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Attorney Grievance Commission of Maryland v. Jennifer Vetter Landeo, Misc. Docket AG No. 79, September Term 2014, filed February 19, 2016. Opinion by Watts, J.

http://www.mdcourts.gov/opinions/coa/2016/79a14ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION FROM PRACTICE OF LAW IN MARYLAND WITH RIGHT TO APPLY FOR REINSTATEMENT AFTER NINETY DAYS

Facts:

On the Attorney Grievance Commission ("the Commission")'s behalf, Bar Counsel filed in the Court of Appeals a "Petition for Disciplinary or Remedial Action" against Jennifer Vetter Landeo ("Landeo"), Respondent, charging her with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5(a) (Reasonable Fees), 1.15(a), 1.15(c), 1.15(d) (Safekeeping Property), 1.16(d) (Terminating Representation), 5.3(a), 5.3(b), 5.3(c) (Responsibilities Regarding Nonlawyer Assistants), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct That is Prejudicial to the Administration of Justice), 8.4(a) (Violating MLRPC).

A hearing judge found the following facts. On December 12, 2001, the Court of Appeals admitted Landeo to the Bar of Maryland. Since January 2004, Landeo has worked at Landeo and Capriotti, LLC, which focuses on immigration law. Landeo is not fluent in any language other than English, and uses bilingual office assistants, who are not certified interpreters or translators, to communicate with Spanish-speaking clients.

Landeo was retained to represent three people in matters concerning their immigration status. In the first client matter, the client—a native and citizen of Guatemala who was fluent in Spanish, spoke little English, and could not read English—entered the United States illegally in 2003, married a United States citizen in 2009, and retained Landeo in February 2012 to file three documents on her behalf to assist her in obtaining legal permanent residence status. Landeo did not deposit attorney's fees or filing fees into an attorney trust account, nor did she have the client's consent, confirmed in writing, to deposit the fees into an account other than an attorney trust account. Although Landeo testified that she planned to refrain from filing one document

until after the Department of Homeland Security promulgated an amendment to a regulation, Landeo failed to convey this plan to the client. And, although the clients had provided Landeo the filing fee and all of the documents that were necessary to file the first document, Landeo did not file the document until nearly eight months later. Between May 2012 and March 2013, Landeo never directly communicated with the client, despite the client's multiple attempts to speak with the client. The client terminated Landeo's representation, and in April 2013, the client retained a new immigration lawyer. The new immigration lawyer requested from Landeo the contents of the client's file and a refund of unearned fees; as of four months later, the new immigration lawyer had not received the client's file, and the client had not received a refund.

In the second client matter, the client—a native and citizen of El Salvador who spoke English but preferred communicating in Spanish—entered the United States illegally in 2002, and retained Landeo in October 2010 to file two documents on her behalf, an "Abused Spouse Petition" and an "Adjustment of Status," which would, if approved, allow the client to get a green card for work authorization. Landeo did not deposit attorney's fees or filing fees into an attorney trust account. Although the client provided Landeo with all of the documents that were necessary to file the Abused Spouse Petition, Landeo did not file the document until nearly three months later. The client requested from Landeo an explanation as to the *prima facie* determination made as to the Abused Spouse Petition, but Landeo never provided the client with an explanation. The client provided Landeo with all of the documents that were necessary to file the Adjustment of Status, but Landeo never filed the document. In December 2012, the client terminated Landeo's representation and retained a new immigration lawyer. The new immigration lawyer requested from Landeo the contents of the client's file. Three weeks later, a member of Landeo's staff e-mailed to the new immigration lawyer scanned copies of the client's file. The new immigration lawyer reiterated his request for the originals of the client's file and requested a refund of a filing fee and unearned attorney's fees. Two weeks later, Landeo mailed to the new immigration lawyer the client's file. Landeo never refunded attorney's fees to the client.

In the third client matter, the client entered the United States illegally in 1997, and was granted "Temporary Protective Status" in November 1999. In 2009, without authorization from the United States government, the client left the United States and returned to Honduras. Because the client failed to get advance permission to leave and re-enter the United States, the client was detained when she attempted to illegally re-enter the United States at the Texas border in 2010. In December 2010, the client had her Temporary Protective Status renewed. In June 2012, the client was informed that her Temporary Protective Status had been withdrawn. And, in July 2012, the client retained Landeo to file a notice of appeal or motion as to her Temporary Protective Status, which was due on July 17, 2012. Landeo did not file the notice of appeal or motion until three months after the deadline, and did not provide any reasons for the late filing. The notice of appeal or motion was denied. Landeo did not deposit the filings fees and other costs into an attorney trust account. In September 2012, the client retained Landeo to file a work permit application her behalf. Landeo did not deposit the filing fees and other costs into an attorney trust account, and never filed the work permit application. On November 26, 2012, the client was detained for purposes of deportation. Thereafter, the client's sister sought to retain Landeo in connection with the client's detainment and to file a motion to stay removal. Although the instructions on the form for a motion to stay removal stated that the form needed to

be hand-delivered, Landeo mailed the form; Landeo then asked for more money from the client's sister to hand-deliver the form. The client's sister initially provided her credit card information to pay the additional fee, but when the credit card information could not be processed, decided not to pay Landeo the additional fee. On December 11, 2012, the client's sister went to Landeo's office to retrieve the documents from the client's file. On December 14, 2012, the client was deported.

The hearing judge concluded that: (1) as to the first client matter, Landeo had violated MLRPC 1.3, 1.4, 1.15, 1.16, and 8.4, but had not violated MLRPC 1.5; (2) as to the second client matter, Landeo had violated MLRPC 1.3, 1.4, 1.15, 1.16, and 8.4, but had not violated MLRPC 1.5 or 5.3; and (3) as to the third client matter, Landeo had violated MLRPC 1.1, 1.3, 1.4, and 8.4, but had not violated MLRPC 1.5, 1.16, or 5.3.

Held:

The Court of Appeals: (1) sustained the Commission's exception to the hearing judge's conclusion that Landeo did not violate MLRPC 1.5(a) in the first client matter; (2) sustained the Commission's exception to the hearing judge's failure to conclude that Landeo violated MLRPC 1.15(a) in the third client matter; (3) overruled all of Landeo's exceptions to the hearing judge's conclusions of law; (4) reversed the hearing judge's conclusions that Landeo did not violate MLRPC 1.5(a) in the second client matter and the third client matter; and (5) held that clear and convincing evidence supported the conclusions that Landeo violated MLRPC 1.1, 1.3, 1.4(a)(2), 1.4(a)(3), 1.4(b), 1.15(a), 1.15(c), 1.16(d), 8.4(d), and 8.4(a), but not MLRPC 1.15(d), 5.3(a), 5.3(b), 5.3(c), or 8.4(c).

The Court of Appeals agreed with the Commission that an indefinite suspension from the practice of law in Maryland with the right to apply for reinstatement after ninety days was the appropriate sanction for Landeo's misconduct. Landeo violated MLRPC 1.1, 1.3, 1.4(a)(2), 1.4(a)(3), 1.4(b), 1.5(a), 1.15(a), 1.15(c), 1.16(d), and 8.4(d) by: failing to provide competent representation; failing to provide diligent representation in time-sensitive immigration matters and waiting months to file documents; failing to keep her clients reasonably informed about the status of their matters, promptly comply with her clients' reasonable requests for information, and explain matters to the extent reasonably necessary to permit her clients to make informed decisions regarding the representation; charging and collecting attorney's fees for services that she failed to provide to any meaningful degree or at all; failing to deposit attorney's fees and filing fees into an attorney trust account; failing to deposit her clients' unearned attorney's fees into an attorney trust account without the clients' informed consent, confirmed in writing, to a different arrangement; failing to reasonably protect her clients' interests and timely surrender files to which the clients' new lawyers were entitled; and engaging in conduct that was prejudicial to the administration of justice. Landeo's misconduct resulted in actual injury to her clients—two clients experienced delays in obtaining their desired immigration statuses, and were forced to terminate Landeo's representation and seek new counsel, and a third client was detained and deported. Landeo's misconduct was aggravated by five factors: (1) Landeo

engaged in a pattern of misconduct; (2) Landeo committed multiple violations of the MLRPC; (3) Landeo had refused to acknowledge the misconduct's wrongful nature; (4) Landeo's clients were vulnerable victims; and (5) Landeo had substantial experience in the practice of law, as she had been a member of the Bar of Maryland for approximately a decade at the time of her misconduct. The only mitigating factor present was the absence of prior attorney discipline. An indefinite suspension with the right to apply for reinstatement after ninety days was necessary to protect the public and impress upon Landeo and all other lawyers the importance of diligent representation and adequate communication in immigration cases.

Daniel M. Mensah v. MCT Federal Credit Union, No.54, September Term 2015, filed February 24, 2016. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2016/54a15.pdf

JUDGMENT – GARNISHMENT – MD. RULE 3-646

Facts:

Daniel M. Mensah, while living in Maryland, in 2006, opened a personal line of credit as well as a credit card account with MCT Federal Credit Union ("MCT"). Mr. Mensah, over the next several years, accumulated debt on both the credit card and on the line of credit. MCT filed two complaints in 2010 against Mr. Mensah in the District Court of Maryland for Montgomery County, one for the outstanding balance on the credit card account and another for the money owed on the line of credit. Mr. Mensah, by the time of the filings, had moved to Texas and MCT was able to achieve substitute service. Mr. Mensah failed to answer either complaint, and MCT was awarded default judgments in the amount of $21,270.12 on the credit card claim and $15,848.64 on the line of credit. Mr. Mensah failed to note any appeal.

In 2013, MCT secured two writs of garnishment in the same actions from the District Court pursuant to Sections 15-601 through 15-606 of the Commercial Law Article, as implemented by Maryland Rule 3-646. The writs were served on the Maryland resident agent of Mr. Mensah's employer, BASF, as well as on its payroll department in New Jersey. Although BASF answered and did not contest the garnishment, Mr. Mensah filed motions to quash the writs, arguing that his wages, earned solely for work he performed in Texas, were not subject to garnishment in Maryland. The District Court denied both motions to quash, and Mr. Mensah appealed to the Circuit Court for Montgomery County, which affirmed.

Held:

Garnishment of wages earned outside of Maryland by a non-resident was valid when court had original and ancillary jurisdiction over the judgment debtor and sufficient contacts in the State to exercise personal jurisdiction over the garnishee.

