

A variance to a local jurisdiction's critical area program may not be granted unless, as a result of special features of a site, or special conditions or circumstances peculiar to the applicant's land

or structure, literal enforcement of the critical area program would result in unwarranted hardship to the applicant. *See* Md. Code (1974, 2012 Repl. Vol.), § 8-1808(d)(5) of the Natural Resources Article. In this context, an unwarranted hardship exists where, without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested. *Id.* § 8-1808(d)(1).

In the instant case, the property owner sought to exercise his right to access the navigable waters bordering the property. Under both common law and statutory law, a riparian landowner has the right to make a pier to allow him to access the water at the edge of the property. Although an owner's riparian rights are not absolute, a request to exercise such a central component of the owner's property rights, in a community where riparian access is a particularly important attribute of land ownership, makes the request more urgent and substantial than other requests made for an owner's mere convenience.

On the question of what constitutes reasonable and significant use, a substantial amount of deference is owed to the Board's findings. In this case, substantial evidence supported the Board's determination that the need for the variance arose from special features that were peculiar to the property. It was reasonable for the Board to conclude that the total deprivation of riparian access would amount to unwarranted hardship.

The landowner's purchase of the property, well after the enactment of the critical area law, with knowledge that the property was located in the critical area adjacent to wetlands, did not establish that the hardship was self-created.

Substantial evidence supported the Board's findings that the variance was necessary for the owner to enjoy a right commonly enjoyed by others in the area and that granting the variance would not confer any special privilege denied to other property owners. The applicant introduced expert testimony that numerous private boat docks in the nearby area were commonly used to gain access to the same body of water. In light of that testimony, merely having the right of riparian access did not amount to a special privilege.

Substantial evidence supported the Board's determinations that the granting of a variance would not adversely affect water quality or natural habitat and that the granting of the variance was in harmony with the general spirit and intent of the critical area program. The Board was entitled to consider both the opinion testimony from the environmental expert and the approvals of the project from other agencies as evidence of the project's potential environmental impact. The Board further relied on testimony showing that the proposed structure was modest in size and any disturbance from the construction would be mitigated.

The critical area statute directs that a local jurisdiction shall make written findings based on competent and substantial evidence as to whether the applicant has overcome the statutory presumption that the proposed activity did not "conform with the purpose and intent" of the critical area program. In this case, the board made no express reference to the statutory presumption. Instead, the Board's made written findings that the applicant had satisfied each of the individual standards. These findings included a finding that the granting of the variance

would be “in harmony with the general spirit and intent” of the critical area program. Remand was not required for the sole purpose of requiring the Board to restate in synonymous language that the applicant had overcome the presumption that the proposed activity did not “conform with the purpose and intent” of the program.

In re: Andre J., No. 1845, September Term 2014, filed June 1, 2015. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2015/1845s14.pdf

CHILDREN IN NEED OF ASSISTANCE – CHANGES IN PERMANENCY PLAN

APPEALS FROM ORDERS NOT FINAL – ORDER AFFECTING CARE AND CUSTODY OF CHILD

Facts:

In 2003, when Andre was eight years old, the Circuit Court for Montgomery County, sitting as juvenile court, adjudicated Andre and his four siblings as children in need of assistance. The court found that the children had been neglected by their mother and that she was unable to give proper care and attention to the needs of her children. Andre, who has been diagnosed with moderate intellectual disability, was committed to the Montgomery County Department of Health and Human Services and placed in specialized foster care.

In 2012, when Andre was 17 years old, the court established a permanency plan of reunification with Andre's mother. At that time, the goal of all parties was to reunite Andre with his mother in Washington, D.C., before Andre would transition out of the foster system on his 21st birthday. Andre's mother, who also has special needs, was incapable of attending to her son's needs without substantial outside support. Andre, however, would be ineligible to receive the necessary support services from the disability agency in Washington until after he could establish full-time residency, a process that would take over 120 days. Visitation with Andre's mother was inconsistent because she often was extremely late for scheduled visits, cancelled at the last minute or after the visit was scheduled to begin, or did not show up at all. Andre became extremely upset after unsupervised visits with his mother, and then he refused to participate in any visits at her Washington home.

