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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Michael Bowen Mitchell, Jr., Misc. Docket AG No. 35, September Term 2014, filed November 24, 2015. Opinion by Barbera, C.J.

http://www.mdcourts.gov/opinions/coa/2015/35a14ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland filed a Petition for Disciplinary or Remedial Action ("the Petition") against Respondent, Michael Bowen Mitchell, Jr. The Petition alleged that Respondent violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") by failing to provide competent and diligent representation of William J. Kolodner in two civil actions and by engaging in dishonest conduct toward Mr. Kolodner and Bar Counsel. A circuit court judge was designated to conduct a hearing and make findings of fact and conclusions of law. The hearing judge entered an Order of Default after Respondent failed to respond to the Petition.

Respondent also failed to respond to Petitioner's discovery requests and did not appear for the hearing before the hearing judge. Because of Respondent's default and his failure to respond to Petitioner's discovery requests, the hearing judge deemed established the averments in the Petition and deemed admitted the facts alleged in Petitioner's Request for Admissions of Fact and Genuineness of Documents. Respondent further failed to appear before the Court of Appeals for oral argument. On September 29, 2015, the Court issued a Per Curiam Order disbarring Respondent immediately from the practice of law.

The hearing judge found the following facts by clear and convincing evidence: Respondent was admitted to the Maryland Bar in 1999 and maintained a law office in Baltimore City, Maryland. In 2009, William J. Kolodner retained Respondent to represent him in two civil actions. The first action alleged that Levindale Hebrew Geriatric Center and Hospital ("Levindale") and certain employees at that facility committed malpractice and assault/battery against Mr. Kolodner in 2008 ("the Levindale action"). Respondent filed a complaint on April 15, 2011, well past the one-year statute of limitations for assault claims. See Md. Code (1989, 2013 Repl. Vol.), § 5-105 of the Courts & Judicial Proceedings Article. In August 2011, Respondent failed

to follow Mr. Kolodner's instruction to file an amended complaint and instead stipulated to dismiss the entire case with prejudice against all defendants. Respondent failed to inform Mr. Kolodner of the dismissal or otherwise discuss the status of the case with him.

The second action involved a claim that Mr. Kolodner's health insurer, Blue Cross Blue Shield, improperly refused to reimburse him for costs incurred during his stay at Levindale ("the insurance action"). Respondent filed a complaint in July 2011 but the circuit court dismissed the action in January 2012 because Respondent had not obtained service on Blue Cross Blue Shield. *See* Md. Rule 2-507. Respondent took no action to prevent the dismissal and did not ask the court to reinstate the case. Respondent further failed to inform Mr. Kolodner that this lawsuit had been dismissed or respond to his requests for information.

After Bar Counsel received a complaint from Mr. Kolodner and notified Respondent of the complaint, Respondent claimed that he had named the wrong defendant in the insurance action but had filed an amended complaint and would serve the defendant with the summons upon receipt from the Clerk. Respondent evidently attempted to file an amended complaint, but the circuit court returned the amended complaint to Respondent with the time/date stamp crossed out because the case had already been dismissed. Respondent failed to inform Bar Counsel that the amended complaint was not accepted and to disclose facts necessary to correct Bar Counsel's misapprehension that this litigation was ongoing. Thereafter, Respondent sent to Bar Counsel a purported amended complaint against Blue Cross Blue Shield without the marks crossing over the court's time/date stamp. Respondent did not inform Bar Counsel either that the amended complaint had not been accepted for filing or that the case had been dismissed in January 2012. The hearing judge found that Respondent made inconsistent, false, and misleading statements to Petitioner's investigator during Petitioner's investigation of Mr. Kolodner's complaint.

Based upon the above findings, the hearing judge concluded by clear and convincing evidence that Respondent's conduct violated MLRPC 1.1; 1.2(a); 1.3; 1.4; 3.2; 8.1(a) and (b); and 8.4(c) and (d).

Held:

Neither Respondent nor Petitioner filed exceptions to the hearing judge's findings of fact. The Court of Appeals 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 upon the Court's de novo review of the record, the Court agreed with the hearing judge that Respondent violated MLRPC 1.1; 1.2(a); 1.3; 1.4; 3.2; 8.1(a) and (b); and 8.4(c) and (d).

The Court held that Respondent violated MLRPC 1.1 by failing to file the Levindale action before the statute of limitations expired on the assault/battery claim and by failing to prevent the insurance action from being dismissed. Respondent violated MLRPC 1.2(a) by failing to file an amended complaint in the Levindale action as instructed, stipulating to the dismissal of the

Levindale action, allowing the insurance action to be dismissed, and failing to inform Mr. Kolodner that both cases were dismissed. Respondent violated MLRPC 1.3 by allowing the statute of limitations to expire in the Levindale action, failing to serve the defendant in the insurance action, and failing to timely file an amended complaint in that action. Respondent violated MLRPC 1.4 by failing to keep Mr. Kolodner informed as to the status of his cases, including his failure to inform Mr. Kolodner that both actions had been dismissed. Respondent violated MLRPC 3.2 by failing to serve the defendant in the insurance action and prevent that action from being dismissed. Respondent violated MLRPC 8.1(a) and (b) by making misrepresentations to Bar Counsel regarding the viability of the insurance action and submitting false evidence of an amended complaint. Respondent violated MLRPC 8.4(c) by misrepresenting to Mr. Kolodner the status of his cases, concealing material information from him, and making misrepresentations to Bar Counsel. Respondent violated MLRPC 8.4(d) by failing to provide competent and diligent representation to Mr. Kolodner and by engaging in intentionally dishonest conduct.

Disbarment is appropriate when an attorney allows a client's case to be dismissed, fails to communicate with the client, and engages in intentionally dishonest conduct. The Court found the presence of several aggravating factors, and Respondent's failure to participate in the disciplinary proceedings precluded the Court from finding any facts in mitigation. The Court therefore held that disbarment was the appropriate sanction for Respondent's misconduct.

Attorney Grievance Commission of Maryland v. Joseph Michael Stanalonis, Misc. Docket AG No. 74, September Term 2013, filed November 23, 2015. Opinion by McDonald, J.

Watts, J., concurs and dissents.
Harrell, J., dissents.

http://www.mdcourts.gov/opinions/coa/2015/74a13ag.pdf

ATTORNEY DISCIPLINE – JUDICIAL ELECTIONS – STATEMENTS CONCERNING CANDIDATE FOR JUDICIAL OFFICE – NO VIOLATION

Facts:

In 2012, there was an election for judge on the Circuit Court for St. Mary's County. Two of the candidates were Respondent Joseph M. Stanalonis and Judge David W. Densford. Mr. Stanalonis was an experienced prosecutor, Judge Densford was a newly appointed judge who, while in practice, had represented criminal defendants. Mr. Stanalonis and Mr. Densford were familiar with each other from their years of practice, sometimes on opposing sides of the same case. The ensuing campaign was vigorous and contentious.

About a week before the primary election on April 3, 2012, Mr. Stanalonis's campaign mailed a flyer to voters that purported to contrast the experience and outlooks of the two candidates. The flyer had several panels contrasting Mr. Stanalonis and Judge Densford. In particular, the right side of the flyer displayed a photograph of Judge Densford in a Hawaiian shirt, below which appeared a number of statements about him, including "Opposes registration of convicted sexual predators."