Mr. Mensah argued that his wages earned exclusively in Texas were not subject to garnishment based upon the Court of Special Appeals's decision in *Livingston v. Naylor*, 173 Md. App. 488, 220 A.2d 34 (2007). In *Livingston*, the intermediate appellate court determined that, pursuant to an enrolled "foreign" judgment from North Carolina, Mr. Naylor's garnishment of Livingston's wages could only reach those wages earned by Livingston, a non-resident, in Maryland. A "foreign" judgment, one that is validly entered in another state or country, may be enrolled in

Maryland under the Uniform Enforcement of Foreign Judgments Act ("UEFJA") and its enforcement sought.

The Court of Appeals distinguished the enforcement of a garnishment order on wages earned out of state arising out of an enrolled "foreign" judgment from a garnishment order based on an original judgment entered in a Maryland court. Garnishment of wages under Sections 15-601 through 15-606 of the Commercial Law Article is valid when the Maryland court has original, continuing and ancillary jurisdiction over the judgment debtor and the judgment debtor's employer/garnishee has sufficient contact with the State.

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State of Maryland v. Jacob Bircher, No. 33, September Term 2015, filed February 23, 2016. Opinion by Battaglia, J.

Harrell, J., joins in judgment only.
Barbera, C.J., Adkins and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2016/33a15.pdf

CRIMINAL LAW – TRIAL – ISSUE RELATING TO JURY TRIAL – INSTRUCTIONS AFTER SUBMISSION OF CAUSE

Facts:

Jacob Bircher was convicted of first degree murder and attempted first degree murder, among other crimes, after he fired a handgun into a crowd outside Cheers Bar and Lounge in Carroll County, hitting Gary Hale and killing David Garrett.

At trial, testimony reflected that Bircher had been flirting with Kristen Remmers, who had arrived at the bar with Gary Hale. During the evening of the shooting, Mr. Hale said loud enough for Bircher to hear, "Your little boyfriend is about to get his ass beat." Bircher attempted to leave, but realized that he had left his debit card at the Bar. Afraid for his life, Bircher secured a semiautomatic Glock 23 pistol from his car and began to return to the Bar at which time he spotted Mr. Hale approaching him. Bircher fired a thirteen round magazine in a matter of seconds, hitting Mr. Hale once in the arm and David Garrett eight times. Mr. Garrett had been standing next to Mr. Hale when the shots were fired.

The State did not request an instruction on transferred intent, but, rather, argued that Bircher intended to kill everyone standing outside the bar. Bircher's defense was that he did not intend to shoot Mr. Garrett; that Bircher acted in self-defense, and that Bircher did not intend to hit anyone. During jury deliberations, the court received a note stating that, "We are confused on the term 'intent.' Does it mean to kill a person or the specific person. Can you please clarify? Thank you." Over the objection of defense counsel, the trial judge responded to the question with an instruction on transferred intent.

The Court of Special Appeals reversed. Although Bircher argued that the supplemental instruction was prejudicial under *Cruz v. State*, 407 Md. 202, 212, 963 A.2d 1184, 1190 (2009), the court determined that *Cruz* was not applicable. Nevertheless, the intermediate appellate court reasoned that the response did not address the question asked by the jury and had "no place at Mr. Bircher's trial to begin with."

Held: Reversed.

The Court of Appeals reversed and concluded that, utilizing an abuse of discretion standard, the evidence reflected that Bircher could have heard Mr. Hale and his threats and been afraid. The evidence also suggested that when Bircher returned to the bar to get his debit card, he may have intended to protect himself by shooting Hale, while the bullets killed David Garrett, the person standing next to Hale.

The Court of Appeals also rejected the notion that the instruction was prejudicial under *Cruz*. The Court reasoned that, unlike in *Cruz*, Bircher's counsel did not concede that Bircher intended to shoot Mr. Hale but not Mr. Garrett, an argument that would have "walked into" the transferred intent issue. To the contrary, Bircher's counsel repeatedly emphasized that Bircher did not intend to shoot anyone, did not intend to shoot Mr. Garrett specifically and acted in self-defense. None of these arguments prejudiced Bircher with regard to the giving of a transferred intent instruction because Bircher, according to his counsel, "Did not have an intent to kill anybody."

In addition to the lack of any concession regarding transferred intent, Bircher's counsel was given adequate time to prepare additional closing remarks, unlike what occurred in *Cruz*. The Court determined that a day to prepare and then give additional closing remarks exceeded that which was given in *Cruz*.

Mashea Louise Ray-Simmons a/k/a Tayana Simmons & Antionette McGouldrick v. State of Maryland, No. 28, September Term 2015, filed February 22, 2016. Opinion by Barbera, C.J.

McDonald, J., dissents.

http://www.mdcourts.gov/opinions/coa/2016/28a15.pdf

CRIMINAL LAW – PEREMPTORY CHALLENGES

Facts:

Petitioners, Mashea Ray-Simmons and Antionette McGouldrick, were tried jointly with a third codefendant before a jury in the Circuit Court for Baltimore City on charges of first degree murder, conspiracy to commit murder, and related handgun offenses. Prior to jury selection, defense counsel requested and received from the trial court a "ruling that an objection made by one defendant would be deemed made by the others." During jury selection, counsel for Ms. Ray-Simmons alleged that the State's exercise of five peremptory challenges, all against African American men, violated the dictates of *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court then called upon the State to explain the exercise of its peremptory challenges, to which the State responded:

> Your Honor, as to 4909, the State struck him because of his age. As to 4773, that man appeared to have a real issue with numbers. He either wasn't here this morning when his number was called or just doesn't – he just appeared to have some issues with that.
>
> *As to 4583, I intended to replace him with another black male. Defense, I believe it was two actually, ended up striking that person.*
>
> . . . .
>
> As to 4692 - . . . His brother was convicted of CDS and he was unemployed. As to 4579 he's also young.

Following that explanation, the trial court stated: "I don't think it would be used to establish a prima facie case," and jury selection resumed. When twelve jurors had been agreed upon, the trial court asked counsel for Ms. Ray-Simmons if the panel was acceptable to his client, to which he replied "Acceptable." Then, in response to the same question, counsel for Ms. McGouldrick answered, "Acceptable, safe from [sic] prior objections, Your Honor." Petitioners ultimately were acquitted of first degree murder but were found guilty of second degree murder, conspiracy to commit murder, and use of a handgun in the commission of a crime of violence.

In an unreported opinion, a panel of the Court of Special Appeals concluded that neither Petitioner preserved a *Batson* claim for appellate review because both had accepted the

composition of the jury at the close of jury selection. The intermediate appellate court then held in the alternative that the trial court had not erred in concluding that Petitioners failed to establish a prima facie case of discrimination, and further held that the prosecutor's explanation was sufficiently neutral to comply with *Batson*.

Held:

The Court first held that the trial court's ruling at the outset of trial proceedings that "an objection made by one defendant would be deemed made by the others" was sufficient to preserve both Petitioners' *Batson* claims for appellate review. The Court reasoned that when counsel for Ms. Ray-Simmons raised a *Batson* challenge, counsel for Ms. McGouldrick joined automatically in that challenge. Likewise, when at the end of jury selection counsel for Ms. McGouldrick stated that the jury was acceptable "safe from [sic] prior objections," counsel for Ms. McGouldrick preserved the *Batson* challenge for his client as well as Ms. Ray-Simmons.

The Court then held that the trial court erred in concluding that Petitioners failed to establish a prima facie case of discrimination because that inquiry was rendered moot when the State offered explanations for the exercise of its peremptory challenges. The trial court's error at this stage was further compounded because the State at that point had exercised peremptory challenges only against African American men; that evidence sufficed to establish a prima facie case of discrimination under *Batson* and its progeny.

The Court also held that the State's explanation as to challenged Juror 4583—"I intended to replace him with another black male"—was neither a clear and reasonably specific explanation nor race- and gender-neutral. A desire to replace a juror with another unspecified member of the panel does not explain in any way, race-neutral or otherwise, the prosecutor's reasons for striking that particular juror. Moreover, the prosecutor's apparent intention to replace Juror 4583 with another African American man discloses that race and gender factored improperly into the prosecutor's decision, in violation of *Batson*. Based upon the trial court's error, the Court concluded that Petitioners were entitled to a new trial.

George Cameron Seward v. State of Maryland, No. 12, September Term 2015, filed January 27, 2016. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2016/12a15.pdf

MARYLAND CODE (2001, 2008 REPL. VOL., 2015 CUM. SUPP.), § 8-301 OF THE CRIMINAL PROCEDURE ARTICLE ("CP") – RIGHT OF DIRECT APPEAL:

Facts:

In 1985, the Circuit Court for Baltimore County found George Cameron Seward ("Seward") guilty of multiple crimes relating to an incident of assault, rape, and robbery. During the trial, Seward's employer testified that she was unable to locate employment records and state whether he was at work the week of the crime. The victim's testimony provided the only substantive evidence to identify Seward as her attacker.

Between 1996 and 1997, Seward's postconviction attorney located the employment records. After reviewing the records, the employer concluded it was "impossible" that Seward could have left his job to conduct the attack. Unsuccessful in seeking postconviction relief, Seward filed a petition for writ of actual innocence in the Circuit Court for Baltimore County in 2010.

The Circuit Court granted Seward a new trial in 2012. Based on the employment records, the Circuit Court concluded that a substantial possibility existed that the result of Seward's trial could have been different. At trial, the State had relied "solely" on the victim's identification of Seward as her attacker. The records showed that Seward "could not have been at the scene of the crime while the crime was occurring." The Circuit Court also concluded that Seward's trial attorney had acted with "due diligence." After reviewing the postconviction court's analysis of Seward's trial attorney's performance, the Circuit Court refused to conclude that the attorney "could have done anything else to obtain" the records.

The State filed a notice of appeal, but Seward moved to dismiss, citing the State's limited authority to appeal as established by statute. In a reported opinion, the Court of Special Appeals denied Seward's motion to dismiss, concluding that the State can appeal an order granting a petition for writ of actual innocence. On the merits of the State's appeal, the intermediate appellate court concluded that Seward's petition must be denied. It concluded that the Circuit Court erred by applying the wrong standard for due diligence. Rather than remand for further proceedings, the intermediate appellate court reversed, reasoning that the records were not newly discovered evidence under a proper due diligence analysis. We granted Seward's Petition for Writ of Certiorari.