At a permanency plan review hearing in 2014, a few weeks before Andre's 20th birthday, the court determined that it was in Andre's best interest to change his permanency plan to another planned permanent living arrangement (APPLA). The court co-committed Andre to Maryland's Developmental Disabilities Administration, so Andre could transition from foster care into an appropriate adult male group home when he turned 21. The order also substantially reduced the mother's visitation.

Andre's mother appealed from the juvenile court's order. The Department moved to dismiss the appeal.

Held: Motion to dismiss denied; order affirmed.

Even though the mother's child was over 18 years of age, the mother was not prohibited from appealing the order that changed her child's permanency plan from reunification to APPLA and that reduced the mother's visitation rights.

Under Md. Code (1974, 2013 Repl. Vol.), § 12-303(3)(x) of the Courts and Judicial Proceedings Article ("CJP"), a parent may appeal from an interlocutory order depriving the parent of the care and custody of the parent's child, or changing the terms of such an order. A court order arising from a permanency plan review hearing is immediately appealable under CJP § 12-303(3)(x) if the order operates either to deprive a parent of the care and custody of the parent's children or to change the terms of the parent's care and custody of the children to the parent's detriment. The appellate jurisdiction conferred by this statute is not limited to orders involving minor children.

In the instant case, antecedent orders from the juvenile court gave the mother certain rights related to the care and custody of her adult child. By eliminating the goal of reunification, the juvenile court's order extinguished the mother's justifiable expectation that she would be reunited with her adult child. The order also transferred custody to an agency that would pursue an adult guardianship for her child, and it drastically reduced the mother's visitation rights. The mother could appeal from the interlocutory order, because the order changed the terms of the child's care and custody to her detriment.

Although the mother was entitled to immediate appellate review, the juvenile court did not abuse its discretion in determining that it was in the child's best interest to change the permanency plan. It was not improper for the juvenile court to give some consideration to views on placement articulated by the 19-year-old male with moderate intellectual disability. The record was sufficient for the court to conclude that child's preference not to relocate to Washington was rational.

In any event, the overriding factor that properly guided the court's determination was the child's ability to be safe and healthy in the parent's home. The court did not err in concluding that there was no likelihood that the child could be safe and healthy in the mother's home within the time that he would remain under the court's jurisdiction. The court's decision was further informed by its finding that the child's emotional ties to his mother had been weakened in part by his mother's inconsistent participation in visitation. Under these circumstances, the court had discretion to change the child's permanency plan to another planned permanent living arrangement suited to his special needs and circumstances.

Claudia Friedetzky v. Roger Hsia, No. 1187, September Term 2014, filed July 6, 2015. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2015/1187s14.pdf

FAMILY LAW – JURISDICTION

Facts:

Appellant Claudia Friedetzky, a Maryland resident, filed single-count petition for custody of her child, M.J., against Appellee Roger Hsia, a New York resident, in the Circuit Court for Prince George's County. Appellant asserted that she conceived M.J. following a single act of intercourse with Appellee in New York City. Appellee filed an answer denying that he was the father of M.J. and requesting that the court order genetic testing to determine paternity. Appellee then engaged in discovery, seeking information related to paternity and child support. Appellant thereafter amended her complaint to add claims for paternity, child support, and counsel's fees. In response, Appellee moved to dismiss the added claims for lack of personal jurisdiction. The circuit court ultimately granted the motion, and this appeal ensued.

Held: Reversed.

The Court of Special Appeals began by explaining the two statutes on which the decision turned: the Maryland Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Maryland Code (1984, 2012 Repl. Vol) Family Law Article ("F.L.") §§ 9.5-101 to 9.5-318, and the Maryland Uniform Interstate Family Support Act ("UIFSA"), F.L. §§ 10-301 to 10-359. The Court distinguished the UCCJEA, governing Appellant's custody claim, and the UIFSA, governing claims of child support and paternity, but not custody. Although each act is distinct, both seek to streamline and synchronize certain family law issues for the benefit of children whose parents and guardians live in different states or countries. The instant case before the Court presented interlocking issues: whether Appellee's affirmative request for relief (paternity testing) and discovery in response to the UCCJEA *custody* petition effectively resulted in submission to the court's exercise of personal jurisdiction over the subsequently added claims for child support and paternity testing under the UIFSA.

