Amicus Curiarum

VOLUME 37
ISSUE 2 FEBRUARY 2020

A Publication of the Office of the State Reporter

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Attorney Grievance Commission of Maryland. v. Anne Margaret Miller, Misc. Docket AG No. 40, September Term 2018, filed January 29, 2020. Opinion by Greene, J.

https://mdcourts.gov/data/opinions/coa/2020/40a18ag.pdf

ATTORNEY GRIEVANCE – DISCIPLINE – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("Petition") with the Court of Appeals alleging that Anne Margaret Miller violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"). Specifically, in its Petition, Bar Counsel alleged that Ms. Miller, during her representation of a client in adoption proceedings, violated the following Rules: MLRPC 1.3 (Diligence); MLRPC 1.4 (Communication); MLRPC 1.5 (Fees); MLRPC 1.16 (Declining or Terminating Representation); MLRPC 8.1 (Bar Admission and Disciplinary Matters); and MLRPC 8.4 (Misconduct).

The hearing judge found the following relevant facts: R.W., Ms. Miller's client, wished to adopt her great niece and retained Ms. Miller to effectuate the adoption. R.W. made clear to Ms. Miller that she wished to have the adoption completed by July 30, 2016, the date on which she and her soon-to-be husband were to be married, and Ms. Miller understood that this date was "significant" to R.W. On July 7, 2015, Ms. Miller visited R.W. at her home and had R.W. sign a retainer agreement. By August 15, 2015, Ms. Miller had prepared a petition for adoption, affidavits for R.W. and her future husband to sign, a motion to waive publication and investigation, and motion through which the biological parent consented to the adoption. The adoption did not contain novel or contested issues. Ms. Miller did not send R.W. monthly invoices, as she had contended; instead, the hearing judge found that Ms. Miller only sent R.W. two invoices demonstrating a balance due—one dated October 26, 2016 and one dated January 23, 2017.

The hearing judge also found that Ms. Miller had misrepresented to R.W. that she had filed the petition for adoption and maintained this deception over the course of several months. When

R.W. became aware of Ms. Miller's deception, a dispute occurred concerning Ms. Miller's fee. After R.W. terminated Ms. Miller's representation, she hired a second attorney to complete the adoption. In addition, during Bar Counsel's investigation of Ms. Miller, Ms. Miller submitted a falsified timesheet to Bar Counsel in attempt to justify placing the entirety of the retainer received from R.W. into her operating account.

Although not directly recognized in the hearing judge's findings of fact, evident from the hearing judge's findings in mitigation, the hearing judge found that Ms. Miller had been diagnosed with PTSD as a result of childhood trauma. In terms of mitigation, the hearing judge found that, although Ms. Miller suffered from PTSD, her condition did not rise to a sufficient level, under *Attorney Grievance Comm'n v. Vanderlinde*, 364 Md. 376, 773 A.2d 463 (2001), to constitute a mitigating factor.

The hearing judge then concluded that Ms. Miller had violated several provisions of the MLRPC including, 1.3, 1.4 (a) and (b), 1.5, 8.1(a) and (b), and 8.4(a), (c), and (d).

Held: Disbarred

The Court of Appeals held that all the hearing judge's findings of fact were not clearly erroneous, and his conclusions of law were based on clear and convincing evidence. The Court sustained exceptions received from both Bar Counsel and Ms. Miller that Ms. Miller's good reputation within the legal community constituted a mitigating factor. The primary issue before the Court was whether Ms. Miller's arguments concerning mitigation, based on her PTSD, met the standard previously promulgated in *Vanderlinde*. Ms. Miller urged the Court to expand the *Vanderlinde* standard to encompass situations where an attorney suffered from a psychological diagnosis that causes only temporary debilitation.

Ultimately, the Court determined that Ms. Miller's PTSD did not rise to the "root cause" standard established in *Vanderlinde*. Moreover, the Court declined to expand the standard, determining that such expansion would limit the Court's ability to effectuate the underlying purposes of the MLRPC. In terms of mitigating factors, the Court concluded that Ms. Miller had established mitigation regarding her lack of a prior disciplinary record and good reputation within the legal community. The Court also determined that several aggravating factors were present: (1) a dishonest or selfish motive; (2) multiple offenses; (3) submission of false statements during the disciplinary process; and (4) substantial experience in the practice of law.