Held: Reversed.

Because the right of appeal is entirely statutory in Maryland, *Pack Shack, Inc. v. Howard Cnty.*, 371 Md. 243, 247, 808 A.2d 795, 797 (2002), we examined Maryland Code (1973, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article ("CJP") to determine whether the State had a right to appeal an order granting a petition for writ of actual innocence under Maryland Code (2001, 2008 Repl. Vol., 2015 Cum. Supp.), § 8-301 of the Criminal Procedure Article ("CP"). Critical to each party's argument was *Douglas v. State*, in which we held that "a denial of a petition for writ of actual innocence is a final judgment under [CJP] § 12-301." 423 Md. 156, 174, 31 A.3d 250, 261 (2011).

The State construed *Douglas* as affirming that CJP § 12-301 applies "in actual innocence cases." The State read *Douglas* for the proposition that any decision in an actual innocence case constitutes a final judgment. But the State failed to confront a patent difference between *Douglas* and this case. Although we held that the Circuit Court's decision in *Douglas* was a final judgment under CJP § 12-301, the procedural context was materially different.

We concluded in *Douglas* that an order denying a petition for a writ of actual innocence was final because the order "conclude[d] a petitioner's rights as to all claims based on the newly discovered evidence alleged in the petition." 423 Md. at 171, 31 A.3d at 259. When an order denies a petition based on allegedly newly discovered evidence, the petitioner can never refile "on the basis of the same [] evidence." *Id*. at 172, 31 A.3d at 259. The order, then, prohibits the petitioner from further "'prosecut[ing] or defend[ing] his . . . rights and interests in the subject matter of the proceeding.'" *Id*. at 171, 31 A.3d at 259. (citation omitted). Once a circuit court denies the petition regarding that evidence, no "further action is to be taken in the case." *Id*. (citation omitted).

In direct contrast, the Circuit Court's order here did not prohibit the State from further prosecuting and defending its rights and interests in the newly discovered evidence. Because the Circuit Court granted Seward a new trial, the State could exercise its right to prosecute Seward at that trial and attack the newly discovered evidence. *See id*. Indisputably, "'further action is to be taken in th[is] case.'" *Id*. (citation omitted). To permit the State to appeal this order would subvert the purpose of CJP § 12-301: "'to prevent piecemeal appeals and . . . the interruption of ongoing judicial proceedings.'" *Id*. at 172, 31 A.3d at 259 (citation omitted).

The State unsuccessfully sought to focus our analysis on the question of whether CP § 8-301 was part of the underlying criminal case or was a collateral, civil proceeding. That distinction is unhelpful because CJP § 12-301 provides a right of appeal "in a civil *or* criminal case." (emphasis added). The appeal must be "from a final judgment." CJP § 12-301. The Circuit Court's order, as we said, was not a final judgment.

Finally, the State unsuccessfully argued that the General Assembly failed to include a right to appeal for either the petitioner or the State in CP § 8-301 because that right already existed in CJP § 12-301. This argument, however, presumed that the right of appeal in CJP § 12-301 was available to the State. It was not. The State's argument rested on a misreading of *Douglas*. In *Douglas* we said it "would be redundant" for CP § 8-301 to have "explicit language" that "authorizes the right of appeal from a final judgment." 423 Md. at 173, 31 A.3d at 260. The

redundancy, however, followed from our conclusion that the denial of a petition for writ of actual innocence was a final judgment, and thus, within the scope of CJP § 12-301. *Id*. at 171, 31 A.3d at 259. Legislative history had nothing to do with that conclusion. *Id*. at 173, 31 A.3d at 260.

Felicia Lockett v. Blue Ocean Bristol, LLC, No. 29, September Term 2015, filed February 22, 2016. Opinion by McDonald, J.

http://www.mdcourts.gov/opinions/coa/2016/29a15.pdf

LANDLORD-TENANT LAW – RESIDENTIAL LEASES – RETALIATION ACTIONS – CONDITION FOR RELIEF THAT TENANT BE "CURRENT ON THE RENT"

ATTORNEYS' FEES – AWARD PURSUANT TO STATUTE – PROCEDURE

Facts:

Petitioner Felicia Lockett is a tenant in an apartment building known as Bristol House in Baltimore City. She has participated in the tenants association at Bristol House and advocated vigorously on behalf of the tenants there. This apparently resulted in a contentious relationship with the landlord, Respondent Blue Ocean Bristol, LLC (Blue Ocean).

In 2014, Blue Ocean decided not to renew Ms. Lockett's lease and, when she did not vacate the apartment, Blue Ocean filed a tenant holding over action. Ms. Lockett defended and asserted a counterclaim on the basis that the non-renewal and tenant holding over action were in retaliation for her advocacy on behalf of the tenants association. She requested damages and attorneys' fees under the anti-retaliation statute, Real Property Article §8-208.1. Under that statute, a tenant must be "current on the rent" to obtain relief for any act of retaliation by a landlord.

The Circuit Court ultimately ruled in Ms. Lockett's favor on the question of retaliation. However, it awarded her damages for only one of two alleged acts of retaliation on the ground that she failed to prove that she was "current on the rent" at the time of the second alleged act and therefore was not eligible for relief as to that act. Although she had fully paid the fixed monthly amount specified as the "rent" in one part of her lease, she had an ongoing dispute with Blue Ocean over her liability for other charges, such as utility charges and other fees that varied from month-to-month and that the lease "deemed rent."

With respect to Ms. Lockett's request for attorneys' fees, the trial court declined to allow Ms. Lockett to provide evidence on that issue following the trial and denied the award simply by noting that an award of attorneys' fees is "discretionary."

Held:

Ms. Lockett's other debts to Blue Ocean – even if she in fact owed them − do not factor into whether she was "current on the rent" for the purposes of the anti-retaliation statute. In addition, while it is true that the decision whether to award fees and the amount of any such fees is entrusted to the discretion of the trial court, the court must follow the procedure set forth in

Maryland Rule 2-703 and give some explanation of its reasons for how it chose to exercise its discretion.

In commercial leases, courts sometimes defer to the lease's definition of rent, but this is inappropriate for two reasons in Ms. Lockett's case. First, Ms. Lockett's lease is a residential lease, and residential leases are more likely to be provided on a take-it-or-leave-it-basis that does not reflect actual negotiation and agreement of the parties. Second, the lease utilizes several different definitions of rent in its own terms.

Rather, in accordance with the usual approach to statutory construction, it is better to use the ordinary meaning of "rent" — the periodic sum paid for the use or occupancy of property — which harmonizes with other statutory references to "rent" that seem to contemplate an easily ascertainable value and that, in other places, seem to exclude utility charges and other variable fees. This also accords with legislative intent, because this is a remedial statute, and exceptions to remedial statutes are to be construed narrowly.

A court has broad discretion to award or not award attorneys' fees, but Maryland Rule 2-703(g) requires the court to state on the record or in a memorandum filed in the record the basis for its use of discretion, in order to enable an appellate court to review the reasons for denial. Thus, the Circuit Court must hear evidence and argument regarding attorneys' fees and then render a decision with an explanation of its basis.

Andrew Glenn v. Maryland Department of Health and Mental Hygiene, No. 48, September Term 2015, filed February 22, 2016. Opinion by Harrell, J.

McDonald, J., concurs.

http://www.mdcourts.gov/opinions/coa/2016/48a15.pdf

MARYLAND PUBLIC INFORMATION ACT – RECORDS – FREEDOM OF INFORMATION – TEMPORARY DENIAL

Facts:

A lack of specific governmental oversight led to dangerous conditions for women seeking abortions in Maryland and resulted, in 2012, in the Maryland Department of Health and Mental Hygiene ("DHMH") adopting new procedures regarding the application process for surgical abortion facilities. These regulations require that individuals and other entities must obtain a license from the Secretary of DHMH before establishing or operating such a facility.

On 12 March 2013, Petitioner Andrew Glenn, pursuant to the Public Information Act ("PIA"), Maryland Code (2014), General Provisions Article, § 4-101, *et seq*. ("Gen. Prov."), requested the records of all such applications submitted for a license under these regulations. DHMH responded to Glenn's PIA request on 3 July 2013, providing copies of the applications, but redacted the names and email addresses (where the email address contained the individual's name) of individuals who were listed as owners, administrators, and medical directors for each facility, asserting that it "was in the public interest to deny access to those particular pieces of information" pursuant to Gen. Prov. § 4-358(a). There was no redaction of corporate or other business names of applicants.

Within 10 working days as required by Gen. Prov. § 4-358(b), on 19 July 2013, DHMH filed a petition in the Circuit Court for Baltimore City, seeking judicial confirmation for the continued denial of the names and email addresses of these individuals. DHMH, arguing that disclosure of the redacted information was against the public interest, cited to instances where medical doctors and individual owners of this type of facility have been harassed, assaulted, or murdered around the United States over the last few decades. On 8 May 2014, the Circuit Court granted DHMH's petition, indicating that the agency's decision to redact was made on the basis of public safety concerns for those individuals who proposed to operate the facilities.

In an unreported opinion, the Court of Special Appeals affirmed the Circuit Court's judgment on 21 April 2015 concluding "that DHMH provided a reasonable and sufficiently supported explanation" for redaction due to the national historical record of violence and harassment towards abortion providers and the potential chilling effect it would have on providers if redaction did not occur.

The Court of Appeals granted Glenn's Petition for a Writ of Certiorari, *Andrew Glenn v. Maryland Department of Health and Mental Hygiene*, 444 Md. 638, 120 A.3d 766 (2015), to consider the following questions:

> 1. Did the Court of Special Appeals err in granting deference to DHMH's legal conclusion that it was authorized, under Gen. Prov. § 4-358 of the Maryland PIA, to redact the records in question?
>
> 2. Did the Court of Special Appeals err in substituting for the PIA's requirement of proof of "substantial injury to the public interest" the far less demanding standard of mere "greater risk" that disclosure of public information might have a "chilling effect" on owners of regulated businesses?

Held: Affirmed.

The Court of Appeals, through different reasoning than the Court of Special Appeals, affirmed the judgment that redaction and denial of the relevant information in this case was appropriate.

Enacted in 1970, the PIA provides a general right to information, with a strong presumption in favor of disclosure. The Court made clear, that although the presumption skews heavily the calculus toward disclosure, it may be rebutted. The ability to rebut the presumption is not to be construed liberally, however, because the PIA was established with the over-arching purpose of allowing oversight of the government, resulting in a strong practice of disclosure.

