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http://www.mdcourts.gov/opinions/coa/2015/28a14ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed with this Court a Petition for Disciplinary or Remedial Action (the "Petition") against Respondent, Matthew Richard Young. The Petition alleged that Respondent violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") by contracting to perform home improvement work without a valid license and engaging in dishonest conduct toward the Maryland Home Improvement Commission ("MHIC") and Bar Counsel.

The Court of Appeals assigned the matter to the Honorable Marcus Z. Shar ("the hearing judge") to conduct an evidentiary hearing and issue written findings of fact and conclusions of law. After an evidentiary hearing, at which Respondent appeared and testified on his own behalf, the hearing judge found the following facts by clear and convincing evidence:

From 2009 to 2013, Respondent contracted to perform home improvement work for thirty-two homeowners in the State of Maryland without first obtaining a home improvement license. The hearing judge found that Respondent, who had "vast experience in home improvement," knowingly worked as an unlicensed home improvement contractor and earned a substantial amount of money from that work.

Respondent's brother, Brian Young, is a contractor licensed by MHIC. Respondent testified that Brian gave Respondent permission to "use" Brian's license to perform home improvement work. Brian testified, however, that he had never given Respondent permission to enter into contracts under, or otherwise use, his license.

In the summer of 2009, Respondent contracted through the LLC with Jake and Sunni McCarty to perform plumbing work at their home in Baltimore County, Maryland. The McCartys refused

Respondent's subsequent demands for additional payment because they were not satisfied with the quality of his work. On June 5, 2012, Respondent filed suit for damages against the McCartys in the District Court of Maryland, sitting in Baltimore County. The District Court entered judgment in the McCartys' favor, and the hearing judge found that the suit was frivolous and filed in bad faith.

In November 2009, Respondent contracted through the LLC with Jerry and Catherine Woods to perform home improvement work. The Woodses likewise refused Respondent's requests for additional payment when they were unsatisfied with his work. The same day he filed suit against the McCartys, Respondent filed suit against the Woodses in the District Court of Maryland, sitting in Baltimore County. Respondent dismissed this suit voluntarily after judgment was entered in the McCartys' favor in that litigation. The hearing judge found that the lawsuit against the Woodses was also frivolous and filed in bad faith.

After the McCartys and the Woodses submitted written complaints to MHIC, Kevin Niebuhr, an investigator with the Department of Labor, Licensing & Regulations ("DLLR"), investigated those complaints and later testified before the hearing judge. When Mr. Niebuhr first contacted Respondent in 2012, Respondent told Mr. Niebuhr that he was a licensed contractor, and though he initially refused, eventually gave Mr. Niebuhr a license number. Mr. Niebuhr learned thereafter that the license number Respondent provided belonged to his brother, Brian, and that Respondent was not a licensed contractor at the time this work was performed. The hearing judge found that Respondent's conduct during the MHIC investigation was dishonest, fraudulent, and deceitful.

Mr. McCarty filed a complaint with the Commission on June 8, 2012. After Bar Counsel notified Respondent of the complaint, Respondent replied that the "claim that I am unlicensed is not accurate. I am licensed in Maryland and will provide proof of such licensing upon further request." Based upon that representation, which the hearing judge found to be an intentional misrepresentation, Bar Counsel dismissed the complaint. Mr. McCarty renewed his complaint on August 2, 2012. Respondent then responded to Bar Counsel that "I was working under my brother's license when I performed the work at Mr. McCarty's home." The hearing judge found that the information Respondent provided to Bar Counsel during its investigation was dishonest, fraudulent, and deceitful.

Based upon these findings, the hearing judge concluded, by clear and convincing evidence, that Respondent violated MLRPC 8.1(a) and 8.4(a), (b), (c), and (d).

Held:

Neither Respondent nor Petitioner filed exceptions to the hearing judge's findings of fact. The Court, therefore, treated those findings as established for the purpose of determining the appropriate sanction. Moreover, neither Petitioner nor Respondent excepted to the hearing

judge's conclusions of law. Based on the Court's *de novo* review of the record, the Court agreed with the hearing judge that Respondent violated MLRPC 8.1(a) and MLRPC 8.4(a), (b), (c), and (d).

The Court held that Respondent knowingly worked as a home improvement contractor without a valid license, which is a misdemeanor proscribed by Md. Code (2011, 2015 Repl. Vol.), § 8-601 of the Business Regulation Article. The Court further held that Respondent engaged in intentional dishonest conduct by claiming falsely to Mr. Niebuhr and Bar Counsel both that he was properly licensed and that he had Brian's permission to use Brian's license. Disbarment is the proper sanction for intentionally dishonest conduct absent compelling extenuating circumstances. Respondent failed to provide any circumstances that might justify a lesser sanction. The Court therefore held that disbarment was the appropriate sanction for Respondent's misconduct.

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Attorney Grievance Commission of Maryland v. Patricia DuVall Storch, Misc. Docket AG No. 7, September Term 2014. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2015/7a14ag.pdf

ATTORNEY DISCIPLINE – INDEFINITE SUSPENSION

Facts:

This matter arose from Respondent's appointment as personal representative of the Estate of George Gault. As personal representative, Respondent failed to timely file Interim Accounts and failed to appear for hearings before the Orphans' Court. When Respondent was removed as personal representative of the Estate and ordered to deliver the Estate's property to the successor personal representative, she failed to turn over the estate property and continued to act as personal representative of the Estate. Despite being found in civil contempt by the Orphans' Court, Respondent remained unwilling to turn over the Estate property to the successor personal representative.

Held:

Based upon the Court's independent review of the record, the Court determined that Respondent violated Maryland Lawyers' Rules of Professional Conduct 1.1, 1.2(a), 1.3, 1.16(a) and (d), 3.2, 3.4(a) and (c), and 8.4(a) and (d). Under the circumstances, the Court of Appeals held that the appropriate sanction was indefinite suspension. The Court explained that a personal representative has a duty to administer an estate expeditiously, and upon termination, must make timely delivery of estate property to the successor personal representative. Respondent's failures to make proper filings and appear at hearings delayed the administration of the Estate. Her repeated refusal to turn over the Estate property to the successor personal representative compounded this delay. In doing do, Respondent failed to provide competent and effective services to the Estate.

The Brownstones at Park Potomac Homeowners Association v. JPMorgan Chase Bank, N.A., No. 13, September Term 2015, filed October 8, 2015. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2015/13a15.pdf

MOTION TO DISMISS – JURISDICTION – MARYLAND RULE 7-104(e) (2014) – ENTRY OF JUDGMENT

Facts:

The Brownstones at Park Potomac Homeowners Association ("Petitioner") filed in the District Court of Maryland, sitting in Montgomery County ("the District Court") a complaint against JPMorgan Chase Bank, N.A. ("Respondent") alleging that Respondent had failed to pay homeowners' association dues since taking possession of property in Potomac, Maryland. Respondent filed a Notice of Intention to Defend and later filed a motion to dismiss. On March 10, 2014, the District Court conducted a hearing on the motion to dismiss and held the matter *sub curia*. Later that day, the District Court issued an order granting the motion to dismiss. According to a certificate of service, the District Court's order was mailed to each party's counsel on March 10, 2014.

The District Court docket contained multiple entries dated March 10, 2014. Significantly, one entry was labeled "Court Order Entered" and spanned five lines on the docket, stating: "Based on the foregoing and after consideration on this 10th day of March 2014 it is therefore ordered that [Respondent]'s motion to dismiss is granted and it is further ordered that the above referenced suit is dismissed with prejudice." (Capitalization omitted).

On April 10, 2014, Petitioner appealed to the Circuit Court for Montgomery County ("the circuit court"), which affirmed the judgment of the District Court without a hearing. Petitioner filed a petition for a writ of *certiorari*, which this Court granted. In the Court of Appeals, Respondent moved to dismiss the case arguing that the appeal to the circuit court had been untimely filed.

Held: Appeal dismissed.

The Court of Appeals held that the appeal to the circuit court was untimely and mandated dismissal of the instant appeal for lack of jurisdiction.

The Court of Appeals concluded that, pursuant to Maryland Rule 7-104(e) (2014), the District Court's order dismissing the case was entered onto the docket within the file, as the docket entries stated, on March 10, 2014; *i.e.*, on March 10, 2014, "the District Court first ma[d]e[] a

record in writing of the . . . order on . . . [the] docket within the file, . . . and record[ed] the actual date of the entry" by notating and entering onto the electronic docket the order dismissing the case.

The Court of Appeals held that Petitioner had thirty days from March 10, 2014, to note an appeal of District Court's order dismissing the case. Thirty days from March 10, 2014, was April 9, 2014; however, Petitioner noted an appeal to the circuit court on April 10, 2014, one day after expiration of the thirty-day appeal period set forth in Maryland Rule 7-104(a). The Court of Appeals observed that Petitioner had not identified any rule, statute, or case extending its time for noting an appeal, and that the Court knew of none applicable under these circumstances.

Montgomery County, Maryland v. Jean K. Phillips, et al., Misc. No. 20, September Term 2014, filed October 16, 2015. Opinion by Watts, J.

Greene and Harrell, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/20a14m.pdf

AGRICULTURAL LAND TRANSFER TAX – MD. CODE ANN., TAX-PROP. (1986, 2012 REPL. VOL.) § 13-407(A) – "TOTAL RATE OF TAX" – MD. CODE ANN., TAX-PROP. (1986, 2012 REPL. VOL.) § 13-303(D) – SURCHARGE

Facts:

Jean K. Phillips, Trustee of the Jean K. Phillips Revocable Trust, and Carol Ann Mumma (together, "Appellees") owned the Phillips family farm in Montgomery County, Maryland ("the County"), Appellant. The Board of Education of Montgomery County ("the Board of Education") condemned the Phillips family farm for the purpose of building an elementary school. The Board of Education and Appellees agreed that the just compensation for the Phillips family farm was $4,142,500.

The agricultural land transfer tax to be collected by the County, on the State's behalf, was calculated at the rate of 4% of the value of the agricultural portion of the land ($4,138,200—the just compensation of $4,142,500 less $4,300, which was the value of the non-agricultural portion of the land), arriving at a State agricultural land transfer tax of $165,528. The State surcharge of 25% of the State agricultural land transfer tax was calculated to be $41,382 (which is 25% of $165,528). In total, the amount of agricultural land transfer tax owed to the State was $206,910 (the State agricultural land transfer tax of $165,528 plus the State surcharge of $41,382).

The County calculated its own agricultural land transfer tax—or the County farmland transfer tax—at the rate of 2% of the just compensation of $4,142,500, arriving at a County farmland transfer tax of $82,850. Between the State agricultural land transfer tax, including the State surcharge, and the County farmland transfer tax, Appellees were taxed $289,760, which is approximately 7% of $4,138,200, which was the value of the agricultural portion of the land.