As a result of this statement, the Attorney Grievance Commission charged Mr. Stanalonis with violations of MLRPC 8.2(a), 8.4(c), and 8.4(d).

At the evidentiary hearing in the attorney grievance proceeding, Judge Densford and Mr. Stanalonis both testified. The hearing judge found their testimony "equally compelling." She concluded that Mr. Stanalonis "determined that [Judge] Densford opposed the [sex offender] registry" through "conversations surrounding the issue and interactions with fellow prosecutors." However, she also concluded that Judge Densford had never expressed blanket opposition to the sex offender registry, although he had tried to prevent his clients from being placed on the registry.

The hearing judge held that Mr. Stanalonis had a "demonstrable basis" for believing his statement, but he had nonetheless violated MLRPC 8.2(a), 8.4(c), and 8.4(d) by not making a "more substantial effort" to ensure the accuracy of his statement.

Held: Petition dismissed.

There was not clear and convincing evidence that Mr. Stanalonis violated MLRPC 8.2(a), 8.4(c), or 8.4(d).

Mr. Stanalonis did not violate MLRPC 8.2(a) because there was insufficient evidence that he made his statement with knowledge that it was false or with reckless disregard as to its truth or falsity. "Reckless disregard" may refer to a subjective or objective standard. The Court did not decide which of these is the correct standard for MRLPC 8.2(a), because the result was the same either way. According to his testimony, which the hearing judge credited, Mr. Stanalonis actually believed that Judge Densford opposed the sex offender registry, so the subjective standard was not met. Because Mr. Stanalonis had a "demonstrable basis" for believing that Judge Densford opposed the sex offender registry, his saying so was not a gross deviation from the standard of conduct of a reasonably prudent lawyer in his position. Hence, the objective standard was not met either.

Mr. Stanalonis did not violate MLRPC 8.4(c), which can be violated by a knowing falsehood or an omission or misrepresentation with a "conscious objective or purpose" to conceal truthful information. There was insufficient evidence that Mr. Stanalonis did either of these things.

Mr. Stanalonis did not violate MLRPC 8.4(d), which proscribes conduct prejudicial to the administration of justice. Making a statement that one has a demonstrable basis for believing does not have a negative effect on the public's perception of the legal profession, so Mr. Stanalonis did not engage in conduct prejudicial to the administration of justice.

Lisy Corp. v. McCormick & Co., Inc., et al., No. 8, September Term 2015, filed November 23, 2015. Opinion by Greene, J.

McDonald, J., dissents.

http://www.mdcourts.gov/opinions/coa/2015/8a15.pdf

CIVIL LAW – CASE INFORMATION REPORT – JURY DEMAND

Facts:

Lisy Corp. ("Petitioner") filed suit against McCormick & Co., Inc., Mojave Foods Corp. ("Respondents"), and Barry A. Adams ("Adams") in the Circuit Court for Howard County, alleging tort and contract claims. Petitioner served all defendants with its complaint along with a completed Case Information Report ("CIR"). In the CIR, Petitioner checked the "yes" box to indicate a jury trial had been demanded. No pleadings or papers filed in the case by Petitioner asserted the constitutional right to a trial by jury.

The Circuit Court's Office of Calendar Management notified the parties that it was scheduling the trial before a jury. Respondents and Adams, relying on our decision in *Duckett v. Riley*, 428 Md. 471, 52 A.3d 84 (2012), objected and moved to confirm a bench trial arguing that the manner in which the alleged jury demand had been elected—by reference in the CIR solely—was procedurally defective, because it did not comply with the requirements of Md. Rule 2-325(a). That Rule requires a jury demand to be made in a pleading or separate "paper." Petitioner, however, argued that *Duckett* was distinguishable, because, in the instant case, the opposing parties were served with the CIR containing a reference to a jury demand, and therefore had notice of the assertion of the right to a jury trial.

The motions judge found *Duckett* controlling, and determined that a served CIR is not a proper vehicle for asserting a jury demand under Rule 2-325(a). Therefore, the motions judge ordered the case to proceed as a bench trial, because Petitioner's failure to comply with the Rule resulted in a waiver of the right to a jury trial under Rule 2-325(b). The administrative judge then granted Petitioner's motion to postpone trial in order to allow Petitioner time to file a petition for a writ of mandamus. After the Court of Appeals denied the petition, the case proceeded as a bench trial on April 15, 2013. Final judgment was entered against Petitioner and in favor of the Respondents. Petitioner appealed to the Court of Special Appeals, and the intermediate appellate court affirmed the trial court's ruling.

Held: Affirmed.

The Court of Appeals reaffirmed *Duckett*, and held that a CIR, whether served or unserved, does not constitute a separate "paper" within the meaning of Rule 2-325. Rule 2-325(a) is a precise

rubric, which is to be strictly followed, and Petitioner's failure to comply, whether intentional or unintentional, resulted in a waiver of that right under Rule 2-325(b). In *Duckett*, we stated that a CIR is an administrative tool designed "to assist the Clerk and the court in scheduling actions in the court promptly and efficiently. It is not intended to be an original vehicle, and, in fact, is separate from the methodology, for asserting the constitutional right to a jury trial." 428 Md. at 480, 52 A.3d at 89.

Within the meaning of Rule 2-325, a separate "paper" is a document, printed or written, that is filed in conjunction with court pleadings. The purpose of a paper is to convey supporting documentation to the court (not necessarily the clerk's office), which may include information and/or evidence in support of a party's position. Under this definition, it is implicit then that a paper originates with a litigant or an interested party. The mere act of referencing a jury demand by checking "yes" in the Jury Demand section of the CIR is not an assertion of a constitutional right, but rather, it simply indicates whether the party has already filed, or intends to file, a jury demand pursuant to Rule 2-325(a).

Allstate Lien and Recovery Corporation, et al. v. Cedric Stansbury, No. 7, September Term 2015, filed November 23, 2015. Opinion by Battaglia, J.

Harrell, J. concurs.

http://www.mdcourts.gov/opinions/coa/2015/7a15.pdf

COMMERCIAL LAW – MOTOR VEHICLE – CREATION OF GARAGEMAN'S LIEN

Facts:

Cedric Stansbury, Respondent, was involved in a car accident and had his Mazda RX-8 serviced at Russel Collision in Baltimore, Maryland. When Mr. Stansbury was notified that his vehicle was repaired, he was presented a bill in the amount of $6,330.37 for repairs. Later, $1,000 was added to the repair bill, representing "lien enforcement costs" or "cost of process" fees, when Mr. Stansbury attempted to redeem the car. The $1,000 was not actually incurred by Russel Collision but, rather, was the amount agreed upon between Russel Collision and Allstate Lien to conduct auction of the vehicle. Russel Collision placed a lien on the car and subsequently sold it.

After Mr. Stansbury filed suit, trial eventually was held on the issue of whether the $1,000 was recoverable under Section 16-202(c) of the Commercial Law Article, which provides for a garageman's lien to include charges incurred for "repair or rebuilding, storage, or tires or other parts or accessories". In her instruction to the jury, the judge stated that the $1,000 "cost of process" fee was not an appropriate part of the lien. The jury awarded Mr. Stansbury $16,500 in economic damages.