The presumption in favor of disclosure may be rebutted by applying one of the enumerated exceptions or applying the "catch-all" provision found in Gen. Prov. § 4-358. No specific exception provision applies here. Under Gen. Prov. § 4-358(a), "[w]henever this title authorizes inspection of a public record but the official custodian believes that inspection would cause substantial injury to the public interest, the official custodian may deny inspection temporarily." The Court of Appeals, in applying this exception, found that DHMH presented sufficient evidence to warrant the continued denial of the sought-after information.

Gen. Prov. § 4-358(a) does not demand absolute certainty that the public interest would be harmed by disclosure, only that the disclosure of the information "would cause substantial injury to the public interest." Here, based on the facts on record, the Court determined that the threat did not create merely a greater risk because the threat to the public interest was more than speculative. The Court of Appeals concluded that DHMH presented sufficient facts to the Circuit Court to show that public safety and public health would be affected substantially if the requested information was disclosed. It is well-known that there is "widespread hostility" in certain quarters towards abortion and abortion providers. Additional facts were presented in the form primarily of a 19 July 2013 affidavit from Patrick Dooley, then Chief of Staff for DHMH, which presented facts on a national scale regarding the history of violence associated with a career in providing surgical abortion services. The evidence of these threats and actual

incidences of violence related to out-of-state occurrences, but Dooley referred also to a few associated events reported in Maryland.

The Court found that DHMH did provide Glenn with all of the basic information about the facilities and business entities, if any, in the applications, as well as any accreditation under which the facility would operate. This information, even with the redaction of the medical director's or administrator's names, would be helpful in "public policing" of the Department's action on the applications for the surgical abortion facilities. Furthermore, a woman contemplating a procedure at one of the facilities would be able to review the same information and conduct research on the business entities proposing to operate the facilities. The Court of Appeals was not persuaded by Glenn's arguments to comparable out-of-state public information acts, because the other state statutes differed greatly from Maryland's PIA.

Because of the history nationally of harassment and violence associated with the provision of abortion services, the Court held that there was a palpable basis for concern that releasing the redacted information would jeopardize medical professionals from practicing within this particular field, which would deter ultimately access to women who seek an abortion in Maryland. Thus, the threshold for a denial under Gen. Prov. § 4-358 was crossed.

State of Maryland, et al. v. Vadim Roshchin, et al., No. 10, September Term 2015, filed January 26, 2016. Opinion by McDonald, J.

Adkins, J., dissents.

http://www.mdcourts.gov/opinions/coa/2016/10a15.pdf

TORTS – FALSE ARREST AND FALSE IMPRISONMENT

TRANSPORTATION – AVIATION – POLICE AUTHORITY TO ARREST FOR CRIMINAL VIOLATIONS OF STATUTES AND REGULATIONS RELATING TO AVIATION

TRANSPORTATION – AVIATION – REGULATIONS – POSTING AS A PREREQUISITE TO ENFORCEMENT

Facts:

In February 2010, Respondent Vadim Roshchin was employed as a driver by Respondent American Sedan Services, Inc., a commercial transportation service that has a permit from the Maryland Aviation Administration to provide ground transportation services at Baltimore Washington International Thurgood Marshall Airport (BWI). On one night, Mr. Roshchin was picking up passengers at the airport on behalf of American Sedan, an activity which requires a displayed permit. Mr. Roshchin had a permit, but he had left it in another car. Maryland Transportation Authority police, who happened to be conducting a special enforcement effort of the permit requirement that night, arrested Mr. Roshchin and impounded American Sedan's car. Both were released early the next day. The criminal charges against Mr. Roshchin were ultimately dropped.

Two years later Mr. Roshchin and American Sedan sued the State and several State agencies for false arrest, false imprisonment, and related claims. They asserted that the arrest of Mr. Roshchin and impoundment of the car without the issuance of a citation were unlawful, because a statute makes issuing a citation is mandatory and, in these circumstances, exclusive of an arrest. They also argued that the regulation had to be posted at the airport to be enforceable and that it had not been posted.

The Circuit Court granted summary judgment to the State on the basis that the arrest was supported by probable cause and did not violate Mr. Roshchin's rights, and that the impoundment of the American Sedan vehicle was appropriate in light of the lawful arrest. The Court of Special Appeals reversed, holding that, although the officers had probable cause for the arrest, they lacked legal justification under the statute for the arrest. The court also held that the regulation concerning the permit requirement had to be posted to be enforceable, and that, because there was a fact dispute whether it had been posted, summary judgment was inappropriate.

Held:

The arrest was lawful, and the regulation did not need to be posted to be enforceable. Accordingly, it was appropriate to award summary judgment in favor of the defendants on the claims of false arrest, false imprisonment, or related claims.

The State, its employees, and its agencies are not ordinarily liable for false arrest, false imprisonment, or other tort claims when police make a lawful arrest. In general, a police officer may lawfully arrest a suspect when the suspect commits a misdemeanor in the officer's presence under the common law and as codified in Criminal Procedure Article, §2-202. Failing to display a required permit when picking up passengers in a commercial vehicle at BWI is a misdemeanor. Hence, the police could lawfully arrest Mr. Roshchin when he failed to display the required permit.

Under Transportation Article (TR) § 5-1104, when an individual is charged with a misdemeanor, the officer "shall prepare" a citation and "need not" arrest the individual. This does not take away an officer's general discretion to arrest for a misdemeanor in the officer's presence, because "need not" is not a prohibition, and citation and arrest are not mutually exclusive.

The regulation making failure to display a permit at the airport a misdemeanor, COMAR 11.03.01.05-1, is in a chapter of COMAR that lists the statutory authority for adopting regulations as including four different statutes. One of the statutes, TR § 5-426, requires that regulations adopted under the statute "be posted conspicuously in a public place at the airport." However, this statute does not provide any of the authority for adopting COMAR 11.03.01.05-1, so COMAR 11.03.01.05-1 need not be posted to be effective.

COURT OF SPECIAL APPEALS

Employees' Retirement System of Baltimore County v. Brandt Bradford, No. 2266, September Term 2014, filed February 24, 2016. Opinion by Reed, J.

http://www.mdcourts.gov/opinions/cosa/2016/2266s14.pdf

ADMINISTRATIVE LAW AND PROCEDURE – POWERS AND PROCEEDINGS OF ADMINISTRATIVE AGENCIES, OFFICERS AND AGENTS – RULES, REGULATIONS, AND OTHER POLICYMAKING – ADMINISTRATIVE CONSTRUCTION OF STATUTES – DEFERENCE TO AGENCY IN GENERAL

STATUTES – CONSTRUCTION – CLARITY AND AMBIGUITY; MULTIPLE MEANINGS – RESOLUTION OF AMBIGUITY; CONSTRUCTION OF UNCLEAR OR AMBIGUOUS STATUTE OR LANGUAGE – PURPOSE AND INTENT; DETERMINATION THEREOF

Facts:

After retiring from the Baltimore County Police Department ("BCPD") for the first time in 1999, Officer Brandt Bradford selected "Option 4," a certain "optional allowance" which provided a fixed dollar amount to his wife in the event of his death. Twenty-two months later, Officer Bradford was rehired by the Baltimore County Police Department pursuant to "Special Rule 2.14," a county personnel statute that allows police officers that have been retired for less than 24 months to return to their same status as before their retirement, and converts their time away into leave without pay.

Thirteen years later, in 2012, Officer Bradford retired from the force for the second time, and attempted to switch his optional allowance to "Option 7," an option that did not exist at the time of his first retirement. The Board of Trustees of the Employees' Retirement System of Baltimore County ("ERS") refused to allow Officer Brandt Bradford to change his retirement benefit option upon his second retirement from the force, and required him to keep his original option, pursuant to § 5-1-231(a) of the Baltimore County Code, 2003, which provides that "[a] member who has elected an optional benefit may not change such election after the first payment of the member's allowance becomes normally due, except as provided below."

Officer Bradford appealed that decision to the Baltimore County Board of Appeals. The Board of Appeals determined that both § 5-1-231 and Special Rule 2.14 were "silent" as to Officer Bradford's situation, and therefore an ambiguity existed. The Board of Appeals determined that the statutory scheme under which Special Rule 2.14 was enacted was to encourage police

officers to stay beyond the 20-year service requirement, and found that the Baltimore County Council's intent was therefore to render his prior retirement a "nullity." The Board of Appeals accordingly reversed the decision of ERS, and the Circuit Court for Baltimore County affirmed the Board's decision.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err in affirming the Board's decision that the Baltimore County Code did not prevent Officer Bradford from changing his retirement option upon his second retirement from the BCPD in 2012. The Court first resolved the administrative law issue in this case, namely, which "agency"—ERS or the Board—is entitled to deference under our standard of review. Citing prior caselaw and the Baltimore County Charter, which provides for a *de novo* review by the Board, the Court clarified that the Board was entitled to deference in this case, not ERS.

The Court then turned to the canons of statutory construction to resolve the ambiguity that arose in this case. While the language of § 5-1-231 is otherwise "plain and unambiguous," and therefore would normally need no further examination, the ambiguity in this case came from the "net effect" of § 5-1-231 as applied to Officer Bradford's situation, i.e., an officer that was once retired but was rehired pursuant to Special Rule 2.14.

This opinion holds that the Board was correct in determining that Officer Bradford should be able to switch his retirement option, despite the prohibitive language of § 5-1-231(a). Using other canons of statutory construction, the Court determined that the Board of Appeals correctly found that the overall statutory scheme of the Baltimore County Council was to encourage police officers to stay with the force longer than the normal 20-year period, and accordingly, Special Rule 2.14 should be the "operative" statute in the circumstances presented here.

Robert Shenker, et al. v. Bernice Polage, et al., No. 2620, September Term 2014, filed February 1, 2016. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2016/2620s14.pdf

CLASS ACTION SETTLEMENTS – APPROVAL BY COURT

Facts:

Objecting shareholders of Cole Real Estate Investment, Inc. ("CREI") including Robert Shenker brought derivative and class action claims alleging the board breached its fiduciary duties in negotiating and completing due diligence for its February 2014 merger with another real estate investment trust, American Realty Capital Properties, Inc. ("ARCP"). Although the parties reached a preliminary settlement releasing the officers and directors of both companies from any future liability, the settlement was amended to release only CREI's officers and directors after ARCP announced that certain financial results had been misstated and others were not reliable. The trial court approved the amended settlement, and Shenker appealed.