On Appellees' behalf, the Board of Education paid the State agricultural land transfer tax of $206,910 and the County farmland transfer tax of $82,850. The Board of Education paid $3,852,740—the remainder of the just compensation of $4,142,500—to Appellees' counsel in trust for Appellees.

Subsequently, Appellees requested from the Supervisor of Assessments for the County a refund of a portion of the County farmland transfer tax, specifically $41,468, plus interest. According to Appellees, the maximum amount of the combined State agricultural land transfer tax and the

County farmland transfer tax permitted by law was 6% of $4,138,200 (the value of the agricultural portion of the land), or $248,292, which was less than $289,760, which was the amount taxed. Appellees contended that, in calculating the County farmland transfer tax, the County was incorrect in concluding that the 25% State surcharge was not part of the combined transfer tax, and thus could be ignored when calculating the cap on the County's portion of the combined transfer tax. The County denied the request for a refund, explaining that its calculations satisfied the law because the State surcharge was to be imposed in addition to, and separate from, the combined transfer tax.

Appellees appealed to the Maryland Tax Court ("the Tax Court"). Following a hearing, the Tax Court issued a Memorandum and Order affirming the County's denial of Appellees' request for a refund. Specifically, the Tax Court ruled, in agreement with the County, that the State surcharge was "to be collected in addition to the State [agricultural land] transfer tax [] and the County [farmland] transfer tax[.]" Appellees petitioned for judicial review. The Circuit Court for Montgomery County ("the circuit court") reversed the Tax Court's decision, entered judgment in Appellees' favor, and ordered that the County "shall refund to [Appellees] the excess transfer tax imposed by [the] County upon the transfer of the [Phillips family farm] to the [] Board of Education in the amount of $41,468, plus interest from the date of imposition to the date of payment." The County appealed. The Court of Special Appeals considered the parties' briefs and heard oral argument, but, before reaching a decision, that Court certified this case to this Court. On January 23, 2015, this Court issued a writ of certiorari.

Held: Certified question of law answered. Case remanded to the Court of Special Appeals with instructions to affirm the judgment of the Circuit Court for Montgomery County.

The Court of Appeals held that the total rate of tax that applies to a transfer subject to the agricultural land transfer tax, as set forth in Md. Code Ann., Tax-Prop. (1986, 2012 Repl. Vol.) ("TP") § 13-407(a)(2) and (3), includes the State surcharge imposed by TP § 13-303(d), and that the State surcharge is, by definition, a part of the State agricultural land transfer tax, and must be calculated into, and treated as a part of, the tax ceiling limiting a county's agricultural land transfer tax.

The Court of Appeals held that, by TP § 13-407(a)(2)'s and (3)'s plain language, the County farmland transfer tax is subject to and limited by the tax ceiling set forth in TP § 13-407(a)(3), which clearly states that if the "total rate of tax that applies to a transfer . . . exceeds" the tax ceiling set forth in TP § 13-407(a)(2)—which, for the County, is 6% (5% plus the rate that applies to improved residential property in the County, or 1%)—the County must reduce its farmland transfer tax "as necessary to comply with the" tax ceiling. As specifically provided in TP § 13-407(a)(2) and (3), the tax ceiling includes "the total rate of tax that applies to a transfer[.]" The Court of Appeals stated that the total rate of tax is easily determined through a simple mathematical calculation, namely, dividing the total agricultural land transfer tax by the value of the agricultural portion of the land. The Court of Appeals remarked that nothing in TP §

13-407 provides, explicitly or implicitly, that the tax ceiling is limited to the portion of agricultural land transfer taxes that is determined by base tax rates; i.e., nothing in TP § 13-407 provides that the State surcharge—although not determined by base tax rates, but instead determined by multiplying the amount derived from the applicable base tax rate by 25%—is somehow excluded from the "total rate of tax that applies to a transfer[.]"

The Court of Appeals held that it is clear that, through its plain language, TP § 13-407 applies to transfers of property "subject to the agricultural land transfer tax under Subtitle 3 of this title[.]" TP § 13-407(a)(1). In other words, the limitations on a county's transfer tax are explicitly tied to Subtitle 3 of Title 13 of the Tax-Property Article, i.e., the State's agricultural land transfer tax. Subtitle 3 of Title 13 expressly defines "agricultural land transfer tax" to include the surcharge imposed under TP § 13-303(d). TP § 13-301(c). The Court of Appeals stated that the definition of "agricultural land transfer tax" demonstrates a legislative intent that the State surcharge be considered a part of the agricultural land transfer tax, and, thus, a part of the "total rate of tax" imposed on a transfer of agricultural land.

The Court of Appeals noted that the legislative history of the 2008 amendment to the State agricultural land transfer tax (adding the State surcharge) supported the Court's reading of the pertinent statutes that the total rate of tax that applies to a transfer subject to the agricultural land transfer tax of TP § 13-407 includes the State surcharge imposed by TP § 13-303(d). The Court of Appeals stated that the legislative history demonstrates that the State surcharge is to be collected and distributed directly to the State, and makes no mention whatsoever that the State surcharge is somehow exempt from the tax ceiling on the "total rate of tax" under TP § 13-407(a)(2). Through Senate Bill 662, the General Assembly clearly intended that the State surcharge be a part of the agricultural land transfer tax—and it even expressly defined "agricultural land transfer tax" as including the State surcharge. The Court of Appeals noted that, tellingly, the General Assembly could have, but did not, modify or otherwise raise the tax ceiling on the combined State agricultural land transfer tax and county agricultural land transfer tax that may be imposed. The Court of Appeals concluded that, absent any indication in the statutory language or the legislative history that the General Assembly did not intend the State surcharge to be a part of the State agricultural land transfer tax, the Court declined to construe the relevant statutes to reach such a strained result.

Jakeem Roy v. Sandra B. Dackman, et al., No. 6, September Term 2015, Filed October 16, 2015. Opinion by Harrell, J.

Battaglia and McDonald, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/6a15.pdf

APPEAL AND ERROR – EXTENT OF REVIEW DEPENDENT ON NATURE OF DECISION APPEALED FROM

APPEAL AND ERROR – EXTENT OF REVIEW – DUAL NATURE OF PROCEEDINGS

EVIDENCE – EXPERT WITNESS – QUALIFICATIONS – MEDICAL TESTIMONY

EVIDENCE – EXPERT WITNESS – QUALIFICATIONS –SOURCE OF EXPOSURE

Facts:

Petitioner Jakeem Roy filed suit in the Circuit Court for Baltimore City in negligence against Sandra Dackman, individually and as trustee of the assets of Jacob Dackman & Sons, LLC ("the Dackmans"), alleging that the Dackmans provided negligently premises for rent that contained chipping, peeling, and flaking lead paint, in violation of the Baltimore City Housing Code. The complaint alleged only one source of alleged lead paint exposure. Roy's blood lead levels were elevated during the time he resided at 2525 Oswego Avenue in Baltimore and his mother testified in her deposition that the property had flaking and chipping paint through the house. The house's exterior paint tested positive for lead, but the interior was never tested.

After discovery was completed, Petitioner identified two expert witnesses to testify both as to the source of Roy's lead exposure, but only one of them as to the medical causation of his injuries. Dr. Simon, an industrial hygienist and toxicologist, was expected to speak to the source of lead. Dr. Sundel, a board-certified pediatrician with 20 years in practice was tapped to testify as to the medical causation of Roy's alleged injuries. Dr. Sundel concluded that 2525 Oswego Avenue was the source of Roy's lead exposure and that his alleged injuries were caused by this exposure. His opinion was based on the condition of the house, the testimony provided by Roy's mother, the exterior testing of 2525 Oswego Avenue, and an in-person neuropsychological evaluation of Roy conducted by neuropsychologist Dr. Barry A. Hurwitz, Ph.D.

The Dackmans moved to have Roy's two experts excluded under Md. Rule 5-702, claiming specifically that Dr. Sundel was not qualified because he lacked any direct experience with the treatment of victims of lead paint poisoning. After excluding Dr. Sundel, the Circuit Court granted summary judgment because without the testimony of Roy's sole medical expert to establish causation, he could not move to trial on circumstantial evidence alone.

Roy appealed timely to the Court of Special Appeals, which affirmed the Circuit Court's judgment and concluded that Dr. Sundel was unqualified for the same reasons that he was considered unqualified in *City Homes v. Hazelwood*, 210 Md. App. 615, 63 A.3d 713 *cert. denied*, 432 Md. 468, 69 A.3d 476 (2013). The *Hazelwood* opinion held, with respect to Dr. Sundel's qualifications that he could not testify as a medical expert on lead poisoning because he had no experience with the treatment or identification of lead positioning in children.

We issued a writ of certiorari, on Roy's petition, *Roy v. Dackman*, 441 Md. 217, 107 A.3d 1141 (2015), to consider the following questions:

1) Did the trial court err when it found that a board-certified pediatrician was not qualified as an expert to address the nature and extent of Petitioner's injuries from childhood lead exposure?

2) Did the Court of Special Appeals utilize the incorrect standard of review when it ignored the initial finding that the pediatrician was qualified to offer medical causation opinions and then reviewed his qualifications de novo?

Held: Reversed and remanded

The Court of Appeals held that Dr. Sundel was qualified to testify in this lead paint poisoning case as to medical causation, but was excluded properly as an expert witness as to source of the lead poisoning. Under Md. Rule 5-702, an expert witness who proposes to testify on medical injury must base his or her opinion on reliable knowledge, skill, and experience, but is not required necessarily to be a specialist. Admission of expert testimony is a threshold issue for a judge to decide, with the weight of the testimony to be decided by the finder of fact.

Based on Dr. Sundel's background post-*Hazelwood*, affidavit, and deposition, the Court of Appeals determined that he was competent, under the standards set forth in Md. Rule 5-702, to testify as an expert as to medical causation. It was an abuse of the Circuit Court's discretion to exclude Dr. Sundel as to this portion of Roy's claim. The Court of Special Appeals in *Hazelwood* concluded that Dr. Sundel was not qualified to testify as an expert because he lacked specialized knowledge on the subject of lead poisoning, which is not the standard set forth in Md. Rule 5-702. The material differences between the record in this case and the one presented in *Hazelwood*, including a fourteen page affidavit from Dr. Sundel supplementing his qualifications in view of *Hazelwood*, led the Court of Appeals to hold here that Dr. Sundel was qualified to testify as an expert as to medical causation.