The Court concluded that the instant attorney grievance proceedings were comparable to those in *Attorney Grievance Comm'n v. Guida*, 391 Md. 33, 891 A.2d 1085 (2006). Therefore, the Court held that, given Ms. Miller's overarching intentionally dishonest conduct, in combination with the fact that her PTSD did not reach the applicable standard in mitigation established in *Vanderlinde*, disbarment was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Jason Edward Rheinstein, Misc. Docket AG No. 77, September Term 2015, filed January 24, 2020. Opinion by Battaglia, J.

https://www.mdcourts.gov/data/opinions/coa/2020/77a15ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action with the Court of Appeals alleging that Jason Edward Rheinstein violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (Competence), 3.1 (Meritorious Claims and Contentions), 3.2 (Expediting Litigation), 3.4 (Fairness to Opposing Party and Counsel), 4.4 (Respect for Rights of Third Persons) and 8.4 (a), (c) and (d) (Misconduct). The charges stemmed from Rheinstein's representation of Charles and Felicia Moore in challenging confessed judgments entered against them based upon their default of a construction loan in the amount of $200,000.00 from Imagine Capital, Inc.

The hearing judge found that Rheinstein had advanced unsubstantiated claims of fraud against Imagine Capital, Inc., its principals and attorneys in both state and federal courts, all in an effort to intimidate his opponents and bully them into settlements for exorbitant amounts. Rheinstein also made misrepresentations to the Circuit Court for Baltimore City which indicated that Imagine Capital, Inc. had been facing criminal charges, a representation that lacked bases. Such an assertion, the hearing judge found, set into motion years of frivolous litigation. Furthermore, Rheinstein attempted to disqualify any attorney retained by the opposing party, contending that the retained attorneys had been complicit in the alleged fraud.

The hearing judge also found that Rheinstein significantly frustrated the disciplinary proceeding against him. Bar Counsel initially filed the Petition for Disciplinary or Remedial Action on February 17, 2016, but Rheinstein acted to prevent the disciplinary proceeding's timely conclusion by removing it to federal court on two separate occasions. Rheinstein further failed to comply with Bar Counsel's discovery requests, contending that his removal to the federal court negated any obligation to adhere to the state court's scheduling orders.

Upon the disciplinary proceeding's second remand to state court, the Court of Appeals ordered that a hearing on the matter be held within sixty days of May 17, 2019. Over the course of the disciplinary proceeding's pendency, Bar Counsel filed two separate motions for default judgment and sanctions based upon Rheinstein's refusal to answer interrogatories or produce documents as requested. The hearing judge ultimately granted Bar Counsel's motion for sanctions, resulting in the admission of the averments contained in the petition for Disciplinary or Remedial Action and in the preclusion of Rheinstein's ability to proffer any evidence, including the testimony of expert witnesses.

As late as mid-June of 2019, for the first time, Rheinstein notified Bar Counsel of his intention to proffer mitigation based upon his diagnosis of attention deficit hyperactivity disorder ("ADHD") by way of expert testimony. Such proffer, however, as the hearing judge noted, could not be admitted based upon the previous discovery sanctions which had been imposed.

After considering Bar Counsel's proposed Findings of Fact and Conclusions of Law, the hearing judge concluded that Rheinstein had violated MLRPC 1.1, 31., 3.4(c) and (e), 4.4(a) and 8.4(a), (c) and (d). Bar Counsel withdrew the Rule 3.2 allegation.

Held: Disbarred.

The Court of Appeals affirmed the imposition of sanctions on Rheinstein based upon his failure to respond to discovery and sustained the hearing judge's findings of fact based upon the default judgment. Accordingly, the Court concluded that the hearing judge properly exercised his discretion in admitting the averments of the petition and precluding Rheinstein from proffering any evidence, including mitigation by way of expert testimony. The Court also overruled Rheinstein's exceptions to the hearing judge's conclusions of law.

The Court agreed with Bar Counsel that disbarment was the appropriate sanction. The Court explained that, as an officer of the court, Rheinstein was expected to manifest integrity, but, instead, he misrepresented facts to the Circuit Court with the intent to secure a favorable outcome, thereby, resulting in the use of abhorrent tactics in seeking settlement and subordinating his duty to his clients and the court. He also pursued litigation in a vexatious manner and intolerably delayed and sullied the ensuing disciplinary process.