Allstate Lien, Jeremy Martin, and Russel Collision appealed, and in a reported opinion, the Court of Special Appeals affirmed. *Allstate Lien & Recovery Corp., et al. v. Stansbury*, 219 Md. App. 575, 101 A.3d 520 (2014). The Court of Special Appeals utilized a plain meaning approach to interpret Section 16-202(c) and held that a motor vehicle lien does not include "cost of process" fees.

Held: Affirmed.

The Court of Appeals affirmed. The Court determined that Section 16-202(c) does not encompass lien enforcement costs or expenses or cost of process fees prior to sale, should the owner attempt to redeem the vehicle before sale.

The Court also discussed the statutory context of the garageman's lien, which includes Sections 16-206, 16-207, and 16-208 of the Commercial Law Article and determined that the costs accrued in the course of arranging an impending sale can only be recovered by the garageman through judicial intervention, prior to sale, solicited by the owner, in a replevin action or in an

appropriate judicial action by posting a corporate bond covering such costs. In either circumstance, the amount owed for enforcement costs incurred, not the subject of a lien established under Section 16-202(c), would be subject to judicial scrutiny for reasonableness.

The Court concluded that to interpret the statute differently would permit the repair company to assert, prior to sale, any amount (imaginary or otherwise) for lien enforcement costs in order to redeem the vehicle, even though the owner never consented to their assessment nor were they provided for in Section 16-202(c).

Mario Sibug v. State of Maryland, No. 2, September Term 2015, filed November 25, 2015. Opinion by Battaglia, J.

Adkins and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/2a15.pdf

CRIMINAL LAW – COMPETENCY TO STAND TRIAL

Facts:

In 1999, in the Circuit Court for Baltimore County, Mario Sibug, Petitioner, was charged with three counts of first degree assault, two counts of second degree assault, three counts of reckless endangerment, one count of allowing minors access to a firearm and one count of the use of a gun in the commission of a crime of violence. The charges against Sibug arose from an incident in 1998, when, according to charging documents, Sibug pointed a handgun at his five children and threatened to kill them.

Sibug entered pleas of not guilty, not criminally responsible and not competent to stand trial. Sibug was admitted to the care of the Department of Health and Mental Hygiene for evaluation and treatment. The Department diagnosed Sibug as suffering from "religious delusions" and opined that he was not competent to stand trial. The Circuit Court entered an order finding Sibug incompetent and committing him to the Department for inpatient care until no longer incompetent to stand trial.

Sibug remained a patient with the Department for over four years. In 2003, after Sibug was involuntarily medicated, the Department sent a letter to the Circuit Court opining that Sibug's condition had improved and he was now competent to stand trial. Although the letter contained a "draft order of competence" for a judge to sign, no judicial determination of competency was ever made. Nonetheless, Sibug's trial commenced in May of 2004 in the Circuit Court for Baltimore County and Sibug was convicted on a not guilty agreed statement of facts. Sibug's conviction, however, was overturned in 2005 as the result of coram nobis proceedings in which the court found that Sibug's counsel had failed to advise him of the deportation consequences of a conviction.

Sibug's retrial began in 2008 before the same judge who presided over the coram nobis proceedings. Sibug's testimony at trial was reflective of his "religious delusions" which led to his initial finding of incompetency. Despite his behavior, the issue of competency was not raised during trial and Sibug was convicted.

Prior to sentencing, Sibug's counsel requested a competency evaluation because he believed Sibug had been incompetent to stand trial. At sentencing, the judge stated that Sibug had been

competent to stand trial despite his behavior and prior determination of incompetency. The Court of Special Appeals affirmed Sibug's conviction.

Held: Reversed.

The Court of Appeals held that after having been adjudicated incompetent in the same case in the same court, Sibug needed to have been adjudged competent under Section 3-104 of the Criminal Procedure Article, Maryland Code (2001, 2008 Repl. Vol.). The Court of Appeals held that Section 3-104 was clear in the need for a judicial determination of competency and "[b]ecause the responsibility for a competence determination lies with the court, Sibug was still under the previous finding of incompetence at the time of his 2008 trial."

The Court of Appeals also held that a determination by a psychiatrist would not be sufficient because "delegation by the court of its constitutional responsibility is not acceptable." See *In re: Mark M.*, 365 Md. 687, 782 A.2d 332 (2001).

The Court of Appeals held that comparing Sibug's testimony at trial with his prior evaluations of incompetency "yields to the conclusion that the judge clearly erred in finding Sibug competent to stand trial."

Joseph E. Simms v. State of Maryland, No. 78, September Term 2014, filed November 23, 2015. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2015/78a14.pdf

CRIMINAL PROCEDURE – POST-CONVICTION DNA TESTING STATUTE – WITHDRAWAL OF APPOINTED COUNSEL – APPOINTMENT OF COUNSEL – REASONABLE PROBABILITY DETERMINATION.

Facts:

On April 6, 1995, Joseph E. Simms was convicted of two counts of first degree murder and two counts of related weapons offenses. Among the evidence introduced at his trial were several articles of clothing, including a jacket, boots, socks, and a towel, containing blood stains that matched the DNA profiles of the two victims. These clothes were found in a trash bag close to the home of Mr. Simms' aunt, who testified that she observed Mr. Simms wearing these clothes near the time of the murders. The convictions were affirmed on direct appeal and the Circuit Court later denied his petition for post-conviction relief.

On January 7, 2008, Mr. Simms filed a *pro se* petition for relief pursuant to Section 8-201 of the Criminal Procedure Article ("CP §8-201"). He alleged that a DNA test conducted under a short-term tandem repeats method would prove that he never wore those clothes found near his aunt's home. Specifically, Mr. Simms alleged that he suffered from a degenerative skin condition and that, as a result, some of his epithelial cells would be found on the socks if he had worn them.

The Circuit Court summarily denied that petition without requiring the State to respond. Mr. Simms appealed directly to this Court, which held that his *pro se* petition, when liberally construed, presented a *prima facie* case for DNA testing and therefore should not have been denied summarily. *Simms v. State*, 409 Md. 722, 733, 976 A.2d 1012 (2009). This Court remanded the case to the Circuit Court to require the State to respond to the petition.

Upon remand, at the request of the Public Defender, *pro bono* attorneys from the University of Baltimore School of Law Innocence Project Clinic ("Innocence Project") represented Mr. Simms on his petition. The State apparently did not oppose DNA testing of the socks; however, on March 3, 2011, the State filed an affidavit from the custodian of records for the Evidence Control Unit of the Baltimore Police Department stating that the socks, along with other evidence, had been destroyed on October 23, 2000. Attached to the affidavit was supporting documentation, including chain of custody reports that recorded the destruction of the clothing. On March 15, 2011, Mr. Simms' attorneys sent a status report to the Circuit Court indicating that the socks had been destroyed and explaining that the attorneys from the Innocence Project would not pursue any further relief on behalf of Mr. Simms. Mr. Simms then unsuccessfully pursued *habeas corpus* relief *pro se*, alleging that the socks had been destroyed in bad faith.