Maryland law allows a witness to qualify as an expert without requiring that witness to be a specialist on the subject. In addition to his "book-learning" attained from reading scholarly articles on lead paint poisoning in children, Dr. Sundel's academic and experiential qualifications include a three year pediatric residency in New York, a two year pediatric fellowship at Johns Hopkins University Hospital, and more than 20 years in practice. With this experience and as a board-certified pediatrician, Dr. Sundel was shown on this record to possess a sufficient

background from which to provide an opinion as to the injuries claimed to have been suffered by Roy as the result of alleged exposure to lead.

As to Dr. Sundel's ability to qualify as an expert witness for source identification of Roy's lead exposure, the Court of Appeals agreed with the Court of Special Appeals and the Circuit Court that he was not an appropriate expert witness. Dr. Sundel's conclusion that 2525 Oswego Avenue was the source of Roy's lead exposure was based solely on scant circumstantial evidence, including the age of the home and exterior tests of the paint on the dwelling. Dr. Sundel was excluded properly because his conclusion was based only on assumptions and did not indicate how he eliminated other potential environmental sources to reach the conclusion that 2525 Oswego Avenue was the source of Roy's childhood exposure to lead.

Because Roy had an additional expert to testify as to his source of lead (Dr. Simon) and the Court of Appeals concluded that Dr. Sundel was competent to testify as to medical causation, the grant of summary judgment was an abuse of discretion at the point in the proceedings when it was entered and the case was remanded to the Circuit Court for Baltimore City for further proceedings.

COURT OF SPECIAL APPEALS

Medical Management and Rehabilitation Services, Inc., et al. v. Maryland Department of Health and Mental Hygiene, No. 2386, September Term 2013, filed October 28, 2015. Opinion by Kenney, J.

http://www.mdcourts.gov/opinions/cosa/2015/2386s13.pdf

CIVIL PROCEDURE – ADMINISTRATIVE LAW–STANDARD OR REVIEW IN AGENCY INTERPRETATION OF WHAT CONSTITUTES A REGULATION

ADMINISTRATIVE LAW – AN AGENCY REQUEST FOR PROPOSALS DOES NOT CONSTITUTE A REGULATION

ADMINISTRATIVE LAW – AGENCY SELECTION OF CONTRACTOR UNDER RFP NOT REGULATION SUBJECT TO CHALLENGE BY PETITION FOR DECLARATORY JUDGMENT – EXHAUSTION DOCTRINE APPLIES TO AGENCY SELECTION OF CONTRACTOR UNDER RFP

Facts:

Medicaid participants with specified rare, expensive, or medically complex conditions can enroll in the Rare and Expensive Case Management ("REM") program, which is a case managed fee-for-service reimbursement system. At the inception of the REM program in 1997, the Maryland Department of Health and Mental Hygiene ("the Department") contracted for the necessary case management services with several different individual agencies. Medical Management and Rehabilitation Services ("MMARS") was one of the original case management agencies selected in 1997 and has continued as a REM program case management provider for fifteen years.

In 2012, the Department decided to reduce the number of agencies providing REM program case management services from four to one. On December 20, 2012, the Department published a Request for Proposals ("RFP") notifying case management providers of the Department's intent to award the July 1, 2013 through June 30, 2016 contract for case management services to a single provider whose proposal it deemed most advantageous to the State. The RFP also set forth the procedures for protesting or disputing the RFP or the subsequent contract award, in addition to those procedures already established in 10.01.03 of the Code of Maryland Regulations ("COMAR"). It further stated that any appeals would not stay the starting date of the contested contract. Prior REM contracts fell under the state procurement regulations But, because the Department, in 2009, set the rates for case management services by regulation

subsequent contracts for case management services were not procurement contracts governed by its competitive sealed proposal selection procedures.

Five case management providers submitted proposals in response to the December 20, 2012 RFP, none of which objected to the procedures or to the reduction in the number of providers to one. A three-person evaluation committee concluded that TCC best addressed the evaluation factors provided in the RFP. After the Department notified MMARS, on April 12, 2013, that it had not received the contract award, MMARS challenged the award of the contract to TCC concurrently in multiple venues, including the Office of Administrative Hearings ("OAH"), the Maryland State Board of Contract Appeals ("the Board"), and the Circuit Court for Talbot County.

The Department and OAH

On April 15, 2013, MMARS, via email to the Department, objected to the award of the case management contract to TCC. The Department, on May 6, 2013, delegated its authority to issue a proposed decision regarding MMARS's objections to OAH. The Administrative Law Judge ("ALJ") conducted hearings on October 2, 3, 4, and 31, and November 1, and issued a proposed decision on December 27, 2013. The ALJ concluded that the Department did not improperly reject MMARS's proposal in response to the RFP and recommended that MMARS's appeal of the contract award be dismissed. MMARS filed exceptions to the ALJ's proposed decision with the Secretary of the Department, but, in March of 2014, it dismissed those exceptions.

The Board of Contract Appeals

On June 24, 2013, MMARS filed a bid protest with the Board of Contract Appeals challenging the contract award. The Board, finding that the RFP fell outside the definition of a procurement contract, dismissed the protest for lack of jurisdiction on September 6, 2013. MMARS filed a petition for judicial review of that decision in the Circuit Court for Talbot County on October 1, 2013, but dismissed that petition on April 9, 2014.

The Declaratory Judgment Action

On September 4, 2013, MMARS filed a Complaint and Motion for Temporary Restraining Order in the Circuit Court for Talbot County. The Department filed a Motion to Dismiss for Failure to State a Claim ("Motion to Dismiss") and Opposition to the Motion for Temporary Restraining Order on September 20. On October 1, 2013, MMARS withdrew its Motion for a Temporary Restraining Order and filed a response to the Department's Motion to Dismiss. MMARS filed an

additional response on October 25, 2013. That same day, the circuit court conducted a hearing on the Motion to Dismiss.

On December 23, 2013, the court granted the Motion to Dismiss, stating that MMARS had failed to exhaust its available administrative remedies. At the time of the court's ruling, the petition for judicial review of the Board's decision was pending before the circuit court, and the exceptions and objections to the Department's contract award were pending before OAH.

Held:

The circuit court did not err in granting the Department's motion to dismiss MMARS's complaint for failure to exhaust administrative remedies because the Department's RFP and subsequent contract award do not constitute a regulation that qualifies as an exception to the exhaustion doctrine under Maryland Code § 10-125 of the State Government Article.

The Court of Appeals and this Court have consistently held that an agency action that does not formulate new rules of widespread application, change existing law, or apply rules retroactively to the detriment of an entity that had relied on the agency's past pronouncements is not a regulation. Neither appellate court has specifically addressed whether the selection of a contractor under a RFP can be considered a regulation that is subject to challenge by a petition for declaratory judgment under SG § 10-125. But, this Court has determined that the introduction of previously unconsidered provisions in a single RFP and that case-by-case agency determinations fall outside of the definition of a regulation.

In this case, the Department, through the RFP, did not formulate new rules of widespread application, change existing law, or apply rules retroactively to MMARS's detriment. First, the single provider RFP, and the subsequent contract award is limited to case management services for a finite segment of the greater Medicaid population for a single contract period of July 1, 2013 through June 30, 2016, and applies only to the case management agencies responding to the RFP. Second, although the competitive bid procedure for procurement contracts that was followed for previous RFPs under the REM program no longer applied, that change in the procedure was in accordance with statute and implementing regulations adopted in accordance with the rulemaking provisions of the APA.

Third, The Department, through the RFP and the contract award, did not impair MMARS's rights under the existing case management contract. Finally, any claimed detrimental reliance on the Department's previous contract awards to multiple case management would have been unreasonable in light of the clear language of the RFP about awarding the contract to a single provider.

State of Maryland v. Philip Morris, Inc., et al., No. 1256, September Term 2014, filed October 2, 2015. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2015/1256s14.pdf

COURTS – SCOPE AND EXTENT OF REVIEW

ALTERNATIVE DISPUTE RESOLUTION – PREEMPTION

ALTERNATIVE DISPUTE RESOLUTION – CONSTRUCTION

ALTERNATIVE DISPUTE RESOLUTION – AFFIDAVITS, EVIDENCE, OR RECORD

ALTERNATIVE DISPUTE RESOLUTION – DISPUTES AND MATTERS ARBITRABLE UNDER AGREEMENT

Facts:

This appeal arises from a Master Settlement Agreement ("MSA") between appellees, who are numerous cigarette manufacturers (the "Participating Manufacturers" or "PMs"), and appellant, the State of Maryland ("Maryland"), along with 51 other states and territories (collectively, the "Settling States"). Specifically, it involves the multi-state arbitration of an MSA dispute over the "Non-Participating Manufacturer Adjustment" ("NPM Adjustment") – a potential reduction to the annual payment that the PMs make to the Settling States under the MSA, which is allocated among those states who failed to diligently enforce certain obligations under the MSA.

During the arbitration of the 2003 NPM Adjustment dispute, the PMs reached a settlement ("Term Sheet" agreement) with 22 states (the "Term Sheet States") before it was determined whether those states were diligent or non-diligent. Maryland and the other "Non-Term Sheet States" were also offered the settlement, but declined to join. In light of this partial settlement, the arbitrators (a "Panel" of three former federal judges) were tasked with resolving how the 2003 NPM Adjustment should be allocated to any Non-Term Sheet States who were found non-diligent. On March 12, 2013, the Panel interpreted the MSA's language and concluded that the NPM Adjustment should be allocated post-settlement pursuant to the "pro rata" method of judgment reduction.

After holding individual evidentiary hearings for the Non-Term Sheet States, whose diligence for 2003 was still contested, the Panel concluded that Maryland and five other Non-Term Sheet States were non-diligent and thus subject to the 2003 NPM Adjustment. On September 11, 2013, after assessing Maryland's enforcement record for 2003, the Panel found that Maryland lacked "a culture of compliance" and that its efforts "fell short of its efforts in earlier years."

Maryland filed motions in the Circuit Court for Baltimore City to vacate the Panel's awards for the 2003 NPM Adjustment that adopted the pro rata judgment-reduction method and that found Maryland to be non-diligent. On November 12, 2013, Maryland also filed a motion to compel the PMs to arbitrate Maryland's diligence for 2004 in a state-specific arbitration, rather than as part of a multi-state arbitration of the entire 2004 Adjustment dispute. On July 28, 2014, the circuit court denied all three motions, and on August 20, 2014, Maryland noted this appeal.

Held: Affirmed in part and reversed in part.

A party cannot waive the proper standard of review by failing to argue it. Such a determination remains for courts to make for themselves.

Where the parties' MSA provided for "govern[ance] by the laws of the relevant Settling State, without regard to conflict of law rules of such Settling State," Maryland law applies in reviewing the Panel's decisions, despite the fact that the arbitration itself was "governed by the [Federal Arbitration Act ("FAA")]." Our procedural rules are not preempted by national policy favoring arbitration, and application of the Maryland standard of review would neither serve to frustrate the underlying goals of the FAA, nor result in a failure to carry out the arbitration provision of the MSA as the parties had intended.