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Won Bok Lee v. Won Sun Lee, No. 13, September Term 2019, filed January 23, 2020. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2020/13a19.pdf

MARYLAND RULE 2-601(b) – ENTRY OF JUDGMENT – TIME FOR FILING APPEAL – RENEWAL OF JUDGMENT – CREATION OF LIEN – EXPIRATION OF LIEN

Facts:

In July 2002, in the United States District Court for the District of Maryland, Won Bok Lee ("Petitioner") obtained a default judgment against his brother, Won Sun Lee ("Respondent"). In May 2004, in the Circuit Court for Howard County, Petitioner submitted a Request to File Notice of Lien based on the federal judgment. On June 1, 2004, the clerk entered the notice on the docket and indicated that judgment had been entered as of that date. Over a decade later, in July 2015, Petitioner filed a Request to Renew Judgment, and that same month, the clerk entered "Notice of Renewed Judgment" on the docket. Several months later, in March 2016, Respondent filed a Motion to Vacate Renewal of Judgment and Request for Hearing. On June 2, 2016, the circuit court conducted a hearing and denied the motion. On the same date, the circuit court issued a one-page order to the same effect, which the clerk stamped "Entered" on June 3, 2016. This time, the circuit court clerk entered a docket entry into the circuit court's electronic case management system ("ECMS") and on the case search feature on the Judiciary website. Neither the entry on the circuit court's ECMS nor the initial entry on Case Search expressly set forth the date of the entry of the judgment. On July 6, 2016, Respondent noted an appeal. Petitioner moved to strike the notice of appeal as untimely. After a remand by the Court of Special Appeals and the circuit court's issuance of a memorandum explaining the sequence of events in this case, the Court of Special Appeals denied a motion to dismiss the appeal, holding that the notice of appeal, although initially premature, had become ripe. Additionally, the Court of Special Appeals reversed the circuit court's denial of the motion to vacate, and remanded the case to the circuit court with instruction to vacate the renewal of the judgment.

Held: Affirmed.

The Court of Appeals held that, to constitute an effective judgment under Maryland Rule 2-601 and start the thirty-day appeal period set forth in Maryland Rule 8-202(a), the entry of the judgment must satisfy both Maryland Rule 2-601(b)(2) and (b)(3). Maryland Rule 2-601's plain language makes clear that a judgment must be entered in accordance with Maryland Rule 2-601(b) to be effective and thus trigger the thirty-day appeal period. Maryland Rule 2-601(a)(4) clearly states that "[a] judgment is effective only when [] set forth [on a separate document] and when entered as provided in section (b) of this Rule." This means that a judgment must be entered as described in Maryland Rule 2-601(b)(2) and (b)(3)—namely, the clerk must enter the

judgment on the docket of the ECMS that the circuit court uses "along with such description of the judgment as the clerk deems appropriate[,]" and, "[u]nless shielding is required . . . , the docket entry and the date of the entry shall be available to the public through the case search feature on the Judiciary website[.]"

The Court of Appeals stated that, although the language of Maryland Rule 2-601 is clear, the 2015 amendments to the Rule demonstrated that the amendments were proposed to account for new technology, to clarify when a judgment is entered, and to make the date of an entry of a judgment available to the public. Indeed, the amendments plainly indicated that the intent was to ensure that a clerk clearly identifies the date of an entry of a judgment and makes the entry available to the public. The Court stated that requiring that the entry of the judgment and the date of the entry be made available on Case Search to the public pursuant to Maryland Rule 2-601(b)(3) fulfills the goals of making the entry of the judgment and the date thereof clear and available to the public, as the Standing Committee on Rules of Practice and Procedure intended.

Applying the holding to the circumstances of the case, the Court of Appeals held that the initial docket entries concerning the denial of the motion to vacate failed to satisfy the requirements of Maryland Rule 2-601(b) because the date of entry of the judgment was unclear and not available to the public through Case Search; *i.e.*, the docket entries failed to satisfy the requirements of Maryland Rule 2-601(b)(3). The docket entries did not provide notice of the date when judgment was entered as required under Maryland Rule 2-601(b)(3) and, accordingly, did not trigger the thirty-day appeal period.

The Court of Appeals concluded that, at bottom, an entry of a judgment on either Case Search or the ECMS should be clear as to what the date of the entry of the judgment is. The docket entry at issue, as originally set forth, was simply not clear as to the date of the entry of the judgment. The docket entry failed to provide notice to the public of the date of the entry of the judgment as required by Maryland Rule 2-601(b)(3), and thus did not trigger the thirty-day appeal period set forth in Maryland Rule 8-202(a). Accordingly, Respondent's notice of appeal was premature when it was filed, because the judgment concerning the motion to vacate had not been entered as provided in Maryland Rule 2-601(b).