The Court explained that the UCCJEA contains a "limited immunity" provision, which provides that a "party to a child custody proceeding . . . is not subject to personal jurisdiction in this State for another proceeding or purpose solely by reason of having participated in . . . in the proceeding." F.L. § 9.5-108(a). The Court then reviewed the UCCJEA definition of "child custody proceeding," which explains that a "child custody proceeding" includes "a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, *paternity*, termination of parental rights, and protection from domestic violence, in which the issue may appear." After

reviewing the commentary to the Uniform Act and cases from other jurisdictions, the Court concluded that the definition was intended to resolve confusion regarding the *kinds of proceedings* in which *custody determinations* may be made, rather than to extend limited immunity to parties involved in any of the proceedings listed in the definition simply because the issue of custody arose. Thus, the Court concluded that the immunity provision under the UCCJEA protected Appellee from submitting to the personal jurisdiction for the custody claim only.

The Court then turned to the issue of whether Appellee's actions satisfied the UFISA long-arm provision. The UIFSA allows for the exercise of personal jurisdiction over a nonresident defendant in a proceeding to establish child support or parentage where, *inter alia*, "the individual submits to the jurisdiction of this State by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction." F.L. § 10-304(a)(2).

Considering the UCCJEA immunity provision and the UIFSA long-arm statute together, the Court concluded that the UCCJEA immunity provision provides that personal jurisdiction will not exist "solely" by virtue of participation in a custody proceeding. Here, however, Appellee did not confine his participation to the issue of custody, as he could have, by simply denying paternity as his defense or averring lack of sufficient information to admit or deny the allegations presented in Appellant's petition. Instead, Appellee prayed that the court "order genetic testing be performed to determine the paternity of the minor child that is the subject of this case." In other words, Appellee *invoked* the court's jurisdiction by affirmatively requesting relief, particularly coupled with his requests for discovery on the issues of paternity and child support, which extend beyond the realm of custody alone. Therefore, the Court held that Appellee's affirmative request for relief—his request for genetic testing to establish paternity of M.J.—coupled with his efforts to obtain discovery on matters relating to paternity and child support, constituted grounds for personal jurisdiction under the UIFSA long-arm statute, F.L. § 10-304(a)(2).

The Court further held that by affirmatively seeking relief from the court, the circuit court's exercise of personal jurisdiction over him would satisfy the constitutional "minimum contacts" and comported with the "traditional notions of fair play and substantial justice.

Marvin Wilson v. Sylvia Wilson, No. 497, September Term 2014, filed July 1, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/0497s14.pdf

FAMILY LAW – SEPARATION AGREEMENT – MILITARY RETIREMENT BENEFITS – DISABILITY

Facts:

In an Opinion, Judgment of Divorce, and Order of Court ("Judgment of Divorce") dated July 30, 2009, the Circuit Court for Prince George's County granted an absolute divorce to appellant, Marvin Wilson, from appellee, Sylvia Wilson. In the Judgment of Divorce, the court noted, among other things, that on July 21, 2009, the parties recited on the record an agreement on all property issues, which "included a division of the parties' pension interests." On August 6, 2009, the United States Air Force ("the Air Force"), appellant's employer, notified appellant that he would be placed on temporary disability retirement on October 28, 2009. On January 21, 2010, the court entered a Marital Property Consent Order reflecting the parties' July 2009 agreement, and ordering, among other things, that appellee shall receive fifty percent of the marital share of appellant's "military pension fund."

Appellant was placed on permanent disability retirement on April 3, 2011. On July 23, 2013, the Air Force sent a letter to appellant's attorney, stating that it could not pay appellee her portion of appellant's retired pay, because the entire amount of such pay was based on appellant's disability, which by law cannot be paid to a former spouse. After a hearing on March 26, 2014, the trial court issued an order on April 30, 2014, finding that appellant had breached the parties' agreement, and ordering appellant to pay to appellee arrears in the amount of $63,543, representing appellee's portion of appellant's retirement benefits from May 2011 through March 2014.

Held: Affirmed.

The Court of Special Appeals held that, pursuant to the terms of the parties' agreement, appellee's share of appellant's "military pension fund" included his disability retirement benefits. Under Maryland contract law, a provision dividing retirement benefits includes disability benefits unless they are expressly excluded. The parties' agreement never mentioned any disability. Moreover, although the Air Force's Physical Evaluation Board recommended on June 1, 2009, that appellant be placed on "temporary retirement with a disability," there was no evidence in the record that such recommendation was disclosed to appellee or the trial court prior to the parties' agreement entered on the record on July 21, 2009.