The Panel did not lack jurisdiction to interpret the MSA and determine the appropriate method for reallocating the 2003 NPM Adjustment post-settlement. The Panel erred, however, when it created an ambiguity in the MSA and, as a result, reallocated the 2003 NPM Adjustment without first determining the diligence of all contested states.

The circuit court properly denied Maryland's request to vacate the Panel's final award, as Maryland failed to meet its burden of proving that the Panel refused to hear evidence material to the controversy, to the substantial prejudice of Maryland's rights

The circuit court did not err in denying Maryland's request for a state-specific arbitration on the issue of whether Maryland diligently enforced during 2004, because the structure and plain meaning of the MSA require a uniform determination of this issue.

LaShaun Kirk v. Hilltop Apartments, L.P., No. 2054, September Term 2013, filed September 30, 2015. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2015/2054s13.pdf

CIVIL PROCEDURE – AMOUNT IN CONTROVERSY – FEDERALLY SUBSIDIZED HOUSING

Facts:

Appellant LaShaun Kirk leased an apartment in a federally subsidized housing complex owned by appellee Hilltop Apartments, L.P. In March 2013, Hilltop notified Kirk that it was terminating her lease, due to numerous leasehold violations, and directed her to vacate the apartment. When she failed to leave the premises, Hilltop filed a breach-of-lease action in the District Court of Maryland for Prince George's County seeking repossession of the premises. Kirk then demanded a jury trial. She claimed that the amount in controversy exceeded $15,000 – the amount required by law for a jury trial. The case was then transferred to the Circuit Court for Prince George's County.

In the circuit court, Hilltop moved to strike Kirk's jury demand, contending that the amount in controversy was, in fact, less than $15,000 and therefore the District Court had exclusive jurisdiction over the matter. Ruling in Hilltop's favor, the circuit court struck the demand for a jury trial and remanded the case to the District Court for trial. Kirk appealed that ruling.

Held: Reversed.

The issue on appeal centered on how the "amount in controversy" was to be calculated. Generally, a party to a landlord-tenant action may request a jury trial where "either" the claim for "money damages" or "the value of the right to possession" of the leased premises is over $15,000. *Bringe v. Collins*, 274 Md. 338, 347 (1975). Here, neither party asserted a claim for money damages and thus, the issue before the Court of Special Appeals was whether Kirk's right to possession of the leased premises exceeded $15,000 and, significantly, how that figure was to be calculated.

Kirk's lease, by its express terms, automatically renewed for successive one-year terms unless terminated for good cause. Accordingly, the Court of Special Appeals determined that Kirk had a right to possess the apartment for an indefinite period of time. *See Carroll v. Housing Opportunities Commission*, 306 Md. 515, 525 (1986). The Court held, therefore, that the correct method of calculating the amount in controversy, that is, the value of Kirk's right to possession of the leased premised, should be determined by multiplying the annual fair market rental

payment by Kirk's remaining estimated life expectancy, *id.*, a product which the parties agreed exceeded the amount required for a jury trial.

The Court of Special Appeals distinguished the Court of Appeals' decision in *Carter v. Maryland Management Co.*, 377 Md. 596 (2003), in which the Court of Appeals rejected the notion that a tenant in a federal housing *tenant-based-voucher* program enjoyed an indefinite tenancy. The Court of Special Appeals noted that Carter's lease involved a federal housing voucher program and the lease did not automatically renew for successive terms. Kirk's apartment, on the other hand, was located in a *project-based* federal housing complex and her lease expressly provided for "automatic renewal" of the initial one-year lease term, unless terminated for good cause. Accordingly, the Court of Special Appeals concluded that the *Carroll* decision was controlling.

Morgan Stanley & Co., Inc. v. John D. Andrews, Jr., No. 935, September Term 2014, filed October 1, 2015. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2015/0935s14.pdf

JUDGMENTS – GARNISHMENT – JOINT ACCOUNTS

Facts:

Morgan Stanley & Co., Inc ("Morgan Stanley") obtained a judgment in the Circuit Court for Montgomery County for $196,477.16 against John Andrews, appellee ("Son"). Morgan Stanley moved to garnish funds held in a joint bank account owned by both Son and his father, Don D. Andrews ("Father"). Father filed a motion pursuant to Maryland Rules 2-645(i) and 2-643(e), asserting his claim to the garnished property and requesting a hearing. Father's motion was denied without a hearing, and Father noted a timely appeal. In an unreported opinion, we reversed the judgment of the circuit court. *Don D. Andrews, Jr. v. Morgan Stanley & Co., Inc.*, No. 85, September Term 2012 (filed May 16, 2013). We held that the trial court erred by denying Father's claim without a hearing and remanded the case for further proceedings. We expressly took "no position on the merits of [Father's] claim of sole ownership." Id., slip op. at 7.

Following the remand, the circuit court held an evidentiary hearing. The court heard from various witnesses, and the parties stipulated that Father was the original source of all of the funds in the joint account. The evidence demonstrated that the joint account was established in order for Son to manage the remodeling of Father's vacation home. Son did not pay any of his own expenses from the joint account. Father provided Son with a limited number of checks to pay various individuals performing renovation work at the home. Father did not give Son the checkbook because he wanted to maintain control over it.

The circuit court ruled in favor of Father, concluding that Father had established by clear and convincing evidence that all of the funds in the joint account belonged solely to him. Morgan Stanley noted a timely appeal.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err by concluding that the funds within the joint account were the sole property of Father and not subject to garnishment by Morgan Stanley.

The Court of Special Appeals rejected Morgan Stanley's assertion that the funds in the joint account were per se subject to garnishment because they were held in a joint account upon which

Son, the judgment debtor, was a named owner and authorized signatory. The Court noted that it had previously explained that, "[f]or the purposes of garnishment a bank deposit *prima facie* belongs to the person in whose name it stands." *Wanex v. Provident State Bank of Preston*, 53 Md. App. 409, 413 (quoting 38 C.J.S. Garnishment § 80 (1943)). The Court observed that it had not previously addressed under what circumstances a presumption of ownership can be rebutted.

The Court of Special Appeals considered approaches taken by other jurisdictions which had addressed the issue of the availability of garnishment of jointly owned accounts. The Court differentiated between legal and equitable title of funds within an account, and held that a creditor of one joint account holder may execute against a joint account only to the extent of the debtor's equitable interest in the account. The Court adopted the majority rule and held that a co-owner of a joint account can rebut the presumption of joint ownership by proving, by clear and convincing evidence, which portion of the account belongs to each co-owner.

The Court next turned its attention to the specific facts related to the case at hand. The Court observed that the trial court had considered copious evidence when it determined that Father had proved, by clear and convincing evidence, that he was the sole owner of all funds held in the joint account. The Court of Special Appeals held that the circuit court's factual findings were supported by the evidence presented and that the trial court did not err in concluding that Father had effectively rebutted the presumption of joint ownership. Accordingly, the Court of Special Appeals affirmed.

Maryland Commissioner of Financial Regulation v. CashCall, Inc., et al., No. 1477, September Term 2013, filed October 27, 2015. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2015/1477s13.pdf

COMMERCIAL LAW – MARYLAND CREDIT SERVICES BUSINESS ACT – DEFINITION OF "CREDIT SERVICES BUSINESS" – WHEN DIRECT PAYMENT FROM CONSUMER REQUIRED

COMMERCIAL LAW – MARYLAND CREDIT SERVICES BUSINESS ACT – DEFINITION OF "CREDIT SERVICES BUSINESS – LEGISLATIVE HISTORY

COMMERCIAL LAW – MARYLAND CREDIT SERVICES BUSINESS ACT – DEFINITION OF "CREDIT SERVICES BUSINESS" – DIRECT PAYMENT FROM CONSUMER

Facts:

CashCall, a California corporation, and its president and sole share-holder, John Paul Reddam, were engaged in the business of marketing small loans to Maryland consumers. The loans were to be issued, at interest rates significantly greater than those permitted by Maryland law, by two federally insured out-of-state banks. CashCall provided consumers with an application for the loan and offered assistance in filling out that application. It then forwarded completed applications to one of the two federally insured out-of-state banks for approval. Once an application was approved by one of the two banks, that bank would disburse the loan to the consumer, though subtracted from the amount of the loan was an "origination fee," that is, "a fee charged by a lender for preparing and processing a loan."

After the loan was made, CashCall would promptly purchase the loan from the issuing bank. Upon purchasing a loan, CashCall acquired the right to enforce the loan's terms and to collect the payments that were to be made by the borrowing consumer under the terms of the loan, including all interest, penalties, and fees. Thus a Maryland consumer, who used CashCall to obtain such a loan, never paid any loan payments or, for that matter, any fees or other payments of any nature, to the out-of-state bank that initially issued the loan, but, instead, made all such payments directly to CashCall. In making loan payments to CashCall, the consumer paid CashCall the origination fee, which had been "rolled into" the amount of the loan.

The Commissioner, after receiving consumer complaints regarding CashCall's collection activities on the loans it had arranged for them, investigated CashCall's business activities. He found that CashCall was operating as a "credit services business," as defined by the Maryland Credit Services Business Act ("MCSBA"), without having the required license to do so, ordered CashCall and Reddam to cease and desist from engaging in "credit services business" activities

in Maryland, and imposed a civil penalty for each of the loans CashCall had assisted consumers in obtaining.

CashCall filed a petition for judicial review in the Circuit Court for Baltimore City, and that court reversed the Commissioner's final order, concluding that CashCall was not a "credit services business" under the MCSBA and therefore was not required to comply with the terms of that act.

Held: Reversed

The requirement set forth in *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128 (2012), that, in order to be a "credit services business" subject to the requirements of the MCSBA, a business must receive payment directly from a Maryland consumer in return for its assistance in obtaining a loan for the consumer, was not intended to apply to businesses whose sole purpose is arranging loans. *Gomez* addressed a different set of facts, where there were two separate commercial relationships between the business, Jackson Hewitt, and the consumer: one relationship for tax preparation purposes and the other for facilitating a loan. For the business to be subject to the MCSBA, a direct payment for the credit services was necessary to define what party fulfilled what role in these separate commercial transactions. Thus, the "direct payment" requirement set forth in *Gomez* was intended to apply only to businesses that offer loan arrangement services as an ancillary service, separate and distinct from the principal services they provide to Maryland consumers. In the instant case, loan arrangement services were the ***only*** services CashCall provided to Maryland consumers. Since the nature of the commercial relationship between CashCall and the consumers was clear, it was not necessary to make the applicability of the MCSBA contingent on whether the consumers had made a "direct" payment to CashCall.