More than two years later, on December 23, 2013, Mr. Simms renewed his request for relief under CP §8-201 questioning whether the socks had been destroyed in October 23, 2000. He argued that the affidavit, by itself, was insufficient to establish when the socks had been destroyed or that the socks did not exist. He asked the Circuit Court to hold a hearing and to appoint counsel for him.

When it issued a scheduling order, the Circuit Court appeared to assume that the Innocence Project attorneys continued to represent Mr. Simms. Those attorneys filed a motion to withdraw their appearance. On May 14, 2014, the Circuit Court held a hearing regarding the Innocence Project attorneys' motion to withdraw, Mr. Simms' motion for appointment of new counsel, and Mr. Simms' motion for relief under CP §8-201. At the hearing, the Circuit Court granted the Innocence Project attorneys' motion, and denied Mr. Simms' motion for appointment of new counsel. On June 3, 2014, the Circuit Court issued a written opinion denying Mr. Simms' motion for relief under CP §8-201.

On July 1, 2014, Mr. Simms appealed the Circuit Court rulings.

Held: Affirmed.

The Court of Appeals considered whether (1) the Circuit Court abused its discretion when it granted the Innocence Project attorneys' motion to strike their appearance; (2) the Circuit Court abused its discretion when it denied Mr. Simms' motion to appoint new counsel; and (3) the Circuit Court was clearly erroneous when it declined to order relief under CP §8-201.

On the first issue, the Court explained that Md. Rule 2-132 governs an attorney's motion to strike an appearance in the context of a post-conviction proceeding. In the instant case, the Court held that the Circuit Court did not abuse its discretion in granting the Innocence Project attorneys' motion to withdraw. The Court noted that everyone involved in the case, including Mr. Simms, appeared to have treated the determination, in early 2011, that the clothing had been destroyed as the conclusion of proceedings under CP §8-201. The Court further pointed out that Mr. Simms did not identify any particular prejudice that he would suffer as a result of the withdrawal of the Innocence Project attorneys.

On the second issue, the Court held that the Circuit Court did not abuse its discretion in deciding not to appoint counsel for Mr. Simms. The Court explained that the Circuit Court was faced with a petitioner who previously enjoyed the benefit of well-qualified and experienced counsel in pursuing DNA testing on this particular matter. Furthermore, Mr. Simms did not allege any basis to contradict the legality and timing of the clothing's destruction.

On the third issue, the Court held that the Circuit Court was not clearly erroneous when it determined that there was no reasonable probability that a further search under CP §8-201 would yield exculpatory or mitigating evidence. The Court pointed out that the affidavit with the supporting documentation indicated that a further search would prove fruitless. The Court also explained that casting doubt on his aunt's testimony was the only result that a DNA test could

prove. This, however, would not prove exculpatory in the way that DNA testing of a rape kit might exonerate an individual convicted of rape. Faced with this affirmative and unrebutted evidence, the Court concluded that the Circuit Court was not required to conduct a fishing expedition to entertain every permutation that Mr. Simms might imagine and held that the Circuit Court's ruling was not clearly erroneous.

COURT OF SPECIAL APPEALS

Elton F. Norman, Attorney for the Estate of Nancy V. Puppolo by its Personal Representative Celeste A. Puppolo v. Sinai Hospital of Baltimore, Inc., et al., No. 932, September Term 2014, filed October 28, 2015. Opinion by Hotten, J.

http://www.mdcourts.gov/opinions/cosa/2015/0932s14.pdf

CIVIL PROCEDURE – APPEALS – MOTION TO WITHDRAW – COLLATERAL ORDER DOCTRINE – ATTORNEY AND CLIENT – ACT OF PARTIES – UNDUE HARDSHIP

Facts:

On January 19, 2011, Celeste A. Puppolo ("Ms. Puppolo"), personal representative for the Estate of the decedent, Nancy V. Puppolo, filed a malpractice action, pro se, in the Health Care Alternative Dispute Resolution Office, against appellees, Sinai Hospital of Baltimore Inc. ("Sinai Hospital") and Christine D'Arbela, M.D. (formerly Kajubi). Ms. Puppolo sought compensation for damages allegedly caused by appellees regarding the care and treatment of the decedent. Ms. Puppolo proceeded pro se in the matter until she retained Lowell J. Gordon, Esquire ("Mr. Gordon"), who entered his appearance on April 11, 2011. For unspecified reasons, Mr. Gordon's representation was subsequently terminated.

Thereafter, on July 25, 2013, Thomas O'Toole, Esquire ("Mr. O'Toole"), entered his appearance on behalf of the Estate. The Circuit Court for Baltimore City issued an order setting a trial date for the malpractice action against appellees to begin on July 8, 2014. On May 10, 2014, Ms. Puppolo terminated Mr. O'Toole's representation for reasons that are not relevant to the appeal. A pretrial settlement conference was subsequently held on May 19, 2014. Appellees were in attendance. However, Ms. Puppolo failed to appear, without securing prior approval from the court or providing notice of her absence to appellees.

On May 27, 2014, appellant, Elton F. Norman ("Mr. Norman") entered his appearance on behalf of the Estate. Mr. Norman entered into an agreement with Ms. Puppolo, which provided that he would participate in the case as counsel contingent upon 1) postponement of the trial date, and 2) Ms. Puppolo obtaining another attorney as lead counsel. However, neither contingency was fulfilled prior to the trial date.

On May 30, 2014, Mr. Norman filed a Motion to Modify the Scheduling Order as attorney for the Estate, seeking to postpone the July 8, 2014 trial date to conduct further discovery and allow additional time to prepare for trial. Appellees filed an opposition to the motion and requested the

court to move the trial date one day, to July 9, 2014, to allow representatives for Sinai Hospital to be present when trial commenced. On May 28, 2014, the circuit court granted appellees' motion to postpone the trial date by one day.

Thereafter, on July 2, 2014, the circuit court denied the Estate's motion to postpone the trial and the parties were scheduled to appear on July 8, 2014 for a continued pretrial conference. On July 3, 2014, Mr. Norman filed a Motion to Withdraw in accordance with the requirements of notice reflected in Md. Rule 2-132. However, the trial judge determined that his motion was not ripe at the time of the pretrial conference since the time for appellees to file an opposition had not yet expired. During the pretrial conference held on July 8, 2014, Mr. Norman orally argued a Motion to Withdraw, in addition to a Motion for Reconsideration of the denial of the Motion to Modify the Scheduling Order. After receiving argument, the circuit court denied both motions. Thereafter, Mr. Norman noted a timely appeal to the Court of Special Appeals. As a result, the trial did not commence on July 9, 2014.

Held: Appeal dismissed.

The Court of Special Appeals held that the circuit court's order denying Mr. Norman's Motion to Withdraw is not an appealable order under the collateral order doctrine because the order satisfied only two of the four requirements under the doctrine. For a non-final judgment to be appealable under the common-law collateral order doctrine each of the following elements must be satisfied: (1) it must conclusively determine the disputed question; (2) it must resolve an important issue; (3) it must be completely separate from the merits of the action; and (4) it must be effectively unreviewable on appeal from a final judgment.