The Court affirmed the trial court's finding that appellant breached the parties' contract and made no efforts to perform, because appellant had not paid appellee her portion of appellant's military retirement benefits. The fact that appellant did not voluntarily choose to be placed on disability retirement did not alter or excuse his obligations under the settlement agreement that he entered into before his change in classification. Because the Marital Property Consent Order did not require the Air Force to pay appellee directly, the Air Force's refusal to pay appellee any part of appellant's retirement did not excuse appellant from his contractual obligation to give appellee her portion of his military retirement benefits.

The Court held that the parties' separation agreement was not preempted by federal law, and that the case was controlled by *Allen v. Allen*, 178 Md. App. 145, *cert. denied*, 405 Md. 63 (2008). Although federal law precludes state courts from treating disability retirement benefits as marital property, appellant's military retirement disability benefits, which were based on the husband's marital years of service, replaced the retirement benefits that the service member otherwise would have received. Appellant had already received the pension benefits for the period of May 2011 through March 2014, which became part of his general assets, and thus he could satisfy the judgment against him with any assets, thereby not conflicting with federal law. Because appellant's anticipated military retirement benefits were divisible and assignable at the time of contract, the parties' property settlement agreement was valid at the time it was executed, and the trial court had the authority to enforce the parties' agreement.

In re: Dany G., No 1096, September Term 2014, filed July 6, 2015. Opinion by Friedman, J.

http://www.mdcourts.gov/opinions/cosa/2015/1096s14.pdf

FAMILY LAW – IMMIGRATION – SPECIAL IMMIGRANT JUVENILE

Facts:

Following guardianship proceedings, the Circuit Court for Montgomery County refused to enter two of the requested Special Immigrant Juvenile predicate order findings requested by Charlene M. (the guardian) that reunification with the child's parents was not viable due to neglect and that it is not in the child's best interest to return to his parent's country of nationality.

The SIJ status predicate order must contain five findings:

> (1) The juvenile is under the age of 21 and is unmarried; 8 C.F.R. § 204.11(c)(1) - (2);
>
> (2) The juvenile is dependent on the court or has been placed under the custody of an agency or an individual appointed by the court; 8 C.F.R. § 204.11(c)(3);
>
> (3) The "juvenile court" has jurisdiction under state law to make judicial determinations about the custody and care of juveniles; 8 U.S.C.A. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(a), (c) [amended by the Trafficking Victims Protection Reauthorization Act ("TVPRA") 2008];
>
> (4) That reunification with one or both of the juvenile's parents is not viable due to abuse, neglect, or abandonment or a similar basis under state law; 8 U.S.C.A. § 1101(a)(27)(J) [amended by TVPRA 2008]; and
>
> (5) It is not in the "best interest" of the juvenile to be returned to his parents' previous country of nationality or country of last habitual residence within the meaning of 8 U.S.C.A. § 1101(a)(27)(J)(ii); 8 C.F.R. § 204.11(a), (d)(2)(iii) [amended by TVPRA 2008].

Here, the circuit court declined to make the finding that reunification was not viable due to neglect and that it is not in the child's best interest to be returned to his parents' country of nationality. Charlene M. appealed to the Court of Special Appeals, which reversed and remanded.

Held: Reversed and remanded.

The Court of Special Appeals noted that under federal regulations, a juvenile court, under 8 U.S.C.A. § 1101(a)(27)(J) as amended by the TVPRA 2008, must determine whether the child has been abused, neglected, or abandoned as defined and applied by state law without regard to where the child lived at the time the events occurred. The Court concluded that because the circuit court had not applied the full Maryland definition of "neglect" that the circuit court committed legal error.

The Court also found that the circuit court abused its discretion by applying the wrong standard to determine whether it is in the child's best interest to not return to Guatemala. In the context of SIJ status predicate orders, the question is whether it is in the child's best interest to remain in his current situation or whether it is in his best interest to return to conditions which may include abuse, neglect, or abandonment.

The case was reversed and remanded to the circuit court for appropriate proceedings.