Moreover, making the MCSBA's applicability contingent on a "direct payment" from the consumer to the business entity, under any and all circumstances, would undermine the protections for Maryland consumers the legislature sought to put in place. The legislative history of the MCSBA demonstrates the legislature's intention to protect Maryland consumers from the lending practices of businesses that market high-interest small loans and partner with out-of-state banks in order to charge what would be usurious rates of interest under Maryland law, regardless of whether such businesses receive "direct payment" from consumers for that service.

Finally, even if it were the case that an enterprise, regardless of the nature of its business and the services it provides, cannot be a "credit services business" unless it is directly paid by the consumers it services, the direct payment requirement was satisfied here. CashCall received direct payment from Maryland consumers for its assistance in obtaining a loan for the consumers after it assisted the consumers in applying for the loans, promptly purchased the loans from the lending bank, and thereafter collected from the consumers all payments on the loans, including the payment of the "origination fee," that is, the fee charged by a lender for preparing and processing a loan.

In Re: Nick H., No. 2768, September Term 2010, filed September 29, 2015. Opinion by Woodward, J.

http://www.mdcourts.gov/opinions/cosa/2015/2768s10.pdf

CONSTITUTIONAL LAW – MARYLAND SEX OFFENDER REGISTRATION ACT ("MSORA") – JUVENILE SEX OFFENDER – RETROACTIVE APPLICATION OF MSORA TO JUVENILE SEX OFFENDER NOT VIOLATIVE OF CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* LAWS

Facts:

In 2006 appellant, Nick H., entered a plea of involved in juvenile court to two counts of second degree sexual offense involving a five-year-old boy. Appellant was fifteen years old at the time of the abuse. Appellant was adjudicated delinquent and placed in residential treatment for about ten months. Thereafter, appellant was placed on probation with outpatient sex offender treatment.

Approximately six months prior to appellant's twenty-first birthday, the State requested that the juvenile court order appellant to register as a sex offender upon leaving the jurisdiction of the juvenile court. Such request was made pursuant to the 2009 and 2010 amendments to the Maryland sex offender registration act ("MSORA"). After holding a hearing, the juvenile court determined, by clear and convincing evidence, that appellant was "at significant risk of committing a sexually violent offense or an offense for which registration as a tier II sex offender or tier III sex offender is required." See Md. Code 2001, 2008 Repl. Vol., 2010 Cum. Supp. § 11-704(c) of the Criminal Procedure Article ("CP 2010"). As a result, the court placed appellant on the sex offender registry for a period of five years. The court also advised appellant that under MSORA he had the opportunity during that five year period to come back to court and ask to be removed from the registry. See CP 2010 § 11-707(a)(4)(iv).

Appellant appealed the juvenile court's order placing him on the sex offender registry.

Held: Affirmed.

Before the Court of Special Appeals, appellant argued that under *Doe v. Dep't of Pub. Safety & Corr. Servs*, 430 Md. 535 (2013), the retroactive application of MSORA to him violated the prohibition against *ex post facto* laws contained in Article 17 of the Maryland Declaration of Rights. The Court disagreed.

The Court first decided that the appropriate standard for evaluating a challenge to a statute under the *ex post facto* clause of Article 17 is the "intent-effects test" set forth in *Smith v. Doe*, 538

U.S. 84 (2003). The intent-effects test is a two-step process wherein the court first determines whether the legislature intended to establish a civil proceeding, and if so, whether the statutory scheme is so punitive in purpose or effect as to negate the legislature's intention.

Relying on *Young v. State*, 370 Md. 686 (2002), the Court first determined that MSORA was intended "as a regulatory requirement aimed at protection of the public." *Id.* at 712. The Court then analyzed the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) to ascertain whether MSORA's effect rendered the statute punitive. Of greatest importance to the Court's analysis was the last *Mendoza-Martinez* factor, namely, whether the sanction of MSORA as applied to a juvenile sex offender is excessive despite its non-punitive purpose.

The Court noted that under MSORA a juvenile court has the authority to place a juvenile sex offender on the sex offender registry after leaving the jurisdiction of the juvenile court only if, among other things, (1) the juvenile had committed a particular sex crime; (2) the State's Attorney or the Department of Juvenile Services requests registration; and (3) the court, after a hearing, determines under a clear and convincing evidence standard that the juvenile is "at significant risk of committing a sexually violent offense" or a tier II or III offense. CP 2010 § 11-704(c). In addition, the juvenile court may order registration for a period of up to five years. CP 2010 § 11-707(a)(4)(iv). Finally, the court may reduce the registration term originally ordered if the registrant requests a reduction, and the court agrees to such request. *Id.* In contrast, adult sex offenders are automatically placed on the sex offender registry if they have committed an enumerated offense, without any individualized assessment of their threat to society, and they have no process by which to remove their names from the registry or to reduce the period of registration.

Consistent with courts of other jurisdictions that have upheld registration statutes against *ex post facto* challenges, the Court concluded that, because of the statutory requirement of an individualized assessment of a juvenile sex offender, under a clear and convincing evidence standard, before placement on the sex offender registry, and the opportunity to seek reduction in the term of registration, the retroactive application of MSORA to a juvenile sex offender does not constitute additional punishment under the intent-effects test. Accordingly, the Court held that the application of MSORA to appellant does not violate the prohibition against *ex post facto* laws contained in Article 17.

Richmond D. Phillips v. State of Maryland, No. 456, September Term 2013, filed October 27, 2015. Opinion by Friedman, J.

http://www.mdcourts.gov/opinions/cosa/2015/0456s13.pdf

STATUTES – INTERPRETATION OF OBSOLETE DNA STATUTE

Facts:

Appellant Phillips challenged the DNA evidence the State introduced against him at trial, where he was convicted of two counts of murder in the first degree and sentenced to two consecutive terms of life imprisonment. The DNA evidence was analyzed by the Prince George's County DNA laboratory with procedures validated by the FBI Quality Assurance Standards for Forensic DNA testing laboratories.

At trial, the trial court determined that the DNA evidence was not automatically admissible under § 10-915 of the Courts and Judicial Proceedings ("CJP") Article of the Maryland Code because it did not include certification that the analysis was performed according to the standards promulgated by either the Technical Working Group on DNA Analysis Methods (TWGDAM) or the DNA Advisory Board, as required by the statute. As such, the trial court held a *Frye-Reed* hearing and determined that the evidence was admissible as generally accepted in the relevant scientific community.

On appeal, Phillips contended that the trial court was correct to conclude that the DNA evidence was not automatically admissible under CJP § 10-915, but erred in concluding that the DNA evidence was admissible under *Frye-Reed* because the laboratory failed to apply a stochastic threshold in its analysis. Additionally, Phillips argued that his Sixth Amendment right to a public trial was violated when the trial court temporarily closed the courtroom during jury instructions.

Held: Affirmed.

The Court concluded that § 10-915 of the Courts and Judicial Proceedings Article of the Maryland Code is obsolete because it requires that, to be automatically admissible, a DNA profile must include certification that the DNA analysis was performed according to standards promulgated by two entities that no longer exist—the Technical Working Group on DNA Analysis Methods (TWGDAM) and the DNA Advisory Board. Furthermore, the Court concluded that the proper way to deal with a statue that is obsolete on its face is to look to the legislature's intent and work to effectuate that intent in the present legal and factual landscape.

In this case, the Court concluded that legislature intended to create a statute that would track cutting-edge DNA science and ensure automatic admissibility only if the DNA techniques

complied with the standards promulgated by the most rigorous standards-setting body available. SWGDAM, the successor entity to TWGDAM and the DNA Advisory Board, is responsible for recommending rigorous DNA analysis standards to the FBI. Thus, a DNA analysis would be automatically admissible, pursuant to CJP § 10-915, if it had a statement that it had been conducted pursuant to standards promulgated by SWGDAM. Unlike SWGDAM recommendations, however, the FBI Quality Assurance Standards do not reflect the most recent advances in DNA analysis. Thus, while a DNA analysis conducted pursuant to the FBI Quality Assurance Standards may be admissible, it is not automatically admissible under CJP § 10-915.

As to Phillips' *Frye-Reed* argument, the Court concluded that the State sufficiently demonstrated that the Prince George's County DNA laboratory's analysis of the DNA sample was admissible under *Frye-Reed* because the laboratory complied with the FBI Quality Assurance Standards—the minimum national standards for forensic laboratories—and because forensic laboratories commonly use the same methods employed by the laboratory. While the use of a validated stochastic threshold may be a current best practice, the Prince George's County DNA laboratory's failure to use a stochastic threshold does not make its analysis "junk science." The Prince George's County DNA laboratory used a generally accepted methodology to analyze the DNA sample, as required for admissibility under *Frye-Reed*.

Finally, the Court held that Phillips' right to public trial was not violated where the trial court temporarily closed the courtroom from persons who wished to enter or exit during jury instructions because the trial court made repeated efforts to ensure that anyone who wished to be present was in attendance.

Calvin Jerome Hall v. State of Maryland, No. 2757, September Term 2013, filed September 30, 2015. Opinion by Reed, J.

http://www.mdcourts.gov/opinions/cosa/2015/2757s13.pdf

EVIDENCE – OPINION EVIDENCE – COMPETENCY OF EXPERTS – KNOWLEDGE, EXPERIENCE, AND SKILLS

Facts:

The appellant was charged with malicious destruction of property, first-degree burglary, and theft of $10,000 to $100,000 in value. Although he was acquitted at trial of the malicious destruction of property charge, he was convicted of the charges of first-degree burglary and theft of $10,000 to $100,000 in value. The State produced evidence that within two weeks after the burglary the appellant sold nine pieces of jewelry that were stolen from the burglarized home to a pawn shop in a neighboring state. The first of these sales took place at approximately 5:45 p.m. on the day of the burglary. In addition, over the appellant's objections, a State Trooper was offered and accepted as an expert in reading cell site data and plotting it onto a map. The State Trooper testified that based on the appellant's cell site data, the appellant was in the vicinity of the burglarized home within the window of time in which the burglary was believed to have occurred.

The appellant challenged his convictions on appeal. He argued that the trial court erred in ordering him to pay restitution for damage to the front door of the burglarized home even though the malicious destruction of property charge of which he was acquitted was based solely on damage to the same door. He also argued that the State Trooper was not sufficiently qualified to testify as an expert on plotting cell site data and that the evidence was insufficient to sustain his conviction.

Held: Affirmed.

The trial court did not err in ordering the appellant to pay restitution relating to damage to the front door of the burglarized home. Section 11-603(a)(1) of the Criminal Procedure Article allows a sentencing court to order restitution "if, as a direct result of the crime or delinquent act, property of the victim was stolen, damaged, destroyed, converted, or unlawfully obtained, or its value substantially decreased." The fact that the appellant was acquitted of the malicious destruction of property charge–which was based solely on the damage to the front door–does not affect whether the front door damage was a "direct result" of the burglary, which it was.