Specifically, the Court held that the order issued by the circuit court conclusively determined the disputed question of whether Mr. Norman will continue representation of the Estate and that the issue was separate from the merits of the malpractice action. However, the order did not resolve an "important issue" because there was no evidence of actual harm or the potential for significant harm (*i.e.*, undue hardship) to Mr. Norman by the court's ruling. The Court explained that Mr. Norman failed to demonstrate that he incurred fees that his client refused to pay or that there was a conflict of interest between him and his client making continued representation impossible or otherwise harmful to him. Instead, Mr. Norman was aware of the circumstances when he entered his appearance and the contingency agreement was a result of his own doing. Accordingly, the absence of actual harm or the potential for significant harm distinguished Mr. Norman's situation from predecessor cases where the collateral order doctrine applied because the attorney seeking withdrawal in those cases demonstrated that actual harm or the potential for significant harm will result if withdrawal was not permitted.

The Court further held that the order was not "effectively unreviewable" on appeal because the Estate would still have the benefit of a new trial if a reviewing court subsequently determined that the circuit court should have granted Mr. Norman's Motion to Withdraw and reversed the judgment.

Susan Volkman v. Hanover Investments, Inc., et al., No. 1595, September Term, 2014, filed November 25, 2015. Opinion by Berger, J.

http://www.mdcourts.gov/opinions/cosa/2015/1595s14.pdf

DECLARATORY JUDGMENT – NATURE AND GROUNDS IN GENERAL – OTHER REMEDIES – PENDENCY OF OTHER ACTIONS

Facts:

Susan Volkman ("Volkman") was a vice president for One Call Concepts, Inc. ("OCC"), and held a 19% interest in Hanover Investment, Inc. ("Hanover"). Hanover was a holding company that completely owned OCC. Hanover and OCC were Maryland corporations, and Volkman resided in Minnesota. Pursuant to Hanover's shareholders' agreement, to which Volkman was a party, if a shareholder was terminated from OCC "for Good Cause and the Board of Directors of [Hanover] agrees that OCC terminated the Shareholder for Good Cause" then Hanover would redeem the shareholder's shares at a 90% discount.

Volkman was terminated from her position with OCC, and Hanover redeemed Volman's shares at a 90% discount. Volkman filed an action in Minnesota seeking damages for an alleged breach of the shareholders' agreement. While Volkman's action was pending in Minnesota, Hanover filed a complaint in the Circuit Court for Montgomery County asking the court to declare that Hanover fulfilled its obligations with regard to the redemption of Volkman's shares under the shareholders' agreement. Before the Minnesota action was resolved, the circuit court rendered judgment in favor of Hanover, declaring that Volkman was properly terminated for cause, and that Hanover acted properly in redeeming Volkman's shares at a 90% discount.

Held: Reversed.

The Court of Special Appeals held that the circuit court erred in rendering a declaratory judgment while an action involving the same parties and same issues was pending before a court of concurrent jurisdiction.

The Court of Special Appeals first observed that generally the circuit court's decision to issue a declaratory judgment is reviewed under the abuse of discretion standard. *Sprenger v. Pub. Serv. Comm'n of Md.*, 400 Md. 1, 21 (2007). The Court then relied on the Court of Appeals' decision in *Waicker v. Colbert*, for the general rule that "absent unusual and compelling circumstances, a declaratory judgment action is inappropriate where the same issue is pending in another proceeding." 347 Md. 108, 113 (1997) (internal quotations omitted). Although appellate courts in Maryland have not held any circumstance to be sufficiently unusual and compelling so as to permit a circuit court to issue a declaratory judgment while an action involving the same issues is

pending, the Court of Special appeals determined that a case may be unusual and compelling where judicial economy is not offended by the exercise of jurisdiction, where principles of comity do not require deference to be afforded to the court first exercising jurisdiction, and where there is no concern with one party inappropriately controlling the litigation.

The Court of Special Appeals then determined that it would be an inefficient use of judicial resources to permit a declaratory judgment action in this case where the Minnesota action was underway and one interlocutory appeal in the Minnesota action had already been resolved. Further, principles of comity suggested that this issue is more properly resolved in Minnesota where Volkman was located, and where evidence relevant to the circumstances of her termination is more likely to be found. Finally, the Court determined that issuing a declaratory judgment would inappropriately wrest control of the litigation from Volkman by undermining her choice of a Minnesota forum. Accordingly, the Court of Special Appeals reversed the declaratory judgment of the circuit court, and held that the circumstances in this case were not sufficiently unusual and compelling so as to warrant disregarding the general prohibition on issuing a declaratory judgment when an action involving the same issues is pending in another proceeding.

John T. Mitchell v. Maryland Motor Vehicle Administration, No. 713, September Term 2014, filed November 25, 2015. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2015/0713s14.pdf

FREE SPEECH CLAUSE OF FIRST AMENDMENT – VANITY LICENSE PLATES – GOVERNMENT SPEECH – FORUM DOCTRINE.

Facts:

Mitchell applied to the Maryland Motor Vehicle Administration ("MVA") for vanity plates that spelled out "MIERDA." The MVA approved the application and issued the plates; two years later, it renewed the registration for those vanity plates. Soon after, the MVA received a complaint from a citizen that the vanity plate was "inappropriate." MVA employees investigated and determined that the word "mierda" is Spanish for "shit." The MVA rescinded Mitchell's vanity plates on the ground that it violated an MVA regulation prohibiting license plates from displaying profanities, obscenities, or epithets. In a contested case hearing before an Administrative Law Judge ("ALJ"), Mitchell challenged the MVA's action, arguing that, as an agent of the State, it violated his First Amendment right to freedom of speech by rescinding his "MIERDA" vanity plates. The ALJ ruled in favor of the MVA, and the final agency decision was affirmed by the circuit court.

Held: Affirmed.

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), the Supreme Court held that specialty license plates, which are custom designed and retooled base license plates manufactured specially for nonprofit organizations, are government speech. The Court stated that it was not deciding, in that case, whether vanity plate messages are government speech.

Maryland vanity plate messages are not government speech. Although, like all license plates, vanity plates serve as government IDs for vehicles registered in this State, it is clear from the unique and personalized nature of the messages displayed on vanity plates that the speaker of the message is the driver/owner of the vehicle, not the State of Maryland.

Vanity plate messages are private speech on government property. The level of restriction a government may impose on such speech depends upon the type of forum in which the speech is taking place. Under the Supreme Court's forum doctrine, regulation by the government of private speech on government property that is a public forum must satisfy a strict scrutiny standard. Regulation by the government of private speech on government property that is a

nonpublic forum only must satisfy a reasonableness standard. (Both standards require the regulations to be viewpoint neutral.)

Vanity plates are a nonpublic forum. They were not created by the government with the intention of opening a forum for public discourse and debate; access to the forum is limited; and the forum consists of property that the government is regulating. The purpose of vanity plates in Maryland is to raise money for the State. Because vanity plates are a nonpublic forum, Maryland may impose regulations on the private speech in that forum that are reasonable and viewpoint neutral. The regulation as applied in this case satisfied that standard. The MVA did not violate Mitchell's First Amendment right to freedom of speech by rescinding his "MIERDA" vanity plates.