Cash & Carry America, Inc. v. Roof Solutions, Inc., et al., No. 2122, September Term 2012, filed June 30, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/2122s12.pdf

TORTS – FORSEEABILITY OF RISK OF HARM – PRIVITY OF CONTRACT

Facts:

Merle Coe, the owner of townhouse, contracted with a roofing company, Roof Solutions, Inc., an appellee, to replace a roof. Roof Solutions hired subcontractor, Diogo Depaula, also an appellee, to perform the job. At the end of the third day of work (before the project was finished), the workers left. Two hours later a neighbor saw smoke coming from the townhouse roof. The fire department was called, located a fire on the roof, and put it out. The investigation into the cause of the fire revealed that the workers had used a torch to heat tar paper and in doing so had set fire to a part of the roof, which slowly spread. Coe was a part owner of Cash & Carry ("CCA") the appellant, a business that develops computer cash register systems. He had in his house two computers belonging to CCA, which were loaded with software CCA had developed. The computers sustained water damage in from the fire.

In the Circuit Court for Montgomery County, CCA sued Roof Solutions and Depaula, alleging that their negligence in performing the roofing work so as to set fire to the roof had resulted in damage to its computers and to the software on the computers, and had caused a delay in the implementation of CCA's business plan and lost profits. Roof Solutions and Depaula moved for summary judgment on the ground that they did not owe a duty of care in tort to CCA, because they were not in privity of contract with CCA and there otherwise was not an "intimate nexus" between them, and that CCA did not have adequate evidence of causation in any event. The court granted summary judgment on both grounds.

Held: Reversed.

The risk of harm from the roofers' negligence was personal injury, death, and property damage, not solely economic loss. Therefore, under *Jacques v. First National Bank*, 307 Md. 527 (1986), it was not necessary for CCA and the roofers to be in contractual privity or its equivalent for the roofers to owe a duty of care to CCA to protect its tangible personal property inside the townhouse from harm. That is true even though the risk of harm to CCA was property damage only. Whether a duty of care should be recognized in this case depends not on the existence of privity or its equivalent but upon the primary factor of the foreseeability of the risk of harm.

It is reasonably foreseeable to a roofer performing roof replacement work on a structure that if the work is performed negligently so as to cause a fire, tangible personal property inside the

structure, whether belonging to the owner of structure or a third party, will sustain damage. Therefore, the roofers in this case owed CCA a duty of care to protect its tangible personal property, *i.e.*, its computers, from harm. It was not reasonably foreseeable to the roofers that their negligence would cause damage to intangible personal property, such as computer software, especially unique software, and consequent loss of profits and other business losses. The roofers did not owe CCA a duty of care to protect its computer software from harm and to protect it from business losses associated with injury to that software.

There was sufficient evidence in the summary judgment record to support the causation element of the negligence claim.

Myishia Smith v. Rowhouses, Inc., No. 993, September Term 2014, filed July 2, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/0993s14.pdf

TORTS – PREMISES LIABILITY – LEAD PAINT EXPOSURE – CIRCUMSTANTIAL EVIDENCE OF CAUSATION.

Facts:

Myishia Smith, the appellant, brought suit against Rowhouses, Inc., which managed a rental property on Oliver Street, in Baltimore City, in 1992 and 1993, when the appellant lived there as a very young child. She alleged that she had been exposed to lead paint at that property, and had suffered personal injuries as a result. By the time suit was filed, the Oliver Street property had been razed.

Evidence adduced in discovery showed that the appellant lived at a property on Monroe Street from birth to the spring of 1992, when she and her mother moved to the Oliver Street property; and that in the spring of 1993, she and her mother moved to a property on Collington Street. Throughout those time periods, she visited her grandmother's house on Ashland Avenue. The appellant first was tested for lead paint in September of 1992, when she was living at the Oliver Street property. She tested positive. She also tested positive for lead paint in May of 1993, around the time she moved out of the Oliver Street property, and in September of 1993, when she was living on Collington Street. The last test result was the highest.

The appellant's mother testified in deposition that the Monroe Street property was in good shape; that about three or four months after she and the appellant moved into the Oliver Street property, she saw chipping and peeling paint on the windowsills, bannisters, and baseboards; that she saw the appellant put her hands on these areas and then put her hands in her mouth; and that she never saw any chipping, peeling, or flaking paint at the Ashland Avenue property (where her mother lived). The appellant's only expert witness on the issue of causation, i.e., the source of the appellant's lead poisoning, testified that based on the age of the Oliver Street property, it must have contained lead paint. That was the sole basis for his opinion.