Held: Affirmed.

The Court of Special Appeals, interpreting Md. Rule 2-231(h), concluded that a trial court's analysis of a proposed class action settlement should track that of federal courts interpreting the analogous Federal Rule 23(e). Trial courts should carefully consider all the evidence and decide, on a fully informed basis, whether the settlement is fair, adequate, and reasonable. Here, the trial court's written memorandum and the transcript of the fairness hearing indicated that the circuit court reached its ultimate conclusion that he settlement was fair, adequate, and reasonable on a fully informed basis. Although the CREI shareholders relinquished future claims against its officers under Section 14(a) of the Federal Securities Act, 15 U.S.C. § 78n(a), the trial court properly concluded those claims were theoretical, highly uncertain, and lacking in marginal value. Therefore, it made no error in approving the settlement.

Clarence Cepheus Taylor, III v. State of Maryland, No. 2686, September Term 2013, filed January 27, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/2686s13.pdf

CONSTITUTIONAL CRIMINAL PROCEDURE – CONFRONTATION CLAUSE – STATEMENTS OF LANGUAGE INTERPRETER

CRIMINAL PROCEDURE – SCOPE OF CROSS-EXAMINATION – BIAS, PREJUDICE, INTEREST IN OUTCOME, OR MOTIVE TO TESTIFY FALSELY

CRIMINAL PROCEDURE – MANDATORY PRETRIAL MOTIONS – DISCRETION OF COURT

Facts:

Taylor, a deaf criminal defendant, communicates through American Sign Language (ASL), but is unable to speak English or to understand English. Taylor was arrested on the allegation that he had sexually abused minors. A detective interrogated him for nearly five hours with the aid of two sign language interpreters. The interrogation was recorded by video cameras and microphones. The detective who questioned Taylor could not understand his responses apart from what the detective heard from the interpreter.

Through the interpreters, the detective warned Taylor that his answers would be used against him in court. The detective informed Taylor that multiple minor female witnesses had accused Taylor of touching them inappropriately while they were under his supervision at the Maryland School for the Deaf. Taylor initially denied that he had made any inappropriate physical contact with students. According to the interpreter's account of Taylor's statements, Taylor admitted, later during the interrogation, that he remembered specific instances when he had accidentally touched particular girls and then he had apologized to them.

The State filed seven indictments against Taylor, corresponding to each of the seven complaining witnesses. Taylor's attorney filed a generic omnibus motion. With the consent of both parties, the court scheduled a full-day hearing for motions and a single trial date for all offenses. The State issued subpoenas to ensure that the two interpreters from the interrogation would appear as witnesses at the pretrial motions hearing. When Taylor's attorney failed to attend the hearing, the court denied defense requests to postpone the hearing or to re-set the hearing date. Taylor's attorney later filed an untimely motion to sever the charges, which the court denied on the merits.

At trial, each of the seven complaining witnesses testified about specific instances of Taylor's inappropriate touching while they were under his supervision. As another main source of evidence in its case-in-chief, the State offered the recording from the interrogation, which included audio of the interpreter's English-language interpretations of Taylor's sign-language

statements. Taylor objected to the admission of the interpreter's words through the detective's testimony. He asserted that the Confrontation Clause guaranteed him the right to cross-examine the interpreter about the interpreter's account of Taylor's sign-language responses. The court overruled the objection, commenting that the interpreter was "not an accuser."

Taylor took the stand in his own defense and denied the accusations against him. He further testified that there were many "misinterpretations" during the interrogation. On the recorded audio, the interpreter had said that Taylor admitted that he had apologized to specific students after accidentally touching them. By contrast, Taylor testified that he only told the interpreters that, *if* he had touched anyone, it would have been an accident, and he would have apologized.

A jury found Taylor guilty of abusing two of the seven complaining witnesses, and not guilty of abusing one of the alleged victims, but the jury was unable to reach a verdict as to the remaining charges. The court sentenced Taylor to a total term of seven years of incarceration. Taylor appealed from those judgments.

Held: Reversed.

The admission of the interpreted statements during the State's case, under circumstances where the defendant had no opportunity to cross-examine the interpreter, violated the defendant's constitutional right to be confronted with the witnesses against him.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee that "in all criminal prosecutions" the accused has the right "to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court announced new principles for evaluating whether a criminal defendant has the right to be confronted with and to cross-examine the declarant of an out-of-court statement that the State offers as evidence. The Court overruled the prior test of *Ohio v. Roberts*, 448 U.S. 56 (1980), which had held that the Confrontation Clause permitted the admission of hearsay statements from a declarant not present for cross-examination as long as the declarant was unavailable and the statement either fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. *Crawford* held that "testimonial hearsay" from an unavailable witness is admissible against a criminal defendant if the defendant had a prior opportunity to cross-examine that declarant.

In the instant case, the defendant had no prior opportunities to cross-examine the interpreter. The State never asserted, nor did the court find, that the interpreter was unavailable. Consequently, the analysis turned on whether the interpreter's statements were "testimonial hearsay."

Inquiries derived from *Crawford* led to the conclusion that the interpreter's statements about what the defendant had said were testimonial. Responding to a police request, the interpreter made recorded statements inside the formal context of a police interview room, to detectives

investigating past criminal conduct, for the primary purpose of producing evidence to prosecute a targeted individual, and after a warning that the statements would be used against the defendant.

Although an interpreter is not a conventional witness, there is no valid reason for exempting interpreters from the requirement of confrontation and cross-examination when the State offers an interpreter's statements against an accused. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), the Supreme Court refused to create a "forensic evidence" exception to Crawford. In the process, the Court considered and then rejected nearly every potential justification for creating a similar exception for interpreters. Within the meaning of the Confrontation Clause, a witness is still a "witness against" a defendant even if that witness does not directly accuse a defendant of any wrongdoing; even if that witness reports near-contemporaneous observations rather than recalling events observed in the past; even if the witness did not personally observe action related to a criminal act; even when the witness made statements in response to an open-ended police inquiry; and even when the witness states the results of a neutral or scientific analysis.

Here, the State's argument that an interpreter is "merely a relay" was no more convincing than the arguments (already rejected by the Supreme Court) that a forensic lab technician is not a distinct witness under the Sixth Amendment when the technician acts as a "mere scrivener." An interpreter makes independent assertions each time the interpreter conveys his or her opinion of the English-language meaning of the defendant's statements to the police. The State here offered the interpreter's statements both as proof of what the defendant said in the interrogation room and as proof of the defendant's prior conduct.

By treating an interpreter as nothing more than a neutral mouthpiece for a defendant's words, the State's argument here relied upon a fallacy that ignored the reality of language interpretation. An interpreter does not render meaning word-for-word from one language to another. Instead, an interpreter exercises independent judgment and renders an opinion as to a faithful reproduction of the speaker's meaning. Cross-examination of an interpreter might address an interpreter's proficiency, honesty, or methodology; or other factors that may have influenced the accuracy of the interpretations; or the precise meaning of a particularly important statement. Neither a defendant's power to subpoena a declarant that the State chooses not to call, nor the defendant's ability to test the reliability of the declarant's testimony through other "surrogate" witnesses, are permissible substitutes for the confrontation right.

Only one other appellate court has fully analyzed the admissibility of out-of-court interpretations against a criminal defendant according to the principles established by *Crawford*, and the post-*Crawford* forensic evidence cases. In *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013), the Eleventh Circuit held that a defendant has the right to cross-examine an interpreter who interpreted the defendant's statements in a police interrogation, when the State offers the interpretations as evidence against the defendant. The Court reasoned that, in such a context, there are two sets of testimonial statements made out-of-court by two different declarants: the defendant is the declarant of the defendant's non-English language statements; and the language interpreter is the declarant of the interpreter's English language statements. If even results of scientific testing are subject to cross-examination at trial, then certainly an interpreter of the

concepts and nuances of language must be available for cross-examination. A law enforcement officer who has no understanding of the defendant's statements aside from what the officer hears from an interpreter is obviously not a suitable substitute witness for the interpreter. The Eleventh Circuit's reasoning in *Charles* is consistent with the interpretation of the Sixth Amendment set forth by the Supreme Court in *Crawford* and in cases applying *Crawford*.

Other appellate courts, operating under a now-defunct pre-*Crawford* paradigm that focused on whether a statement was sufficiently reliable or fell under a well-recognized hearsay exception, previously had held that a government agent could testify regarding statements made by an interpreter of the defendant without implicating the defendant's confrontation rights. *See United States v. Nazemian*, 948 F.2d 522, 525-28 (9th Cir. 1991), *cert. denied*, 506 U.S. 835 (1992). Borrowing from the so-called "language conduit" doctrine developed in cases involving hearsay issues under the Federal Rules of Evidence, *Nazemian* held that an interpreter's statements could be "properly viewed as" the defendant's own statements, even for Sixth Amendment purposes, if the interpreter's statements satisfied a multi-factor reliability test. The analysis of *Nazemian* does not withstand scrutiny in the post-*Crawford* era, and thus its Confrontation Clause holding should not be followed.

Reversal was required here because the court denied the defendant his constitutional right to be confronted with and to cross-examine the interpreter during the State's case. On remand, the State could not introduce the interpreter's statements (whether through an audio recording or through the memory of the detectives) unless the defendant had an opportunity to cross-examine the interpreter in the State's case against him.

Independently in this case, the trial court committed reversible error by refusing to permit the defendant to cross-examine the parent of a minor complainant about the parent's pursuit of a civil lawsuit regarding the acts at issue in the criminal proceedings. Even if the defense's questions had been designed to elicit evidence of the minor complainant's motive to testify falsely (rather than evidence of the parent's motive), the trial court abused its discretion by imposing a hard and fast limit on the scope of cross-examination of the State's witnesses throughout the trial. The trial court failed to exercise its discretion under Maryland Rule 5-611(b)(1) to decide on an individualized basis whether to permit inquiry into additional matters as if on direct examination. In exercising that discretion, the court should assess whether the line of questioning will disrupt the orderly presentation of evidence in a way that could cause undue delay or confuse the jury, and the court should consider whether allowing the testimony during cross-examination will save time and obviate the need to inconvenience the witness and the parties by requiring the witness to be recalled.