Larry Sutton v. FedFirst Financial Corporation, et al., No. 1751, September Term 2014, filed October 29, 2015. Opinion by Graeff, J.

http://www.mdcourts.gov/opinions/cosa/2015/1751s14.pdf

MERGERS AND ACQUISITIONS – CORPORATE DIRECTOR FIDUCIARY DUTIES – *SHENKER/REVLON* DUTIES – DIRECT SHAREHOLDER ACTIONS – DERIVATIVE SHAREHOLDER ACTIONS – MOOTNESS – UNWINDING CORPORATE MERGERS – RESCISSORY DAMAGES – AIDING AND ABETTING BREACH OF FIDUCIARY DUTY – DECLARATORY ACTIONS

Facts:

On April 15, 2014, FedFirst and CB Financial announced that the two corporations had executed a merger agreement that, if approved by the stockholders of a majority of the outstanding shares of stock, would result in the merger of FedFirst and CB Financial. The merger agreement provided that FedFirst shareholders would receive either $23.00 in cash or 1.1590 shares of CB Financial common stock in exchange for each FedFirst share. The FedFirst shareholders could elect to receive cash or stock, or a combination thereof, subject to the requirement in the agreement that 65% of the total shares of FedFirst would be exchanged for CB Financial stock and 35% would be exchanged for cash. The Merger Agreement also included covenants that protected CB Financial's interests and encouraged the completion of the merger including a "no-shop" provision and a termination fee of $2,750,000, which FedFirst agreed to pay in the event that it terminated the agreement.

On June 13, 2014, CB Financial filed a Registration Statement (Form S-4) with the United States Securities and Exchange Commission ("SEC"). On July 28, 2014, CB Financial filed an amended S-4 with the SEC ("the S-4"), which was more than 300 pages long and included a plethora of information about the companies and the proposed merger.

On April 21, 2014, Larry Sutton, a purported shareholder of FedFirst, filed a class action and derivative lawsuit against FedFirst, its seven individual directors, and CB Financial seeking to enjoin the shareholder vote on the merger and demanding that "the transactions contemplated thereby, should be rescinded and the parties returned to their original position." He claimed that "[i]n any situation where the directors of a publicly traded corporation undertake a transaction that will result in either a change in corporate control or a break-up of the corporation's assets, the directors have an affirmative fiduciary obligation to act in the best interests of the company's shareholders, including the duty to obtain maximum value under the circumstances." He argued that FedFirst's individual directors violated "the fiduciary duties they owe[d] to [Mr. Sutton] and the other public shareholders of FedFirst, including their duty of candor and duty to maximize shareholder value," and he claimed that, "[a]s a result of the Individual Defendants' divided loyalties, [he would] not receive adequate, fair or maximum value for their FedFirst common

stock in the Proposed Acquisition." Mr. Sutton also claimed that CB Financial aided and abetted the FedFirst board in breaching its fiduciary duty.

On September 2, 2014, Mr. Sutton voluntarily dismissed his derivative claim, leaving only his direct claim. In an order dated September 19, 2014, the Circuit Court for Baltimore City dismissed Mr. Sutton's direct claims, with prejudice. Mr. Sutton filed a timely Notice of Appeal.

Mr. Sutton did not move to stay the merger pending his appeal, and on October 31, 2014, FedFirst and CB Financial completed the merger. FedFirst and CB Financial subsequently moved to dismiss this appeal, arguing that "because the merger has now occurred, there is no relief that this Court can order, rendering [Mr.] Sutton's appeal moot."

Held: Affirmed.

Mr. Sutton's appeal is not moot because, although the merger has already been completed, Mr. Sutton asked for rescission of the merger transaction in his amended complaint. "Unwinding" the merger is not a practicable remedy, however, if Mr. Sutton was ultimately successful in his lawsuit (presuming we were to reverse and allow him to move forward), the circuit court could still order rescissory damages, which are damages in lieu of actual rescission.

Typically, shareholders must bring a derivative action when challenging a merger transaction. Mr. Sutton argued that, the Court of Appeals in *Shenker v. Laureate Education, Inc.*, 411 Md. 317 (2009), recognized common law duties to maximize shareholder value and to disclose all material information regarding how maximization was pursued that are owed directly to the shareholders. Mr. Sutton argued that FedFirst's board of directors owed those *Shenker* duties directly to FedFirst's shareholders, including himself. The common law *Shenker* duties are limited to situations where "the decision [was] made to sell the corporation," "the sale was a foregone conclusion," or the sale involved "an inevitable or highly likely change-of-control situation." Here, the only potential avenue for Mr. Sutton's claim is in the "change-of-control" category. The transaction completed by FedFirst and CB Financial is not a change of control, however, because "control of both remained in a large, fluid, changeable and changing market." Consequently, FedFirst's board of directors did not owe *Shenker* duties to Mr. Sutton (or the other FedFirst shareholders) and thus Mr. Sutton cannot maintain a direct action against FedFirst or its directors.

With respect to CB Financial, Mr. Sutton's claim that it aided and abetted FedFirst's breach of fiduciary duty fails for two reasons: (1) there was no underlying breach of fiduciary duty for CB Financial aid and abet; and (2) CB Financial's actions were "those normally attendant to a private entity pursuing the private acquisition of a public corporation."

Yuri Marie Francois Vielot, Jr. v. State of Maryland, No. 2132, September Term 2013, filed November 24, 2015. Opinion by Reed, J.

http://www.mdcourts.gov/opinions/cosa/2015/2132s13.pdf

PRESERVATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW – OBJECTIONS AND MOTIONS, AND RULINGS THEREON – INSTRUCTIONS – REQUESTS AND FAILURE TO GIVE INSTRUCTIONS – IN GENERAL

Facts:

The appellant was convicted of two counts of automobile manslaughter related to an incident in which he fell asleep while driving. The incident occurred on October 21, 2010. On that day, soon after returning home at approximately 7:00 a.m. from working the night shift, the appellant drove his wife's children to school. He returned home again and proceeded to take a two-hour nap from approximately 9:00 a.m. to 11:00 a.m. After his nap, he drove his wife to work and then drove to TGI Friday's to buy her lunch. While driving back from the restaurant, the appellant fell asleep, drove onto the median, and fatally struck two landscapers. The appellant was tried twice because the jury at his first trial failed to return a verdict. However, he was ultimately convicted on September 24, 2013.

The appellant challenged his convictions on appeal. He argued that the trial court erred in in determining that one of the State's witnesses, Ms. Doreen Pavese, was "unavailable" for purposes of admitting her former testimony into evidence. Ms. Pavese had testified at the first trial that she saw the appellant fail to maintain his lane for up to a mile before the accident. However, she did not appear to testify at the second trial due to injuries she suffered in an unrelated car accident. The appellant also argued the evidence did not support the trial court's decision to provide the "deliberate failure" jury instruction, which states that "the deliberate failure of a driver to heed clear warning signs of drowsiness is evidence of a reckless disregard for human life." Lastly, the appellant argued there was insufficient evidence to support his convictions.

Held: Affirmed.

The trial court did not abuse its discretion where it found Ms. Pavese "unavailable" under Md. Rule 5-804(a)(4). Ms. Pavese, a resident of the State of New Jersey, suffered a rotator cuff injury and a torn ligament in her arm in a car accident between the first and second trials. The State offered her disability certificate and a note from her doctor indicating she could not drive long distances. This evidence is sufficient to support the trial court's determination regarding the unavailability of Ms. Pavese. In addition, because subsections (4) and (5) of Rule 5-804(a) are independent, they need not both be satisfied to sustain a finding of unavailability.