Rowhouses, Inc., moved for summary judgment on the ground that there was no admissible evidence that the Oliver Street property contained lead paint and therefore was a source of the appellant's lead paint exposure. The court ruled that the expert witness's opinion was inadmissible and that there was no other evidence to support the causation element of the appellant's claim.

Held: Reversed.

The court correctly ruled that the expert witness's opinion was not admissible. In *Hamilton v. Kirson*, 439 Md. 501 (2014), the Court of Appeals held that evidence of the age of a property alone is not sufficient to support a finding that it contained lead paint. The court erred in ruling that there was no other legally sufficient evidence of causation, however. In *Kirson*, the Court endorsed a method of proving causation by circumstantial evidence that this Court adopted in *Dow v. L&R Properties*, 144 Md. App. 67 (2002). Under *Dow*, the plaintiff's exposure to lead paint at a particular property may be proven circumstantially, by evidence that the plaintiff could not have been exposed to lead paint anywhere else, coupled with evidence that the particular property was built before 1950, and therefore was likely to contain lead paint. In *Kirson*, the Court held that a plaintiff relying on a *Dow* theory of causation "must rule out other reasonably probable sources of lead exposure in order to prove that it is probable that the subject property contained lead-based paint."

In this case, there was evidence on the summary judgment record that the appellant was exposed to lead paint sometime before September of 1992, when she first tested positive for lead. There also was evidence that there was no chipping, peeling, or flaking paint at the Monroe Street property, where the appellant lived before she lived at the Oliver Street property, and that there was no chipping, peeling, or flaking paint at the Ashland Avenue property, where the appellant visited. There was no evidence that she was present at any other properties during this time. There was evidence that there was chipping, peeling, and flaking paint at the Oliver Street property, and that the appellant was seen touching it and putting it in her mouth. Finally, there was evidence that the Oliver Street property was built before 1950. All of this evidence taken together can support a reasonable inference that the only probable source of lead paint exposure to the appellant when she tested positive in September of 1992 was the Oliver Street property.

Rafail Zilichikhis, et al. v. Montgomery County, Maryland, et al., No. 388, September Term 2014, filed May 28, 2015. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2015/0388s14.pdf

FINALITY OF JUDGMENT – ADJUDICATION OF ALL CLAIMS AGAINST ALL PARTIES

SUMMARY JUDGMENT – GENUINE DISPUTE OF MATERIAL FACT

PREMISES LIABILITY – ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF DANGEROUS CONDITION

GOVERNMENTAL IMMUNITY – PUBLIC WAY EXCEPTION

Facts:

Dr. Rafail Zilichikhis suffered a traumatic brain injury after he slipped and fell on a motor oil spill inside a public parking garage owned by Montgomery County. His wife, Mrs. Lubov Zilichikhis, arrived at his parking space a few minutes later.

In the Circuit Court for Montgomery County, the Zilichikhises brought an action against the County and the private companies that operate or maintain the garage, seeking damages for negligence and loss of consortium. The private companies filed cross-claims against each other for indemnity and contribution.

After extensive discovery, the County moved for summary judgment on two grounds: that the County was immune from liability because it was operating the garage in a governmental capacity; and that the County had no actual or constructive knowledge of the slip-and-fall hazard. The private companies also moved for summary judgment on the grounds that those defendants lacked the requisite knowledge of the dangerous condition.

In opposition, the Zilichikhises relied upon affidavits indicating that the proprietors maintained the garage in a perpetually dirty condition. The Zilichikhises contended that they did not need to show that the defendants knew of the specific oil spot where Dr. Zilichikhis fell, but only that the defendants were on notice of the dangerous conditions in general. The Zilichikhises also contended that County could not rely on the defense of governmental immunity, because, they asserted, there was evidence that the fall occurred in a "public way."

The Zilichikhises later submitted two supplemental affidavits in opposition. The Zilichikhises' daughter asserted that she took photographs depicting "the area where [her] father fell" eight hours after the fall. The attached photos depicted a dark stain extending across a walking path and an adjacent parking space. In the second affidavit, a safety engineer averred that he had

examined the photos and that, in his expert opinion, the photos depicted a hazard that had been present for "very likely longer than 36-48 hours."