On a separate issue that could affect the defendant's rights on remand, the trial court acted within its discretion in denying the defendant's requests to postpone or to re-set a pretrial motions hearing when the defendant's attorney failed to appear. An attorney substituting for the absent counsel of record provided no explanation for why the defendant's attorney could not have anticipated or mitigated the effects of a scheduling conflict. Rescheduling the hearing would have caused considerable expense and inconvenience for other parties. Because the attorney's bare-bones written omnibus motion did not inform the court of the issues that the attorney

planned to argue at the hearing, the court had no reason to conclude that the defendant would be prejudiced by the ruling.

In addition, the trial court did not err in holding a joint trial of offenses from seven separate charging documents, where it was apparent from the transcript of a scheduling hearing that the court had scheduled a joint trial with the consent of the defendant and the State. The court did not abuse its discretion when it later denied the defendant's untimely motion for severance on the grounds that the interests of judicial economy outweighed the potential prejudice to the defendant from evidence that (as the defendant conceded) would have been mutually admissible at separate trials.

Finally, the Court of Special Appeals declined to reach the issue of whether the court abused its discretion in refusing to waive the time requirements for issuing subpoenas. On remand, the defendant would have the opportunity to issue subpoenas without needing to rely upon the court to waive the time requirements.

Byron Alexander Kelly v. Montgomery County Office of Child Enforcement, et. al., No. 2504, September Term 2014, filed February 24, 2016. Opinion by Kehoe, J.

http://www.mdcourts.gov/opinions/cosa/2016/2504s14.pdf

FAMILY LAW – CHILD SUPPORT ENFORCEMENT

Facts:

The Montgomery County Office of Child Support Enforcement (the "Office") sought to collect a judgment of $9,866.80 against Byron Alexander Kelly for unpaid child support. At the request of the Office, the Circuit Court for Montgomery County issued a writ of garnishment against Capital One Bank, N.A., where Kelly held two accounts with a combined balance of $2,705.05. Kelly filed a motion in circuit court seeking to insulate these funds from garnishment, claiming that Courts and Judicial Proceedings Article ("CJP") § 11-504(b)(5) entitled him to exempt up to $6,000 from the Office's collection action. The circuit court denied Kelly's motion and separately ordered Capital One to pay the account proceeds to the Office.

Held: Affirmed.

There are two relevant statutes: CJP § 11-504(b)(5), which authorizes a ***debtor*** to exempt up to $6,000 in cash or property from a collection action, and Family Law Article ("FL") § 10-108.3(b)(1), which authorizes the Child Support Enforcement Administration and its constitute agencies to garnish child support ***obligors***' bank accounts to collect arrears.

The exemption in CJP § 11-504(b)(5) is inapplicable to child support collection actions. In considering whether assets are exempt from execution on judgments for unpaid alimony, Maryland courts have distinguished between a "debtor," that is, someone who simply owes money to another, and an "obligor" who must pay money arising out of a separate, and separately enforceable, legal duty. Kelly is an obligor. By its terms, CJP § 11-504(b)(5) applies to debtors. Because Kelly is an obligor, the exemption is not available to him. *Safe Deposit & Trust Co. v. Robertson*, 192 Md. 653, 662–63 (1949); *see also United States v. Williams*, 279 Md. 673, 678 (1977); *Pope v. Pope*, 283 Md. 531, 537 (1978).

Nafissatou Garba v. Alioune Ndiaye, No. 400, September Term 2015, filed February 26, 2016. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2016/0400s15.pdf

MARYLAND UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT – HOME STATE JURISDICTION – TEMPORARY ABSENCE

Facts:

B., a Maryland-born minor, has had a peripatetic young life. He traveled with his mother to her job assignments in several African countries, living in each destination for extended periods of time. But since his father and other relatives remained here, the mother frequently sent B. to spend birthdays in Maryland, and he would stay for weeks or months each time. When B. was twenty-nine months old, the mother filed for divorce and custody in the Circuit Court for Montgomery County, but the father counterclaimed for custody, and won.

The circuit court found that Maryland was B.'s home state, considering that the mother owned a home in Germantown (which she listed as her home address on her complaint), she paid taxes in Maryland and the United States, she had no fixed address while on assignment in Africa, and her missions to Africa were temporary, similar in nature to military deployments.

The mother then challenged the circuit court's jurisdiction to make the initial custody determination, claiming that Ethiopia was B.'s home state under the Maryland "UCCJEA" because he had been living with in Ethiopia for almost a year at the time she filed for a custody determination.

Held: Affirmed.

The Court of Special Appeals concluded that Maryland was B.'s home state for purposes of the UCCJEA. A child's home state (foreign countries can be home states) has exclusive jurisdiction to make initial custody determinations. The UCCJEA defines "home state" as "the State in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence, immediately before the commencement of a child custody proceeding." In this context, "lived" refers to the child's physical presence in a state, and necessarily their legal residence or domicile. Jurisdictions are split, however, as to the meaning of "temporary absence."

B. was physically present in Maryland for most of the six months (August 2013 to February 2014) prior to the commencement of the action, but since he was not *continuously* present in Maryland during that time, this Court had to determine whether B.'s visits to Maryland between

August 2013 and February 2014 were visits from his home in Ethiopia or whether his trips to Ethiopia were "temporary absences" from his home here in Maryland.

Maryland applies a totality of the circumstances test to determine whether a period of absence from the child's otherwise-home-state was temporary or permanent. Factors include, but are not limited to, "the duration of the absence and whether the parties intended the absence to be permanent or temporary, as well as additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise." If the absence was temporary, the time away may be counted toward the requisite six-month period for establishing home state status. If the absence was permanent, that state loses home state status.

This Court agreed with the circuit court's factual findings. Most notably, the Court examined why the mother was absent from Maryland: her job assignments in Africa were, by design, temporary, as each was for a finite duration (usually one year) and the location changed. From this, this Court concluded that the absences flowed from the structure of her employment, and the mother never took steps to finalize or formalize her purported intent to leave Maryland. We noted that she maintained citizenship, a home, a driver's license, and Maryland bank accounts, she paid taxes, and her immediate family lived here. To the contrary, although she did rent an apartment in Ethiopia, she took no steps to otherwise formalize Ethiopia as "home"; indeed, during the life of this litigation, the mother relocated to Sudan. And the Court could not ignore that the mother originated this action in Maryland courts, touting her Maryland residency as the basis for jurisdiction.

Upon those circumstances, this Court concluded that B.'s trips to Ethiopia during the relevant six-month period were temporary absences from his home in Maryland, and could therefore be counted toward the requisite six-month period. As the home state, Maryland had exclusive jurisdiction to make the initial custody determination in favor of the father.

The Fund for Animals, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, No. 2598, September Term 2014, filed February 1, 2016. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/2598s14.pdf

INSURANCE LAW – LATE NOTICE OF CLAIMS

Facts:

The Fund for Animals, Inc. ("FFA"), the appellant, was a plaintiff in case brought against the Ringling Brothers and Barnum & Bailey Circus under the Endangered Species Act ("ESA"). Its standing to sue depended upon whether another plaintiff—an individual—had suffered unique emotional injuries. In a trial on standing, the court found that he had not, and that the FFA and other organizational plaintiffs in the case knew that and were paying the individual plaintiff to give testimony that was false. The court dismissed the ESA case for lack of standing.

Several years before that ruling, the circus sued the organizational plaintiffs in the ESA case, alleging that they were violating the Racketeer Influenced and Corrupt Organizations Act ("RICO") by bribing the individual plaintiff in the ESA case and committing other wrongs in their pursuit of the ESA case. The circus sought to recover in damages the fees it had incurred and was continuing to incur in defending the ESA case. The RICO case was stayed pending the outcome of the ESA case.

The FFA was an insured on a liability insurance policy issued by National Union Fire Insurance Company of Pittsburgh, P.A. ("National Union"), the insurer. It did not notify National Union of the RICO case against it for over two years. By then, the court in the ESA case had made its ruling on the issue of standing. National Union disclaimed coverage on the ground that the FFA did not give it timely notice of the RICO case, under the terms of the policy.

In the Circuit Court for Montgomery County, the FFA sued National Union for breach of the liability policy. Coverage was not disputed. National Union took the position that, in the RICO case, the circus could use collateral estoppel offensively, against the FFA, so as to preclude the FFA from contesting the negative factual findings made against it in the ESA case. National Union maintained that, because the findings in the ESA case would harm the FFA's defense in the RICO case, it had suffered actual prejudice, and therefore effectively disclaimed coverage. At the close of the evidence in a jury trial, the trial court granted judgment in favor of National Union on that basis.

Held: Reversed.

Under Ins. Section 19-110, a liability insurer may disclaim coverage on the ground that the insured breached the policy by giving late notice of a claim "only if the insurer establishes by a preponderance of the evidence that the . . . [late] notice *has resulted in* actual prejudice to the insurer." (Emphasis added.) Thus, to effectively disclaim coverage based on late notice, a liability insurer must prove the existence of a causal link between the delay in notice and the actual prejudice it has suffered.

Assuming collateral estoppel could be used offensively by the circus as the plaintiff in the RICO case, to the detriment of the FFA's defense in that case, that only proves a causal connection between the court's decision in the ESA case and the prejudice to the FFA in the RICO case. To disclaim coverage in the RICO case, National Union had to prove a causal link between the late notice of that case and the prejudice to it. To do so, it needed to show that, had it received timely notice of the RICO case, it could have taken some action to alter the outcome of the ESA case. There was no such proof. The FFA was a plaintiff in the ESA case, and National Union had no control, or right to control, the FFA's pursuit of the ESA case.

J. Thomas Manger, et al. v. Fraternal Order of Police, Montgomery County Lodge 35, Inc., No. 257, September Term 2015, filed February 25, 2016. Opinion by Zarnoch, J.

http://www.mdcourts.gov/opinions/cosa/2016/0257s15.pdf

STATUTORY CONSTRUCTION – LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS – PURPOSE

STATUTORY CONSTRUCTION – LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS – RECORD KEEPING

Facts:

Three police officers employed by the Montgomery County Police Department (the "Department") came under internal investigation in early 2015, after an arrestee filed a complaint against them. Before this investigation began, the Department altered its interrogation policy to utilize video recording technology to record interrogations of officers. Prior to this time, interrogations were audio recorded only. However, before the interrogation could take place, the Fraternal Order of Police, Montgomery County Lodge 35 ("FOP") filed a show cause petition in the Circuit Court for Montgomery County on behalf of the three officers. The petition focused on § 3-104(k) of the Law Enforcement Officers' Bill of Rights ("LEOBR"), Public Safety Article ("P.S."), Maryland Code (2003, 2011 Repl. Vol.), which provides that a department shall keep a "complete record" of its interrogation of an officer and this record "may be written, taped, or transcribed." At the show-cause hearing, the FOP sought to halt the video recording of all officer interrogations, arguing that the term "taped" in § 3-104(k)(2) permitted only audio recording of interrogations, and, thus, keeping a video record of the interrogation violated the LEOBR. The circuit court ruled in favor of the FOP and prohibited videotaped interrogations. The Department appealed.