The trial court did not err in generating the "deliberate failure" jury instruction. Ms. Pavese's testimony that the appellant repeatedly left and then returned to his lane for up to a mile before the accident established the "minimum threshold of evidence necessary to . . . allow a jury to rationally conclude that the evidence support[ed] the application of the ['deliberate failure' jury instruction]." *Bazzle v. State*, 426 Md. 541, 550 (2012) (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)).

Although the outcome would be different without Ms. Pavese's former testimony, the evidence was sufficient to support the appellant's convictions. Evidence that one drove on two hours' sleep is insufficient, by itself, to support a jury's determination that that person acted in a grossly negligent manner. However, the evidence of lack of sleep combined with Ms. Pavese's testimony that the appellant continued to drive for up to a mile after his initial failure to maintain his lane was minimally sufficient to support the jury's determination that he deliberately failed to heed clear warning signs of drowsiness and, therefore, was "driving, operating, or controlling [his] vehicle . . . in a grossly negligent manner." Md. Code Ann. (2011 Supp.), Crim. Law § 2-209(b).

Labria Paige v. State of Maryland, No. 2105, September Term 2014, filed November 30, 2015. Opinion by Wright, J.

http://www.mdcourts.gov/opinions/cosa/2015/2105s14.pdf

CRIMINAL LAW – ACTS, ADMISSIONS, DECLARATIONS, AND CONFESSIONS OF ACCUSED

CRIMINAL LAW – PRIVATE PERSONS; NECESSITY OF STATE ACTION

Facts:

On April 14, 2013, Thea Salley, a loss prevention agent with the Macy's Department store located in the Columbia Mall, testified that appellant, Labria Paige, and two juveniles were stopped by Macy's loss prevention agents as they exited the store carrying concealed merchandise. Because Paige fought with the loss prevention agents in the Macy's parking lot, the agents handcuffed her, for her safety as well as their own. Paige and the two juveniles were then escorted to the Macy's loss prevention office.

Salley stated that, as a loss prevention officer, she worked for Macy's, a retail store that is "not affiliated with any government organization." Salley testified that her office was "not a police department," and that loss prevention officers are not "endowed with arrest powers," nor are they "police officers themselves." According to Salley, during her six years at Macy's, she was never "affiliated with any law enforcement agency" and never worked for the Howard County Police Department or any other police department. Salley also testified that Paige, who was frightened that the parents of the two juveniles would be mad at her, repeatedly said, "I did it. I did everything. I did everything. Don't involve them. Don't get them in trouble."

At a later point, Salley called the Howard County Police, informed them of the theft, and asked them to respond to the store. Officer Kristian Bush of the Howard County Police Department arrived at approximately 2:10 p.m. At around 2:48 p.m., after appellant's handcuffs had been removed, appellant signed a Macy's statement of admission form, a Macy's trespass notification form, and a Macy's civil demand notice.

Defense counsel moved to suppress any statements appellant made after Officer Bush arrived in the Macy's loss prevention office, arguing that the presence of the police officer, as well as the other circumstances surrounding the interview, established that appellant was in custody when she signed the written admissions of guilt and that those statements should be suppressed. The circuit court denied the motion.

Paige was eventually convicted by a jury in the Circuit Court for Howard County of theft under $1,000.00 in connection with a shoplifting case. After she was sentenced to 18 months, with all but six months suspended, appellant timely appealed.

Held: Affirmed.

Loss prevention officers or private security guards who have no arrest powers or other duties associated with typical law enforcement are not special police officers, as that category of individuals is understood under Maryland law. They are not required to give the *Miranda* warnings when interrogating an individual, and the mere presence of a police officer while defendant signs a written admission of guilt is not the equivalent of police custody so as to require the satisfaction of *Miranda*.

Nathaniel Smith, Sr. v. State of Maryland, No. 2554, September Term 2013, filed November 25, 2015. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2015/2554s13.pdf

CRIMINAL PROCEDURE – STIPULATION AS TO A DISQUALIFYING CRIME – PUBLIC SAFETY ARTICLE § 5-133

Facts:

Smith was charged with attempted second degree murder, first degree assault, use of a handgun in the commission of a crime of violence, and possession of cocaine. Smith was also charged with illegally possessing a firearm after a disqualifying conviction, pursuant to Public Safety Article (PS) § 5-133(b) — illegal possession of a regulated firearm after having been convicted of a disqualifying crime, PS § 5-133(c) — illegal possession of a regulated firearm after a felony conviction for violating Criminal Law Article (CL) § 5-602, and PS § 5-144 — possession of a firearm in violation of Subtitle 5 of the Public Safety Article.

Prior to jury selection, the parties and the trial court discussed the manner by which Smith's disqualifying convictions should be presented. At that time, defense counsel stated that he would stipulate that Smith had been convicted of a disqualifying crime.

During the State's case-in-chief, the prosecutor failed to address the issue of Smith's disqualifying conviction. Thereafter, Smith moved for judgments of acquittal. As to the charges for knowingly possessing a firearm after conviction of a disqualifying crime, defense counsel asserted that "there is no evidence that my client did knowingly participate in the illegal possession of a regulated firearm . . . ." The motions were denied. After a brief recess, the court informed the jury that the parties had stipulated "that by law Mr. Nathaniel Smith is prohibited from possessing a firearm."

After the defense rested its case, the trial court and the parties discussed jury instructions. The court indicated that it would "mention the stipulations" during its instructions, and ultimately informed the jury "it should be considered proven . . . [that] defendant, Mr. Smith, is prohibited by law from possessing a regulated firearm."

The jury acquitted Smith of the attempted murder charge, but found him guilty of the remaining counts.

On appeal, Smith contended that the evidence presented was not sufficient to sustain his convictions for illegal possession of a firearm because the prosecutor failed to present evidence of the disqualifying conviction to the jury during the State's case-in-chief.

Held: Affirmed.

In order to secure a conviction for a violation of § 5-133 of the Public Safety Article, which makes it illegal for persons convicted of certain crimes to possess a firearm, the State must establish that the handgun involved was a regulated firearm, that the defendant possessed this firearm, and that the defendant was precluded from doing so because of a disqualifying status. *See Nash v. State*, 191 Md. App. 386, 394, *cert. denied*, 415 Md. 42 (2010). That a predicate prior conviction is an element of the illegal possession charge provides the prosecutor with an opportunity to present evidence that is otherwise prohibited by the propensity rule. D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force*," 49 Hast. L.J. 403, 420 (1998). One way of avoiding, or at least minimizing, the prejudicial effects of such evidence is for the parties to stipulate that the defendant has been convicted of a disqualifying offense. See *Old Chief v. United States*, 519 U.S. 172, 185 (1997); *Carter v. State*, 374 Md. 693, 722 (2003).

Entering into a stipulation as to a disqualifying crime relieves the State of its obligation to prove that the defendant had previously been convicted of a disqualifying crime and precludes prejudicial information about the defendant's prior conviction from entering into the jury's deliberations. See *United States v. Hardin*, 139 F.3d 813, 816-17 (11th Cir.), *cert. denied*, 525 U.S. 898 (1998). Thus, by consenting to the stipulation, Smith relieved the State of its obligation to prove that he had previously been convicted of a disqualifying crime as part of its case-in-chief.