The trial court did not abuse its discretion in permitting the State Trooper to testify as an expert. In *State v. Payne*, 440 Md. 680 (2014), the Court of Appeals affirmed our holdings in *Wilder v. State*, 191 Md. App. 319 (2010), *cert. denied*, 415 Md. 43 (2010), and *Coleman-Fuller v. State*, 192 Md. App. 577 (2010), that cell site evidence may only be admitted through the testimony of an expert witness. In *Wilder* and *Coleman-Fuller*, we held that cell site evidence was improperly admitted through the lay opinion testimony of law enforcement officers. Here, however, the State Trooper who testified on the cell site data had been accepted as an expert. We declined to extend *Wilder* and *Coleman-Fuller* to prohibit law enforcement officers from ever being qualified as experts in cell site data plotting and held that the trial court did not abuse its discretion in accepting the State Trooper as an expert because he was sufficiently qualified under Rule 5-702.

The evidence was sufficient to support the appellant's convictions. Pursuant to *Molter v. State*, 201 Md. App. 155 (2011), we held that the appellant's unexplained possession of recently stolen property was sufficient by itself to permit the jury to infer that he committed the burglary and theft.

Penny McCrimmon v. State of Maryland, No. 1255, September Term 2013, filed October 27, 2015. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2015/1255s13.pdf

SENTENCING AND PUNISHMENT – RESTITUTION – NURSING HOME CREDITOR NOT A VICTIM FOR PURPOSES OF RESTITUTION STATUTES

Facts:

In January of 2012, Penny McCrimmon pled guilty to the charge of fraudulent appropriation by a fiduciary. Her conviction stemmed from her service as a financial agent for her cousin, Reginald Gant, pursuant to a written power of attorney. Gant was in poor health and was admitted to the Chapel Hill Nursing Home. McCrimmon collected Gant's income, but did not pay his bills, most notably his sizable nursing home bill. Upon her conviction in the Circuit Court for Baltimore County, McCrimmon received a suspended sentence of probation and was ordered to pay nearly $20,000 in restitution to the nursing home—a bill Gant wanted paid. She sought post-conviction relief, claiming that the restitution component of her sentence was illegal. When this relief was denied, she sought leave to appeal to the Court of Special Appeals.

Held: Order of restitution vacated; case remanded to the circuit court.

On appeal, McCrimmon argued that the nursing home was a mere creditor of Gant and not a victim statutorily entitled to restitution. Maryland Code (2001, 2008 Repl. Vol., 2014 Supp.), Criminal Procedure Article ("CP") §§ 11-601(j) and 11-603(a), with certain exceptions, authorize restitution to a victim who suffers loss "as a direct result of a crime." In reliance on this language, prior case law excluded creditors of a victim from obtaining restitution.

The appellate court said:

> In many respects, the nursing home here appears to be more than a mere creditor. Even on the sketchy record before us, it is obvious that Chapel Hill's thumbprints are all over the form that made McCrimmon Gant's financial agent. Both the Durable Unlimited Power of Attorney Form and the Advance Directive were witnessed by an employee or employees of Chapel Hill, most likely at the facility. And it is safe to say that absent Gant's admission to the nursing home, such forms would have never been executed and the opportunity to embezzle would have never been presented. Significantly, as the Attorney General told residents in his consumer manual on nursing homes:

> If you have a financial agent, that person must pay the nursing home using your resources. The agent does not accept personal responsibility for your debts, but does accept responsibility to use your resources to pay your debts.

Attorney General's Office, *Nursing Homes: What You Need to Know*, at 42-43 (2012). Similarly, the Attorney General's manual goes on to note:

> If you are a nursing home resident's financial agent, you must use the resident's money appropriately. In most cases, this means using their money to pay for the resident's nursing home care. If you are a financial agent, you should not use the resident's money for your personal benefit.

Id. at 44 (Emphasis added). Adding to this description of industry practices is the fact that Gant apparently wants the nursing home to be paid for its services.

Slip op. at 8-9. However, the Court of Special Appeals noted:

> On the opposite side of the ledger, the Durable Unlimited Power of Attorney Form speaks in the most general terms of the financial agent's duties with respect to Gant's financial and business transactions and does not specifically mention obligations to the nursing home. This document does not treat a nursing home any differently from any other creditor of Gant that McCrimmon was authorized to pay. Under these circumstances, to treat a nursing home as an entity suffering loss as a "direct result" of the embezzlement—even if Gant consented to the restitution order—would eviscerate the clear text of the restitution statutes.

Slip op. at 9-10.

The State also argued that under CP § 11-606(a)(3) the nursing home was a "third-party payor" who "compensated" the victim for pecuniary loss or paid "an expense" on behalf of the victim. The court rejected this contention, noting that the nursing home did not "pay" anything. Finally, the court said that the nursing home could not rely on CP § 11-606(a)(5), which authorizes restitution to a person who has provided a victim "services for which restitution is authorized under § 11-603 of this subtitle." The latter statute did not include a creditor such as Chapel Hill, the court said. Thus, the court vacated the restitution order.

The court also remanded the cases for these reason:

> The State has requested that if we vacate the restitution order, then the case should be remanded for a correct determination of the amount of restitution. On remand, McCrimmon is also free to urge the court to find under § 11-605(a)(1) that she does not have the ability to pay the judgment of restitution. Finally, because Gant has previously indicated that he wants to see Chapel Hill's bill paid,

> the State may seek a restitution order for Gant as a true victim of McCrimmon's offence. And, if he so chooses, the victim may assign the judgment to Chapel Hill as provided in Maryland Rule 2-624. *See also* 46 Am. Jur. 2d Judgments § 431 (2015). Of course, he is under no obligation to make such an assignment.

Slip op. at 10-11.

Juan Carlos Sanmartin Prado v. State of Maryland, No. 1078, September Term 2014, filed October 2, 2015. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2015/1078s14.pdf

CRIMINAL LAW – WRIT OF ERROR CORAM NOBIS

Facts:

Appellant, Juan Carlos Sanmartin Prado, appealed the denial of his writ of error coram nobis by Circuit Court for Baltimore County alleging ineffective assistance of counsel. On January 6, 2011, Sanmartin Prado proceeded to trial on an agreed statement of facts and was convicted of second-degree child abuse. Sanmartin Prado is a legal permanent resident of the United States, and after serving his sentence, he was arrested by Immigration and Customs Enforcement and placed into deportation proceedings.

Sanmartin Prado filed the writ of error *coram nobis* alleging that his defense attorney failed to properly advise him of the immigration consequences of his conviction, as required by *Padilla v. Kentucky*. Sanmartin Prado alleged he would not have proceeded on an agreed statement of facts knowing the definite deportation risk that would follow his conviction.

Held: Reversed and remanded.

To meet the standard set out in *Padilla v. Kentucky*, defense counsel to a noncitizens criminal defendant must give an unqualified and unambiguous explanation of the deportation risk of a criminal conviction. Sanmartin Prado's defense attorney's instruction that he was "possibly deportable" was inadequate under *Padilla*, and thus Sanmartin Prado had a viable ineffective assistance of counsel claim. Although we reverse the decision of the Circuit Court denying Sanmartin Prado's *coram nobis* petition, we remand the case to determine, in light of the improper advice by defense counsel, whether Sanmartin Prado was prejudiced by this advice.

James B. Nutter & Co. v. Edwina E. Black, et al., No. 1563, September Term 2013, filed September 30, 2015. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2015/1563s13.pdf

ESTATES AND TRUSTS – CONVEYANCES BY ADJUDICATED DISABLED PERSONS – E.T. § 13-206(c)(1)

CONTRACT REMEDIES – UNJUST ENRICHMENT AND SUBROGATION – OFFICIOUS PAYORS

Facts:

Ms. Black was adjudicated to be disabled in 1989. Moore has been the substitute guardian of Ms. Black's property since 1994.

In 1995, Moore purchased a home in Baltimore County for Ms. Black's use. To pay for the purchase, Moore took out a loan, signing a deed of trust note and a purchase money deed of trust. The deed of conveyance identified Ms. Black as the grantee and also contained a note referencing the guardianship action. The deed of trust was signed "Edwina E. Black by David L. Moore, Guardian of the Property of Edwina E. Black." And, in 2007, the guardianship action was transferred from the Circuit Court for Baltimore City to the Circuit Court for Baltimore County.

In 2009, Ms. Black entered into a reverse mortgage transaction with Nutter. Nutter engaged a title agent to examine the title to Ms. Black's residence, but the guardianship action was never identified in the court record. Ms. Black executed two deeds of trust to secure repayment of the loan, and, at closing, Nutter paid $154,317.13.

Moore was unaware of the transaction until he received a notice that the loan had been satisfied and the deed of trust released. Moore made inquiries and learned of the transaction. Moore informed Nutter of Ms. Black's disability and requested the documents related to the transaction. Ultimately, Moore asserted that the contract was void and refused to ratify or disaffirm it.

Nutter filed suit in the Circuit Court for Baltimore County seeking ratification of the transaction, and relief through restitution and subrogation. The circuit court concluded that the transaction was void, denied Nutter's claim for restitution, and determined that Nutter was not entitled to be subrogated to the position of the previous loan holder because it had no interest in Ms. Black's property and thus was officious in paying off the loan.

On appeal, Nutter contended that the circuit court erred in holding that the transaction was void and in refusing to provide it relief through restitution and subrogation.

Held: Affirmed.

Appointment and qualification of a guardian of the property of an adjudicated disabled person "vests in him title to all property . . . of the protected person that is held at the time of appointment or acquired later." Estates and Trusts § 13-206(c)(1). Any conveyance by a disabled person, after the appointment of a guardian, is void *ab initio* because the disabled person no longer holds legal title to his or her property. Because title to Ms. Black's property was vested in Moore, at the time of his appointment, Ms. Black had no title to convey to Nutter, and thus the reverse mortgage transaction was void.

Treating conveyances by adjudicated disabled persons as void *ab initio* furthers the purposes of Maryland's guardianship law. Pursuant to Estates and Trusts § 13-206(c)(1), a guardian is obligated to "discharge his duties for the best interest of the . . . disabled person or his dependents." By treating the conveyances as void, as opposed to voidable, guardians are relieved of the obligation to restore purchasers to their pre-contract positions to the detriment of the guardianship estate.