Before the Court of Special Appeals, the Department argued that videotaping interrogations was consistent with the plain text of the statute and that videotaping furthered the statutory purpose of the LEOBR provision, which, it argued, was "to keep a complete record" of the interrogation. The FOP contended that the statutory text allowed the Department to employ one of only three methods to keep a complete record—writing, taping, or transcribing—none of which included videotaping. The FOP also argued that reading the statute to include videotaping would violate the purpose of the LEOBR, which was, in its view, solely to protect police officers under investigation.

Held: Reversed.

The Court held that videotaping was allowed under a plain reading of the LEOBR section. In reaching its conclusion, the Court rejected the FOP's argument that the term "tape[]" does not encompass videotape or other visual recording and specifically disagreed with the contention that the means suggested in subsection (k)(2) are the sole means to record the interrogation. Instead, the Court held that the methods described in subsection (k)(2) are non-exclusive.

The Court also disagreed with the FOP's contention that allowing the Department to videotape interrogations would frustrate the purpose of the LEOBR and prejudice officers under investigation by giving the hearing board video evidence of an officer's interrogation while making available only the written or transcribed testimony of other witnesses. The Court determined that the LEOBR is not intended solely to benefit police officers—instead, it creates procedural rights while leaving to the discretion of the police department how best to investigate and remedy internal misconduct. Thus, videotaping did not contradict the purpose of the statute. The Court also noted that laws are addressed to the future, declaring:

> [I]t is illogical to think that the legislature would want to restrict the means of recording interrogations to only those existing at the time the bill was enacted—especially if technological advances allow a more complete record to be kept. The ultimate purpose of section 3-104(k) of the LEOBR—to keep complete records of officer interrogations—suggests that the legislature intended the provision to be capable of encompassing circumstances and situations which did not exist at the time of its enactment.

The Court was, however, mindful of the concern that a video recording that captures only the image and words of the officer under interrogation—as opposed to capturing the images and actions of the interrogator as well—could present a biased view of the interrogation that would fail to capture a "complete record" as required by § 3-104(k). Thus, the Court said that "[t]o the extent that a police department uses video technology, it should endeavor to record all present at the interrogation, and especially the interrogator and the officer under investigation."

Maryland Office of People's Counsel v. Maryland Public Service Commission, No. 1689, September Term 2014, filed January 28, 2016. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2016/1689s14.pdf

PUBLIC UTILITIES RATE REGULATION – GAS INFRASTRUCTURE REPLACEMENT SURCHARGE – SURCHARGE APPROVAL

Facts:

In 2013 the General Assembly enacted legislation to accelerate gas infrastructure improvements in Maryland by establishing a new mechanism, separate from base rate proceedings, for regulated gas companies to promptly recover certain replacement costs through a customer surcharge. Md. Code (1998, 2010 Repl. Vol., 2014 Supp.), § 4-210 of the Public Utilities Article ("PUA"). The statute is commonly known as the Strategic Infrastructure Development and Enhancement (STRIDE) law.

Within 180 days after a gas company files a plan under this section, the Public Service Commission may approve the plan "if it finds that the investments and estimated costs of eligible infrastructure replacement projects are: (i) reasonable and prudent; and (ii) designed to improve public safety or infrastructure reliability over the short term and long term." PUA § 4-210(e)(3). The "estimated project costs" included in a gas company's plan "are collectible at the same time the eligible infrastructure replacement is made." PUA § 4-210(d)(3)(ii).

Shortly after the statute took effect, Baltimore Gas and Electric Company (BGE) submitted a broadly-outlined plan to completely replace the oldest and most leak-prone classes of assets in its gas distribution system over 30 years. BGE asked the Commission to authorize a surcharge on customers' monthly bills contemporaneously with the upgrades, beginning with the initial implementation of the plan. The Office of People's Counsel (OPC), representing the interests of ratepayers, opposed the plan.

On the last day of the 180-day period for review of the plan, the Commission issued an order "conditionally approv[ing]" the plan. In its opinion, the Commission found that BGE's submissions satisfied most of the statutory criteria, but the Commission required BGE to submit a more detailed list of individual projects, cost estimates, and time lines for projects to be initiated in 2014. The Commission stated that it would review those submissions at an informal administrative meeting before it would authorize a fixed annual surcharge for 2014. The Commission also determined that BGE could not begin collecting the surcharge until after it had begun making the initial replacements.

In compliance with the order, BGE submitted updated and more detailed information about the individual projects to be undertaken in 2014. Meanwhile, OPC petitioned for judicial review of the order of conditional approval. At the subsequent administrative meeting, the Commission

approved BGE's 2014 projects and authorized BGE to begin imposing a customer surcharge when the projects would begin to be implemented the next month.

The Circuit Court for Baltimore City affirmed the Commission's order of conditional approval. OPC appealed from the judgment.

Held: Affirmed.

On appeal, OPC contended that the Commission erred by concluding that the statute authorized a gas company to recover estimated project costs upon the initial implementation of the projects. OPC argued that the statute prohibited gas companies from recovering costs through the customer surcharge until after each project had been completed. The Commission correctly rejected that interpretation.

The Commission's written opinion elaborated on the meaning of PUA § 4-210(d)(3)(ii), which provides that the "estimated project costs" included in a gas company's plan "are collectible at the same time the eligible infrastructure replacement is made." Emphasizing that the statute's purpose was to accelerate improvements by authorizing recovery outside of base rate proceedings, the Commission concluded that the statute "authorizes contemporaneous cost recovery at the time eligible infrastructure replacement work is being performed." This interpretation of the statute was entitled to deference because the Commission had carefully considered the statutory language during an adversarial proceeding and issued a formal opinion that articulated sound reasons for its conclusion.

Even without any deference to the Commission, the principles of statutory interpretation confirmed the correctness of the Commission's legal conclusion. OPC's proposed interpretation relied upon a flawed parsing of the statute's language. OPC argued that the statute permitted cost recovery after the time an eligible infrastructure replacement "has been 'made' or completed." That reading did not reflect the language that the legislature actually enacted ("estimated project costs . . . are collectible at the same time the eligible infrastructure replacement is made"). OPC's reading would have rendered the words "at the same time" essentially meaningless; if a company could recover costs only after a replacement had been completed, then the company would never be permitted to collect the costs "at the same time" the replacement "is made."

Beyond those individual words and clauses, OPC's reading was in substantial tension with other surrounding provisions. While the STRIDE law authorizes recovery of "estimated project costs," it also requires a company to file annual reconciliations to adjust the surcharge to account for differences between the amounts collected under the surcharge and the "actual cost" of the plan. A separate subsection of the statute directs that the surcharge shall be in effect for five years "from the date of initial implementation of an approved plan." The Commission's interpretation was consistent with these features of the statute.

The Commission correctly declined to infuse its reading of the STRIDE law with other factors usually considered in traditional rate-of-return regulation. The STRIDE law represents a departure from that conventional model because it authorizes a surcharge outside the traditional ratemaking process. The Commission is not required to evaluate a customer surcharge under PUA § 4-210 based strictly on criteria that are typically associated with the enumerated criteria for a "just and reasonable rate" set forth in PUA § 4-101. The new and distinct standards of section 4-210 serve as the equivalent of that overarching standard.

Other indicia of legislative intent further supported the Commission's conclusion about the timing of the surcharge. The Commission's construction furthered the express purpose of the General Assembly to accelerate gas infrastructure improvements, by providing more prompt cost recovery than previously available through base rate proceedings. Finally, a fiscal and policy note from the Department of Legislative Services provided additional confirmation of the correctness of the Commission's interpretation.

As a separate issue on appeal, OPC contended that the Commission had exceeded its authority by granting "conditional" approval of BGE's plan before the Commission had actually reviewed the individual projects for the first year of the program. The Commission's order required BGE to submit a compliance filing specifying individual projects, costs, and time lines for 2014; determined that the Commission would review the projects for 2014 at an informal administrative meeting without the benefit of sworn testimony; and then, each year thereafter, directed BGE to submit the necessary project information for the upcoming year. This multi-step approval process was neither unlawful nor an abuse of the Commission's broad discretion to institute and conduct proceedings reasonably necessary and proper to the exercise of its powers and the performance of its duties.

Balfour Beatty Infrastructure, Inc. v. Rummel, Klepper & Kahl, LLP, No. 496, September Term 2014, filed January 28, 2016. Opinion by Leahy, J.

http://www.mdcourts.gov/opinions/cosa/2016/0496s14.pdf

TORTS – NEGLIGENT MISREPRESENTATION – PROFESSIONAL NEGLIGENCE – INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS

Facts:

The City of Baltimore contracted with a design engineering firm, Rummel, Klepper & Kahl, LLP ("RK&K), Appellee in this case, to produce construction designs and associated documents for use by the successful bidder(s) on succeeding proposals for construction of upgrades to the Patapsco Wastewater Treatment Plant. Fru-Con Construction Corporation, predecessor to Balfour Beatty Infrastructure, Inc., ("BBII"), Appellant in this case, was the successful bidder on the plant upgrade projects, and entered into Sanitary Contract 852R with the City in November 2009.

Just over four years later, BBII filed a complaint in the Circuit Court for Baltimore City against RK&K, claiming that during construction BBII ran into costly delays and complications in reliance on RK&K's allegedly defective designs and negligent misrepresentations concerning project timeline projections. Supported by the theory that RK&K had a duty to BBII based on the "intimate nexus" between them, the complaint asserted three causes of action: 1) professional negligence, 2) information negligently supplied for the guidance of others under Restatement (Second) of Torts § 552, and, 3) negligent misrepresentation.