The trial court may present the stipulation as to the disqualifying offense to the jury, after the State has closed its case-in-chief, so long as the presentation is not prejudicial to the defendant. Smith received exactly what he bargained for when he agreed to the stipulation and suffered no prejudice when the stipulation was presented to the jury by the court instead of by the prosecutor during the State's case-in-chief. Accordingly, Smith cannot receive a "windfall from the government's failure to formally read the stipulation to the jury." *United States v. Harrison*, 204 F.3d 236, 242 (D.C. Cir.), *cert denied*, 531 U.S. 911 (2000). *See also Hardin*, 139 F.3d at 817.

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Roderick Colvin v. State of Maryland, No. 2341, September Term 2014, filed November 30, 2015. Opinion by Zarnoch, J.

Friedman, J., dissents.

http://www.mdcourts.gov/opinions/cosa/2015/2341s14.pdf

CRIMINAL PROCEDURE – ILLEGAL SENTENCE – COGNIZABLE CLAIMS

CRIMINAL PROCEDURE – JURY VERDICT – POLLING OF JURY – UNANIMITY OF VERDICT

Facts:

In 1989, appellant Roderick Colvin was tried in the Circuit Court for Baltimore City before a jury on numerous charges in connection with the murder of Charles Reese and the attempted murder of Jeanette Coleman. After completing jury deliberations and returning to the court room, the court asked who would speak for the jury. The foreperson did not speak; instead, the jury selected juror 3 to announce the guilty verdicts. Defense counsel then asked the clerk to poll the jury. The clerk asked, "You heard the verdict. Is your verdict the same?" to which juror 1 responded, "Yes." The clerk repeated this question with each of the other jurors. The jurors responded, "Yes" or "Same." The clerk did not ask the foreperson, juror 3, who had just announced the verdicts for the jury, if her verdict was the same. The clerk then harkened the verdicts, and the jury, including the foreperson, responded, "Yes." The court then dismissed the jury. Colvin was sentenced to imprisonment for life plus an additional 20 years. On appeal, his conviction was affirmed.

In 2013, Colvin filed a motion to correct an illegal sentence pursuant to Maryland Rule 4-345. He argued that the verdicts supporting his convictions were not unanimous because the jury foreperson was not polled after she announced the jury's verdicts. After a hearing held on May 15, 2014, the circuit court denied Colvin's motion, reasoning that a failure to poll the foreperson was not an issue that could be raised on a motion to correct illegal sentence and, alternatively, that the polling process was adequate. On appeal, Colvin argued that the failure to poll the jury's designated foreperson in addition to the other members of the jury rendered the verdict non-unanimous. Colvin argued that because his sentence was based on a non-unanimous verdict, it was illegal.

Held: Affirmed.

The Court viewed Colvin's motion to correct an illegal sentence as a challenge to the unanimity of the verdicts. Maryland Rule 4-345(a) allows a court to "correct an illegal sentence at any time." However, challenges to the legality of a sentence "are limited to those situations in which

the illegality inheres in the sentence itself; i.e., there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantively unlawful." *Brightwell v. State*, 223 Md. App. 481, 489 (2015). Because a defect in the return of a verdict may, in certain circumstances, render a conviction a nullity, the Court held that it was not improper for Colvin to raise the alleged discrepancies affecting the unanimity of a verdict in a motion to correct an illegal sentence.

On the issue of whether the verdict in this case was unanimous, the Court held that the return of the verdict was not improper. In reviewing the caselaw, the Court determined that, when presented with a record where it was clear that the foreperson was not polled along with the other jurors, Maryland courts have not *sua sponte* held that the verdict was a nullity and consequently that the sentence was illegal. The Court was persuaded that under the totality of the circumstances in the present case, the clerk of the court did what was required in order to finalize the verdicts against Colvin:

> Each verdict was announced in open court by the foreperson, the jury was polled (excepting the foreperson), and the jury harkened to its verdict—voiced by all of the jurors including the foreperson. Reinforcing our conclusion, we note that, with the consent of Colvin's attorney, the jury chose its own foreperson. We find it highly unlikely that the jury would have agreed to designate as foreperson a juror who did not agree with the verdicts she would be announcing. Even though the record reflects that the foreperson was not polled, it is clear that the foreperson agreed with the verdicts.

Under the circumstances presented in this case, the Court held that there was no uncertainty as to the unanimity of the verdict. The Court noted that, although it is a better practice for the clerk to poll the foreperson in addition to each of the other jurors, the failure to do so here does not render the verdict a nullity. Therefore, Colvin's sentences were not illegal, as they stemmed from unanimous verdicts that were announced in open court and properly hearkened to by the jury. Accordingly, the circuit court did not err by denying Colvin's motion to correct an illegal sentence.

Vanessa Kreyhsig v. Luis Montes, No. 1694, September Term 2014, filed October 29, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/1694s14.pdf

RES JUDICATA – NAME CHANGE

Facts:

In the course of a divorce and custody proceeding, Father sought to change Son's surname to include his own. His request was granted in that proceeding, but an *en banc* panel reversed that decision. It did, however, give Father the opportunity to seek a hearing, which he did not do. Meanwhile, he filed a separate First Petition to change Son's name, which the court denied without a hearing (Father had not requested one).

Father then filed a Second Petition, and after a hearing the trial court determined that the proceeding was not barred by *res judicata* in spite of the decisions in Mother's favor of both the *en banc* panel in the Custody Proceeding and of the trial court in the First Petition. The court went on to consider the merits of the Second Petition and found in Father's favor, granting the petition to change Son's name.

Held: Reversed.

The doctrine of *res judicata* bars relitigation of the same claim between parties. The doctrine operates slightly differently in issues relating to children—custody, name change, or others—and permits parties to relitigate questions decided previously when circumstances have changed. So, for example, if a court denied a name change petition but circumstances later arose that might render the name change justifiable and in the best interests of the child, *res judicata* would not necessarily bar that subsequent action. Here, however, Father failed to show that any circumstances had changed in the time between the *en banc* denial and the denial of the First Petition, on the one hand, and the filing of the Second Petition, on the other, and so the Second Petition was barred by *res judicata*.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated November 3, 2015, the following attorney has been disbarred by consent:

EUGENE ALAN SHAPIRO

*

By a Per Curiam Order of the Court of Appeals dated November 6, 2015 the following attorney has been disbarred:

TAMARA RENEE GOOD

*

By a Per Curiam Order of the Court of Appeals dated November 10, 2015, the following attorney has been disbarred:

C. TRENT THOMAS

*

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

TAKISHA VERA BROWN

*

This is to certify that the name of

KEVIN TRENT OLSZEWSKI

has been replaced upon the register of attorney in this state as of November 19, 2015.

*

*

By an Order of the Court of Appeals dated November 20, 2015, the following attorney has been indefinitely suspended:

RONALD JAMES GROSS

*

This is to certify that the name of

ANTOINE I. MANN

has been replaced upon the register of attorneys in this state as of November 20, 2015.

*

UNREPORTED OPINIONS

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