A good faith purchaser is one who "acquires property for valuable consideration, in good faith, and without notice of another's prior claim to the property." *Fishman v. Murphy*, 433 Md. 534, 546 (2013). All potential purchasers of real property are on constructive notice of properly indexed information in the land and court records of the county in which the property is located. *See Greenpoint Mortgage Funding v. Schlossberg*, 390 Md. 211, 228-30 (2005). A court order appointing a guardian of the property is constructive notice to the world that the disabled person is without authority to convey his or her property. *Flach v. Gottschalk*, 88 Md. 368, 374 (1898); *Seaboard Surety Co. v. Boney*, 135 Md. App. 99, 117 n.3 (2000). Both the land and court records of Baltimore County disclose that Ms. Black is disabled and that Moore is the guardian of her property. Nutter was on constructive notice of the guardianship action and cannot now assert that it was unaware that the proceeding was pending.

Relief in the form of restitution or subrogation is not available to a person, or entity, that is officious in paying the debt of another. *Hill v. Cross Country Settlements*, 402 Md. 281, 301-02 (2007). "[G]enerally a plaintiff is not officious when he or she acts under a legal compulsion or duty, acts under a legally cognizable moral duty, acts to protect his or her own property interests, acts at the request of the defendant, or acts pursuant to a reasonable or justifiable mistake as to any of the aforementioned categories." *Id*. at 305. Because the contract between Nutter and Ms. Black is void, there is no contract to which Nutter can turn to demonstrate that it was acting pursuant to a legal duty. Nutter does not assert that it was acting under any sense of moral duty, nor can it, because, from Nutter's standpoint, this was strictly a business transaction. Nutter was also not acting to protect any property interest – the contract was void and Nutter did not have any interest in Ms. Black's property. Moreover, Nutter cannot claim to have acted at the request of Ms. Black because she is a disabled person and only Moore had the authority to make

decisions on her behalf. Because Nutter was on constructive notice of Ms. Black's disability, it cannot assert that it was unaware of her condition.

Maryland Board of Physicians, et al. v. Anne Geier, et al., Nos. 722 and 2256, September Term 2014, filed October 1, 2015. Opinion by Arthur, J.

Friedman, J., concurs.

http://www.mdcourts.gov/opinions/cosa/2015/0722s14.pdf

APPEALABILITY – COLLATERAL ORDER DOCTRINE

HEALTH OCCUPATIONS – RECORDS NOT DISCOVERABLE OR ADMISSIBLE

PRIVILEGE – EXECUTIVE OR DELIBERATIVE PRIVILEGE

PRIVILEGE – ATTORNEY-CLIENT PRIVILEGE

Facts:

During the pendency of disciplinary proceedings against Dr. Mark Geier for violations of the Medical Practice Act and against his son David Geier for practicing medicine without a license, the Maryland Board of Physicians issued a cease-and-desist order against Dr. Geier. The order alleged that Dr. Geier had written prescriptions for himself, his son David Geier, and his wife Anne Geier, at a time when Dr. Geier's medical license had been suspended. The document, which was posted in view of the public on the Board's website, also detailed the Geiers' confidential medical information, by identifying the specific medications prescribed to each of the Geiers and the conditions that each medication typically treated.

The Geiers brought an action against the Board in the Circuit Court for Montgomery County, alleging that the Board committed the tort of invasion of privacy and that the Board deprived them of their constitutional rights to privacy by disclosing their personal information. The Geiers then adopted a maximalist approach to discovery, filing multiple motions to compel and motions for sanctions. They did not limit their discovery requests to the circumstances surrounding the Board's disclosure of their medical information. Instead, they sought documents and testimony to reveal the Board's decisional processes in the pending administrative proceedings against Dr. Geier and Mark Geier.

One of the Geiers' motions to compel concerned two classes of documents: the Board's administrative investigatory file for disciplinary proceedings against another doctor, a partner of Dr. Geier; and certain communications between the Board's attorneys and one of its investigators. In an order entered on June 17, 2014, the court granted the Geiers' motion and ordered the Board to disclose the requested documents. The Board took an immediate appeal under the collateral order doctrine, in case number 722.

Before the Court of Special Appeals had issued an order staying further discovery, the Geiers served notice of deposition for a representative of the Board. The Board's representative first failed to appear, and then the designee later appeared for a deposition but was unprepared to address many of the topics in the notice, including the topic of the Board's investigation of Dr. Geier's partner. Granting the Geiers' motion, the court imposed a sanction of a default order as to the Board's liability in the invasion of privacy action. The court reserved judgment on the issue of damages. The Board then attempted to take an appeal from that December 16, 2014, order of default, in case number 2256.

The Court of Special Appeals consolidated the two appeals for the purposes of briefing and argument. The Geiers moved to dismiss both appeals, contending that neither order was appealable.

Held: Motion to dismiss appeal No. 722 denied. Motion to dismiss appeal No. 2256 granted. Discovery order of June 14, 2014, vacated and case remanded for further proceedings.

The collateral order doctrine, a narrow exception to the final judgment rule, permits parties to appeal certain interlocutory orders that conclusively resolve an important issue completely separate from the merits of the action that would be effectively unreviewable on an appeal from the final judgment. The doctrine may permit immediate appeals from certain discovery orders that permit a litigant to inquire into the decisional processes of high-level government officials, such as administrative adjudicators.

Under the collateral order doctrine, the State Board of Physicians could immediately appeal the discovery order of June 14, 2014, which had compelled the Board to disclose its investigatory file from disciplinary proceedings against Dr. Geier's partner. The discovery order met all criteria for the application of the collateral order doctrine: (1) it conclusively determined that the Board was required to produce evidence of its deliberations and decisional processes; (2) the issue resolved was of great importance because of the potentially great harm to the public by the disruption of governmental processes; (3) the discovery issue was completely distinct from the merits of the underlying tort claim; and (4) no effective remedy could be granted in an appeal from a final judgment because harm to the public interest occurs at the time the administrative decision-makers were compelled to disclose their deliberative processes.

In prior cases, Maryland courts invoked the collateral order doctrine to permit immediate review of orders compelling depositions of administrative decision makers in the context of actions for judicial review of administrative decisions. The doctrine also applied here to the orders to compel production of documents in this tort action. The record made it apparent that the Geiers were using the discovery process in the tort action to circumvent the limitations on discovery in their actions for judicial review of the disciplinary proceedings against them. Furthermore, the Board had the right to appeal even though the attempt to invade their decisional processes came in the form of a request for the production of documents rather than a request for depositions.

An immediate appeal pursuant to the collateral order doctrine envisions only review of an order that is collateral — that is, completely separate from the merits of the case. The collateral order doctrine does not allow parties to contest every order in the case as though the court had entered a conventional final judgment. Under the circumstances, appellate jurisdiction for the appeal from the June 14, 2014, discovery order extended only to a review that collateral discovery ruling and a simultaneous ruling (resolving an issue of attorney-client privilege) that formed part of the collateral order. The Court of Special Appeals did not have jurisdiction to consider other orders that related to the merits, such as a previously-entered order denying a motion to dismiss, or the subsequently-entered order of default as to liability.

The Board did not have the independent right to take an immediate appeal from the December 16, 2014, order of default as to liability. The order of default was not a final judgment because it left open the issue of damages. Consequently, the Court of Special Appeals was required to dismiss the Board's appeal from the order of default.

Turning to the merits of the appeal from the discovery order, the Court of Special Appeals held that the circuit court erred in compelling the Board of Physicians to disclose to the Geiers the Board's records in a separate matter involving another doctor.

Maryland Code (1981, 2014 Repl. Vol.), § 14-410 of the Health Occupations Article, limits the discoverability and admissibility of documents related to disciplinary actions before the Board. Section 14-410(a) announces a rule that the proceedings, records, or files of the Board, a disciplinary panel, or any of its investigatory bodies are neither discoverable nor admissible absent express stipulation and consent of all parties. Section 14-410(b) creates an exception under which those same documents may be discoverable and admissible in "a civil action brought by a party to a proceeding before the Board or the disciplinary panel." This provision does not, however, allow a party to a proceeding involving the Board to obtain documents from a different proceeding involving a different party. This exception to the general rule of confidentiality exists only to allow a physician aggrieved by a disciplinary decision to discover files from the cases in which the physician was a party or in which the physician was the subject of the Board's action. Thus, the Geiers could not rely on this exception to discover the Board's files that related to Dr. Geier's partner.

The circuit court also erred when it rejected the Board's invocation of common-law deliberative privilege without conducting the required balancing analysis. Under deliberative privilege, a species of executive privilege, the judiciary is not authorized to probe the mental processes of an executive or administrative officer. If the government asserts executive or deliberative privilege in a case in which the government is itself a party, or in which the government has been accused of wrongdoing, the circuit court should weigh the government's need for confidentiality against the litigant's need for disclosure and the impact of nondisclosure upon the fair administration of justice. Remand was required to allow the circuit court to re-evaluate whether common-law deliberative privilege excused the Board from disclosing the Board's file regarding Dr. Geier's partner.

At the same time the circuit court compelled the Board to disclose documents concerning its deliberative processes, the court also ordered the Board to produce some putatively privileged communications between the Board's attorneys and an investigator for the Board. The circuit court erred in rejecting the claim of attorney-client privilege asserted by the agents and employees of the Board for their communications with the Board's attorneys. Certain State guidelines establish a firewall to separate the attorneys who investigate and prosecute administrative proceedings before the Board from the attorneys who advise the Board. These guidelines had no effect on the confidentiality of communications between the Board's agents or employees and the attorneys who represent them as parties or witnesses in a civil action against the Board and against its agents and employees.

James G. Davis Construction Corporation v. Erie Insurance Exchange, No. 802, September Term 2014, filed October 28, 2015. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2015/0802s14.pdf

INSURANCE – CONTRACTS AND POLICIES – DUTY TO DEFEND

Facts:

Employees of a subcontractor, Frost Fire Insulation ("Frost Fire"), filed a lawsuit against the general contractor, the James G. Davis Constr. Corp. ("Davis"), and another subcontractor, Tricon, for injuries arising from the collapse of scaffolding erected by Tricon. The Frost Fire employees alleged one count of negligence against Tricon and one count of negligence against Davis.

Tricon and Davis had agreed that Tricon would indemnify Davis for claims arising from Tricon's conduct. Accordingly, Erie Ins. Co. ("Erie") insured Tricon with a policy that included Davis as an additional insured. The policy provided that Erie would cover Davis for certain injuries "caused, in whole or in part, by: 1. [Tricon's] acts or omissions; or 2. The actions or omissions of those acting on [Tricon's] behalf[.]" Further, Davis was issued a certificate that included an additional insured endorsement for Davis. The certificate limited coverage only to cases arising out of Tricon's ongoing operations performed for Davis. After being served with the Frost Fire employees' complaint, Davis notified Erie of the litigation and tendered its defense to Erie. Erie, however, declined to assume Davis's defense claiming that the policy did not cover Davis for its own negligent acts.