RK&K filed a motion to dismiss the complaint for failure to state a claim. RK&K's central argument was that the complaint sought recovery for purely economic losses, and, because there was no contractual privity or its equivalent between BBII and RK&K, the economic loss doctrine barred BBII's tort claims. The circuit court granted the motion to dismiss in an order entered on April 10, 2014.

Held: Affirmed.

First addressing BBII's professional negligence claim, the Court of Special Appeals recognized that Maryland courts have established that the economic loss doctrine does not always apply to bar recovery of economic damages. However, in cases such as the one presented, in which a contractor sustains higher than anticipated costs based on the allegedly defective designs of an engineering firm with which it has no contract, the Court acknowledged that states are divided over whether and in what circumstances a negligence claim to recover the costs is barred by the "economic loss doctrine." The Court recognized that Maryland state appellate courts have not

applied the "privity equivalent" test in a construction case sounding in tort for economic damages against a design professional. The Court determined that in construction matters, the law in Maryland contours more narrow circumstances under which the economic loss doctrine does *not* bar tort claims for purely economic loss. A construction contractor's ability to recover for economic losses against a design professional where there is no contractual privity is generally limited to situations involving death, personal injury, property damage, or the risk of death or serious personal injury.

The Court of Special Appeals observed that Maryland law should encourage, rather than discourage, design professionals and contractors to communicate with each other on public works projects where necessary in the interest of public safety. The Court determined that, especially in situations where the design professional is hired as a neutral agent of the owner, expanding Maryland law to permit exposure to tort liability for economic loss would create a chilling effect on the design professional's neutrality and ability to communicate effectively. For these reasons, the Court held that in government construction matters the intimate nexus analysis is not expanded to include "privity equivalent" concepts of extra-contractual duty for the recovery of solely economic loss in the absence of death, personal injury, property damage, or the risk of death or serious personal injury. Therefore, the Court determined that BBII had not properly pleaded a claim for professional negligence against RK&K.

Second, the Court of Special Appeals, after acknowledging that Maryland courts have adopted the Restatement § 552 as an alternative means of satisfying the intimate nexus test, held that the Restatement § 552 is not applicable to create a duty in tort where the parties involved are two sophisticated businesses working on the same government construction project who each negotiated their independent contracts with the owner in what they understood was a "design-bid-build" construction project with the city. Furthermore, the Court determined that BBII failed to allege facts sufficient to support this alternative intimate nexus equivalent.

Third, the Court of Special Appeals dismissed the Appellant's negligent misrepresentation claim, determining that the prerequisites for establishing a duty to support a claim for negligent misrepresentation and professional negligence claims are the same. Therefore, the Court held that where the parties are sophisticated businesses with experience in construction projects and contracts, and were free to allocate their duties and risks in their contracts with the city, extra-contractual concepts of duty do not permit the recovery of solely economic losses in the construction industry in a cause of action for negligent misrepresentation.

Cumberland Insurance Group v. Delmarva Power d/b/a Delmarva Power & Light Co., No. 72, September Term 2015, filed February 1, 2016. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2016/0072s15.pdf

PRODUCT LIABILITY – SPOLIATION

Facts:

Subrogee insurance company (Cumberland) brought suit against a utility company (Delmarva) on the theory that a fire at the home it insured had originated in the area of the electric meter and meter box. While Cumberland put Delmarva on notice of a potential claim, it did not notify Delmarva when the fire scene was destroyed about two months after the fire. Delmarva moved for summary judgment arguing that Cumberland allowed spoliation of the scene that deprived Delmarva of any opportunity to investigate or formulate any theories relating to alternate causes. The circuit court granted the motion for summary judgment, and Cumberland appealed.

Held: Affirmed.

The Court of Special Appeals reexamined the spoliation doctrine in light of *Klupt v. Krongard*, 126 Md. App. 179 (1999), and concluded that in determining whether to impose the severe sanction of dismissal to make up for destruction of the scene, a trial court should (and the trial court here did) balance the degree of fault on the part of the spoliator on the one hand (which need not include ill-will) and the degree of prejudice to the wronged party on the other. Here, Cumberland had not notified Delmarva that the scene was to be destroyed, and Delmarva had no chance to develop a defense. The trial court properly balanced the factors to conclude that no sanction short of dismissal could adequately compensate Delmarva when it was completely deprived of that opportunity.

Melody Shutter v. CSX Transportation, Inc., No. 2592, September Term 2014, filed January 29, 2016. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2016/2592s14.pdf

WORKERS' COMPENSATION – FEDERAL EMPLOYERS LIABILITY ACT

Facts:

In 2002, Melody Shutter, the appellant, an employee of CSX, the appellee, began to experience pain in her back and ankles while working as a "carman" for CSX. She went on medical leave, and in 2003 underwent spinal fusion surgery at the L4-5 and L5-S1 levels. Subsequently, in consideration for the payment of $68,000, she executed a Release that specified that she had made a claim for "Repetitive Strain Injury," including "intrasubstance changes and arthritic changes and disc herniation and/or bulge located at L4-5 and L5-S1" and "including any disorder of any type or origin or any condition, illness, or injury resulting therefrom or relating thereto." She released CSX from any liability for any injury that she claims to be entitled to by reason of her "Repetitive Strain Injury, its progression and/or consequences . . . including any surgery or surgeries . . . as well as correction of any conditions relating to [her] Repetitive Strain Injury, and any increased risk of contracting any physical disorder related thereto." She acknowledged in the Release that her injury may naturally progress and that future intervention, including surgery, may be necessary to treat it. The Release specified that it did not release "any claim [she] might have in the future for a solely new and distinct railroad employment related injury."

Shutter continued to work for CSX, changing positions to a "line of road" job. She continued to experience back pain. In 2011, her back pain increased, and a disc herniation at L3-L4, immediately above the spinal fusion, was diagnosed. She underwent surgery to remove the hardware from her 2003 surgery and to fuse her spine at the L3-L4, L4-L5, and L5-S1 levels.

In the Circuit Court for Baltimore City, Shutter sued CSX under the Federal Employers Liability Act ("FELA"). In deposition, her surgeon testified that the 2011 surgery that he performed had been necessary because she had developed "adjacent disc disease," *i.e.*, disc disease in the discs adjacent to the discs originally affected, and that she would not have developed adjacent disc disease except for the 2003 surgery. The circuit court granted summary judgment in favor of CSX because: 1) Shutter's claim was barred by the Release; and 2) Shutter could not prove a prima facie case of negligence because she did not have an expert witness to testify that CSX breached the standard of care.

Held: Affirmed.

The evidence on the summary judgment record established that Shutter's adjacent disc disease was a progression of her original Repetitive Strain Injury and therefore was covered by the Release. Although the injury may have been "new" it was not "distinct" from the original injury for which she had released CSX from liability.

The Release was not void under Section 5 of the FELA. Under that section, "[a]ny contract . . . , the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter shall to that extent be void . . . ." That language is not intended to void agreements "compromising a claimed liability," *Callen v. Pa. R.R. Co.*, 332 U.S. 625, 631 (1948), and a release that is a "full compromise enabling parties to settle their dispute without litigation" is valid under the FELA. *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949). In *Blackwell v. CSX Transp., Inc.*, 220 Md. App. 113 (2014), we adopted the Third Circuit's "known risk" test, *Wicker v. Consolidated Rail. Corp.*, 142 F. 3d 690 (3rd Cir. 1998), to determine whether a release is void under Section 5. Under that test, a release does not violate Section 5 if it is executed for valid consideration as part of a settlement and the scope of the release is limited to risks that are known to the parties. The known risk test does not limit the scope of a settlement to injuries that are in existence at the time the release was executed, however, and permits employees and employers to compromise potential future claims based on known risks.

The risk that Shutter's Repetitive Strain Injury could progress was known to her when the Release was signed and was expressly covered by the Release. Accordingly, the Release did not violate Section 5 of the FELA.

In addition, the circuit court correctly ruled that expert witness testimony was needed to prove a breach of the standard of care by CSX in staffing and workplace safety. Shutter did not have an expert witness to testify about such a breach, and therefore she could not make out a *prima facie* case of negligence under the FELA.

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated January 29, 2016, the following attorney has been disbarred by consent:

RICHARD MORRIS GUMMERE

*

By an Order of the Court of Appeals dated February 4, 2016, the following attorney has been suspended by consent:

ANGELA M. BLYTHE

*

By an Order of the Court of Appeals dated February 4, 2016, the following attorney has been indefinitely suspended by consent:

CHARLES STEPHEN RAND

*

By an Order of the Court of Appeals dated February 16, 2016, the following attorney has been disbarred by consent:

JOSEPH WHEELER RASNIC

*

This is to certify that the name of

GRASON JOHN-ALLEN ECKEL

has been replaced upon the register of attorneys in this state as of February 18, 2016.

*

*

By an Order of the Court of Appeals dated February 22, 2016, the following attorney has been indefinitely suspended by consent:

LAURA HAWKINS STRACHAN

*

Return to ToC

JUDICIAL APPOINTMENTS

*

On January 29, 2016, the Governor announced the appointment of **DOROTHY MICHELLE ENGEL** to the Circuit Court for Prince George's County. Judge Engel was sworn in on January 29, 2016 and fills the vacancy created by the retirement of the Hon. Michael P. Whalen.

*

On January 29, 2016, the Governor announced the appointment of the **HONORABLE KAREN HOLLIDAY MASON** to the Circuit Court for Prince George's County. Judge Mason was sworn in on January 29, 2016 and fills the vacancy created by the retirement of the Hon. Julia Beth Weatherly.

*

On January 29, 2016, the Governor announced the appointment of the **HONORABLE ERIK H. NYCE** to the Circuit Court for Prince George's County. Judge Nyce was sworn in on January 29, 2016 and fills the vacancy created by the retirement of the Hon. Maureen M. Lamasney.

*

On January 29, 2016, the Governor announced the appointment of **JEFFREY SCHUYLER GETTY** to the Circuit Court for Allegany County. Judge Getty was sworn in on February 1, 2016 and fills the vacancy created by the retirement of the Hon. Gary G. Leasure.

*

On January 13, 2016, the Governor announced the appointment of **KEITH RICHARD TRUFFER** to the Circuit Court for Baltimore County. Judge Truffer was sworn in on February 11, 2016 and fills the vacancy created by the retirement of the Hon. Timothy J. Martin.

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UNREPORTED OPINIONS

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