The circuit court granted summary judgment in favor of the defendants, finding that the Zilichikhises had produced no admissible evidence of the defendants' requisite actual or constructive knowledge of the slip-and-fall hazard, and also that the County enjoyed governmental immunity with respect to its operation of the garage. After the court denied their motion for reconsideration, the Zilichikhises appealed.

Held: Affirmed.

The circuit court's summary judgment order could be appealed, even though the court never formally adjudicated the cross-claims for indemnity and contribution asserted by the corporate defendants. An order that adjudicates the rights of fewer than all of the parties, including rights under cross-claims or third-party claims, is not an appealable final judgment, even if the cross-claims or third-party claims have become groundless because of the entry of judgment on the primary claims raised by a plaintiff. Nevertheless, the appellate court could exercise discretion under Md. Rule 8-602(e)(1)(C) to enter a final judgment on its own initiative as to one or more but fewer than all of the parties. Under the circumstances, it would be difficult for the defendants to resolve their cross-claims for indemnity and contribution without prejudicing their rights, and perhaps impossible to liquidate those cross-claims until the appeal on the merits of the plaintiffs' claims had been resolved.

The circuit court correctly determined that no genuine dispute of material fact existed. The party opposing a properly supported motion for summary judgment must demonstrate the existence of a genuine dispute of material fact by identifying factual assertions, under oath, based on the personal knowledge of the individual swearing out an affidavit, giving a deposition, or answering interrogatories. The non-moving party in this case could not defeat the summary judgment motion by relying on certain submissions that, for various reasons, could not be considered as part of the summary judgment ruling.

The Zilichikhises could not rely on certain interrogatory answers to generate a factual dispute as to the location of the accident, because the document did not affirmatively show that the responses were made under oath on the basis of the personal knowledge of a competent witness. Interrogatory answers from Dr. Zilichkhis were accompanied by an affirmation that the responses were accurate "to the best of [his] knowledge, information and belief." The affirmation was not signed by Dr. Zilichikhis himself, but by "Lubov Zilichikhis, Power of Attorney." Furthermore, the interrogatory answers included no assertion that Dr. Zilichikhis was competent to testify as to the facts described.

Under the circumstances, the photographs taken by the Zilichikhises' daughter were not admissible to show the condition of the accident site shortly after the accident. The daughter's affidavit simply asserted that the images depicted the site of the accident, but by her own

admission she had no personal knowledge of the location of the fall. Because the submissions did not explain the basis for the daughter's knowledge of the location, there was an inadequate foundation to admit the photographs into evidence.

As a result, the Zilichikhises also failed to establish a proper foundation for expert opinion testimony about the scene depicted in the photographs. Even assuming that the safety expert could opine that the substance shown in the photographs was had been on the floor for some time, the opinion related to a scenario not in evidence. A factfinder had no adequate basis to conclude that the photographs depicted the site of Dr. Zilichikhis's fall.

Lacking any evidence showing how long the allegedly dangerous condition existed, the plaintiffs here could not generate a jury question as to negligence by relying on general testimony about the recurrence of hazards on the premises or about the frequency of inspections. To sustain a cause of action in a premises liability case, it is necessary to show that the proprietor either created the hazard or gained actual or constructive knowledge of the hazardous condition in sufficient time to remedy the condition or to warn of its existence. Re-affirming the holding of *Maans v. Giant of Maryland, L.L.C.*, 161 Md. App. 620, *cert. denied*, 388 Md. 98 (2005), the Court rejected the Zilichikhises' invitation to adopt a "mode-of-operation" rule. The Court refused to dispense with the requirement that an injured invitee establish the proprietor's constructive knowledge of the hazard by proving how long the dangerous condition existed before the injury.

Finally, the County was immune from tort liability stemming from its operation of the public parking garage. Under Maryland common law, a local government is immune from tort liability when it functions in a governmental capacity, but not when it functions in a proprietary or private capacity. The public parking garage was sanctioned by legislative authority and operated solely for the public benefit, and there was no evidence of any profit inuring to the local government. A municipality has a private proprietary obligation to maintain its streets, as well as the sidewalks, footways, and the areas contiguous to them, in a reasonably safe condition. Yet that exception did not extend to the parking spaces within a public parking garage. Even assuming that some residents frequently or occasionally walked on some path through the garage, there was no admissible evidence showing that the accident had occurred on that path.