Davis filed a complaint in the Circuit Court for Montgomery County alleging that Erie breached its contract with Davis by failing to honor its duty to defend and indemnify Davis in the tort litigation. Davis and Erie filed cross-motions for summary judgment. The circuit court granted judgment in favor of Erie finding that Davis qualifies as an additional insured, but that the policy does not cover Davis for Davis's own negligence. The circuit court concluded that the policy only covered Davis for claims of vicarious liability arising out of Tricon's performance.

Held: Reversed.

The Court of Special Appeals held that the circuit court erred in declaring that the terms of the policy limited coverage of Davis to claims of vicarious liability arising from Tricon's actions.

The Court of Special Appeals applied the two part test in *Aetna Cas. & Sur. Co. v. Cochran*, which first, requires a determination of the coverage and defenses under the terms of the insurance policy, and second, requires a determination of whether the allegations in the tort

action bring the claim within the policy's coverage. 337 Md. 98, 103-04 (1981). When articulating the scope of the policy, the Court of Special Appeals analogized this case to *G.E. Tignall & Co. v. Reliance Nat. Ins. Co.*, 102 F. Supp. 2d 300 (D. Md. 200), and declined to rely on the more narrow language in the additional insured endorsement on the certificate of liability insurance. Rather, the court employed the broader language in the policy issued by Erie.

The Court of Special Appeals then considered whether the terms of the policy require Erie to defend Davis in the action against Frost Fire. The Court of Special Appeals relied on *Rivera v. Prince George's Cnty. Health Dep't*, 102 Md. App. 456, 475 (1994), for the proposition that vicarious liability means that a third party is liable only by virtue of a relationship with a wrongdoer, and that the third party is otherwise innocent. Accordingly, the Court reasoned that interpreting the language in the policy, which created liability for Erie for conduct "caused, in whole or in part, by" Tricon, as a vicarious liability standard would be too narrow. Rather, the Court held that the policy merely requires a showing that the subcontractor's acts or omissions were a proximate cause of the tort plaintiff's injuries.

The Court then observed that the trial court erred in not examining the compliant to determine whether Davis's liability was alleged to be proximately caused by Tricon's acts or omissions. The Court of Special Appeals further observed that the allegations of the complaint demonstrate that the claim of liability against Davis, if proven, would be proximately related to Tricon's conduct. As such, the claim of negligence against Davis was "caused, in whole or in part, by" Tricon's conduct, and, therefore, falls within the terms of the additional insured endorsements of the Policy. Accordingly, the Court of Special Appeals reversed the judgment of the circuit court and held that Erie had a duty to defend Davis in the litigation against Frost Fire.

Allstate Insurance Company v. Austria Kponve, No. 100, September Term 2014, filed October 28, 2015. Opinion by Salmon, J.

http://www.mdcourts.gov/opinions/cosa/2015/0100s14.pdf

INSURANCE – RIGHT OF RECOVERY BY UNDERINSURED MOTORIST AGAINST HER OWN INSURANCE CARRIER WHEN THE UNDERINSURED CARRIER INTERVENES IN A TORT SUIT FILED BY THE INSURED AGENT AN UNDERINSURED MOTORIST

Facts:

Allstate provided underinsured motorist coverage to Austria Kponve ("Kponve") who was involved in an accident with Douglas Mendoza ("Mendoza"), an underinsured motorist. Kponve sued Mendoza for negligence in the Circuit Court for Montgomery County and Allstate intervened in that suit. Prior to trial, Mendoza's insurance carrier, AMI Insurance Group - American Independent Companies, Inc., with the permission of Allstate. settled Kponve's suit against Mendoza, which left Allstate as the only remaining defendant. On the morning of trial, the parties stipulated that at the time of the accident, Allstate had issued Kponve a policy that afforded her under insurance coverage and that the policy was in effect the date of the accident. The case went to trial and the jury returned a verdict in favor of Kponve for $374,000. The clerk then entered a judgment against Allstate in the same amount as the verdict. Allstate filed a motion that it called a "Motion to Alter or Amend Judgment" in which it asserted: 1) that the policy it issued to Kponve had an underinsured motorist limit of $50,000 per individual; 2) that Mendoza's carrier had settled with Kponve for its limits of $25,000; 3) that under its policy Allstate was entitled to a credit equal to the amount paid to Kponve by Mendoza's carrier; and 4) the total owed by Allstate to Kponve was $25,000.

In response, Kponve refused to say whether Allstate was correct in its proffers as to the amount of coverage or the amount of Mendoza's settlement. Kponve took the position that it was Allstate's burden to prove, prior to the conclusion of he jury trial, the terms of its policy with Kponve and the amount of the credit due as a result of the settlement. According to Kponve, because Allstate had failed to meet that burden, Allstate should be required to pay Kponve $374,000. The trial court agreed with Kponve and Allstate appealed.

Held: Reversed.

The Court said that because Allstate intervened in a tort suit, against an underinsured motorist, it did not have the burden of proving anything in that suit. The holding of the Court was that when an uninsured/underinsured motorist is sued by a plaintiff who has uninsured/underinsured motorist coverage and plaintiff's carrier intervenes in the tort suit, absent consent by the parties,

no judgment in that tort suit should be entered against the carrier that intervened even if: a) the uninsured/underinsured motorist is found by the trier of fact to be solely responsible for the accident; and b) the verdict fact exceeds the policy limits of the underinsured motorist.

John Zorzit, et al. v. Comptroller of Maryland, No. 825, September Term 2014, filed October 1, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/0825s14.pdf

TAX DEFICIENCY – FRAUD – BADGES OF FRAUD

TAX FRAUD – PENALTY – METHOD OF CALCULATION

Facts:

The Tax Court ordered Nick's Amusements and its owner/operator, John Zorzit, to pay over $2,000,000 in unpaid admissions and amusement taxes plus interest, along with a fraud penalty of over $1,000,000. Although Nick's admitted that it failed to pay taxes, it disputed the amount owed and appealed the Tax Court's judgment (which was affirmed by the circuit court).

Held: Affirmed.

Although the Court of Special Appeals held in *Rossville Vending Machine Corp. v. Comptroller of the Treasury*, 97 Md. App. 305 (1993),that payouts from video poker machines were taxable, Nick's argued on appeal that it did not *intend* to withhold taxes and therefore could not be liable for them. The Court disagreed, reiterating the "badges of fraud" that permitted a fact-finder to infer fraud based on circumstantial evidence, and the logical inference that payouts were concealed to avoid criminal liability.

The Court of Special Appeals also affirmed the Tax Court's calculation of a tax deficiency notwithstanding that it could not be altogether exact in its findings. As the Court pointed out, under Md. Code (1988, Repl. Vol. 2010), § 13-403 of the Tax General Article, the Comptroller may assess taxes in the absence of accurate records on which to compute them. The section authorizes the Comptroller to conduct surveys of the business at issue or others engaged in similar businesses, or to compute the tax by "other means." TG § 13-403(b)(3). This catch-all term evidences legislative intent to give the Comptroller broad discretion to calculate what a party owes—particularly appropriate when that party's own failure to keep records leaves the Comptroller without a means to calculate the penalty in the first place.

State of Maryland v. Oliver O.Okafor, No. 1691, September Term 2014, filed October 2, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/1691s14.pdf

WORKERS' COMPENSATION ACT – INJURIES ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT – GOING AND COMING RULE – FREE TRANSPORTATION EXCEPTION

Facts:

It is the policy of the Maryland State Police ("MSP"), to provide its Troopers with patrol cars to use during work and after work, including when driving to and from work. The Trooper employee was assigned to work at the Forestville barrack. Near the end of his 2 p.m. to midnight shift, his patrol car experienced engine trouble, and he had to drive it to the College Park barrack, the MSP's only repair facility. He left the patrol car there for repair, and drove his own car, which was parked at that barrack, home. There was no other patrol car available for him to use at that barrack. There were other Troopers who had patrol cars and who were on vacation or not using them, but the Trooper did not contact them. The next day, the Trooper, in uniform, began driving his own car from home to the Forestville barrack. His car was clipped by another vehicle and went off the road and collided with a tree. The Trooper sustained personal injuries. He filed a claim for benefits with the Workers' Compensation Commission ("Commission"), which the State of Maryland contested. The Commission found that the Trooper's injuries arose out of and in the course of his employment. The employer challenged that decision in the circuit court, asserting that it was entitled to judgment as a matter of law. The court disagreed, and submitted the case to the jury, which returned a finding upholding the Commission's decision. The employer noted an appeal.

Held: Affirmed.

Under the "going and coming rule," injuries sustained by an employee during his commute to or from a fixed place of employment are not compensable, because they do not arise out of and in the course of the employee's employment. The employee is not at work when he is commuting and the dangers he faces during his commute do not differ from those that members of the public face. There are several exceptions to the going and coming rule, however. Also, in *Montgomery County v. Wade*, 345 Md. 1 (1997), the Court of Appeals recognized, outside the context of injuries sustained while commuting, that injuries sustained by an off duty police officer driving a patrol car on a personal errand are compensable when the patrol car was provided to the officer by the employer police department to advance the department's interest in increasing police presence in the jurisdiction, and the officer was required, when using the patrol car while off

duty, to exercise the full police powers when necessary. In that situation the officer was effectively on duty.

In this case, the Trooper's injuries were not compensable under *Wade*. Whatever police presence he created by being dressed in his uniform while driving his own car was slight. Under the analysis in *Wade*, the Trooper was not effectively on duty merely because he was driving his own car to work while in uniform.

The Trooper's injuries were compensable under the free transportation exception to the going and coming rule, however. That exception applies when the contract of employment provides, either expressly or by custom, that the employer will furnish the employee free transportation to and from work. When that is the case, the employee's work day begins when his commute begins. Here, the Trooper's employment agreement included free transportation and, therefore, on the day of the accident, his work day began when he left his home to drive to the Forestville barrack, even though he was driving his own car. Because the Trooper's work day had started before he was injured, his injuries arose out of and in the course of his employment.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated October 19, 2015, the following attorney has been disbarred:

GILBERT BABER

*

By an Order of the Court of Appeals dated October 19, 2015, the following attorney has been placed on inactive status:

DONALD L. HOAGE

*

By an Order of the Court of Appeals dated October 19, 2015, the following attorney has been disbarred:

SEUNG OH KANG

*

By an Opinion and Order of the Court of Appeals dated October 19, 2015, the following attorney has been indefinitely suspended:

PATRICIA DuVALL STORCH

*

By an Opinion and Order of the Court of Appeals dated October 20, 2015, the following attorney has been disbarred:

MATTHEW RICHARD YOUNG

*

*

By an Order of the Court of Appeals dated October 23, 2015, the following attorney has been suspended for thirty days by consent:

MELISSA KENNEY NGARURI

*

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

REGINA WANJIRU NJOGU

*

UNREPORTED OPINIONS

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