Lucy Ware v. People's Counsel for Baltimore County, et al., No. 1008, September Term 2014, filed July 2, 2015, Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/1008s14.pdf

ZONING & PLANNING – RESIDENTIAL ZONES

Facts:

Lucy Ware, the appellant, purchased a single-family residence (the Property) in the DR residential zone in Baltimore County. From the time it was built, 61 years ago, the Property had been used as a single-family residence. It is located in a residential development and is surrounded by other single-family dwellings. Ware bought the property to convert it from use as a single-family dwelling to use as a church. A church is a permitted use in the DR zone. Ware created a parking lot by covering an area of grass in the back yard of the Property with gravel. She planted 45 evergreens, partially shielding the parking lot. Without seeking permission from the zoning authorities, she held church events at the Property. Neighbors complained and Ware was directed to cease use of the Property as a church until she brought the Property in compliance with the Baltimore County Zoning Regulations, including the "Residential Transition Area" regulations (RTA). The RTA regulations impose buffer and screening requirements in residential areas when property that is "to be developed," is located in the DR zone, and lies adjacent to land in that zone, or another, specified, residential zone, on which there are single family dwellings within 150 feet of the tract boundary (which was the case here).

Ware filed petitions with the County Department of Permits, Approvals, and Inspection to reduce the RTA buffers to zero feet and for variances from parking lot regulations. The petitions were denied, and Ware took a *de novo* administrative appeal to the Board of Appeals. People's Counsel and neighboring property owners, the appellee, participated before the Board in opposition to Ware's petitions. The Board ruled that the RTA was generated by Ware's proposed change in use of the Property; specifically, that the change of use is a "residential transition use" because a church is a use permitted in the zone, the Property is in a covered residential zone, and the Property is adjacent to properties in covered residential zones. The Board rejected Ware's argument that the RTA was not generated because she was not making any structural changes or additions to the house, and therefore the Property was not being "developed." The Board concluded that Ware was improving the property, and therefore was developing it. The Board further concluded that the church use did not fall into any exception to the RTA regulations.

Ware filed a petition for judicial review in the Circuit Court for Baltimore County and the circuit court upheld the decision of the Board. Ware noted an appeal from that judgment.

Held: Affirmed.

The RTA regulations apply to a residential transition use, which includes any use permitted as of right in a DR zone. Thus, contrary to Ware's argument, the RTA regulations are not limited to residential uses in the DR zone. The RTA regulations apply when there is a change of use from a present residential use to a proposed non-residential but permitted use in the DR zone. The purpose clause for the RTA regulations, which states that RTA conditions apply to "dissimilar housing types," does not limit the application of the RTA regulations to residential uses when the language in the body of the regulations makes clear that such a limitation does not apply.

The changes made by Ware to the Property constituted "development" within the meaning of the RTA regulations. She created a new parking lot by covering part of the back yard of the Property with gravel. She planted trees in an effort to screen the parking lot from view. She proposed new drainage and storm water management systems. All of these improvements were necessary to accommodate the new use of the Property as a church. Although Ware was not making changes to the structure or exterior of the house, the changes to the Property nevertheless constituted development, as the Board concluded.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated June 9, 2015, the following attorney has been indefinitely suspended by consent, effective July 9, 2015:

GARY STEWART PEKLO

*

By an Order of the Court of Appeals dated July 10, 2015, the following attorney has been disbarred by consent:

WALTER H. KILLIAN

*

By an Order of the Court of Appeals dated July 10, 2015, the following attorney has been disbarred by consent:

ARCADIO JORGE REYES

*

By an Opinion and Order of the Court of Appeals dated July 27, 2015, the following attorney has been disbarred:

SHAUNTESE CURRY TRYE

*

By an Order of the Court of Appeals dated June 25, 2015, the following attorney has been indefinitely suspended by consent, effective July 27, 2015:

ABRAHAM ALLAN GERTNER

*

By an Opinion and Order of the Court of Appeals dated July 27, 2015, the following attorney has been disbarred:

MELISSA DONNELLE GRAY

*

*

By an Opinion and Order of the Court of Appeals dated June 30, 2015, the following attorney has been suspended for thirty (30) days, effective July 30, 2015:

MELODIE VENEE SHULER

*

UNREPORTED OPINIONS

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