As to the merits, the Court of Appeals held that the circuit court erred in denying the motion to vacate the renewal of the judgment. The request to file a notice of lien based on the federal judgment, and the clerk's recording and indexing of the federal judgment, created a lien against Respondent's property in Howard County, not a new judgment. Maryland Rule 2-625 applies to money judgments only, and does not authorize the renewal of a lien. In the case, when Petitioner sought to renew the judgment, the federal judgment had expired, and neither the original federal judgment nor the lien that had been created when the federal judgment was recorded and indexed in Howard County were effective, leaving nothing to renew.

The Court of Appeals concluded that, when Petitioner sought to renew the judgment in 2015, a year after the federal judgment expired, neither the 2002 federal judgment nor the lien that had been created in 2004 when the federal judgment was recorded and indexed in Howard County were effective, and there was nothing left to be renewed. The clerk thus erroneously entered the

notice of renewed judgment on the docket and the circuit court erred in denying the motion to vacate.

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Andrews & Lawrence Professional Services, LLC and Galyn Manor Homeowners Association, Inc. v. David O. Mills, et ux., No. 5, September Term 2019, filed January 28, 2020. Opinion by Booth, J.

Watts, J., concurs
Getty, J., dissents
Adkins, J., concurs and dissents

https://www.courts.state.md.us/data/opinions/coa/2020/5a19.pdf

CONSUMER PROTECTION ACT – DEBT COLLECTION ACTIVITY BY LAWYER

CONSUMER PROTECTION ACT – APPLICATION TO VICARIOUS LIABILITY CLAIMS AGAINST CLIENT FOR LAWYER'S ACTIONS

VICARIOUS LIABILITY – AGENCY

Facts:

David and Tammy Mills brought suit against Galyn Manor Homeowners Association, Inc., alleging violations of the Maryland Consumer Protection Act (CPA) and the Maryland Consumer Debt Collection Act (MCDCA). Galyn Manor filed a third party complaint against Andrews and Lawrence Professional Services, LLC (Andrews), the law firm hired to undertake debt collection activities for delinquent homeowners association (HOA) assessment accounts.

The alleged violations stemmed from Galyn Manor and Andrews's actions beginning in 2007 when Galyn Manor assessed a $50-a-day fine against the Millses for a work truck parked overnight in their driveway. In 2008, when the Millses fell behind on their quarterly assessments, Galyn Manor retained Andrews, a licensed debt collection agency, to collect the fines, fees, costs, and assessments against the Millses.

Andrews employed a variety of means to collect the debts allegedly owed by the Millses, including obtaining two judgments, four liens, an injunction, and garnishment of the Millses' bank account. Andrews communicated with the Millses through their paralegal and letters identifying Andrews as the agent of Galyn Manor. Andrews's letters and statements of account failed to specify the basis for portions of the debt. Although the Millses disputed certain fees and fines, they negotiated payment plans to pay the undisputed fees. In August 2011, the Millses executed a promissory note for $3,429.00. Although the Millses made payments, the debt spiraled out of control. In June 2012, less than one year after the promissory note was executed, Andrews sent a letter to the Millses thanking them for their payments and noted that their arrearage was now $14,433.86. By May 2015, the Millses alleged that Galyn Manor had recorded $28,938.83 in liens against their property under the Maryland Contract Lien Act.

After enduring nearly ten years of collection efforts against them with no apparent end in sight, the Millses commenced this suit in the Circuit Court for Frederick County in April 2016. The circuit court granted Galyn Manor's motion for summary judgment on the CPA claim, reasoning that Galyn Manor could not be vicariously liable for the actions of its attorneys because the CPA exempts the professional services of lawyers. On appeal, the Court of Special Appeals reversed the circuit court's finding as a matter of law that the lawyers' exemption for "professional services" under the CPA shielded Galyn Manor from either direct liability or vicarious liability for deceptive trade practices under the statute.

Held: Affirmed.

The Court of Appeals held that, in the context of debt collection activity, not all services provided by a lawyer or law firm fall within the professional services exemption under the CPA. Under the CPA, the General Assembly has created a statutory exemption from its

application for certain professionals when undertaking "professional services." Maryland Code, Commercial Law Article ("CL") § 13-104(1). The Court held that: (1) where the lawyer's services could be provided by any licensed debt collection agency without regard to whether the agency is affiliated with a lawyer or a law firm; or (2) where the alleged conduct by the lawyer or law firm violates the MCDCA, the collection activities in question do not fall within the lawyers' "professional services" exemption of the CPA and do not thereby escape the reach of the Act.

Where the professional services exemption applies to a lawyer's professional services, the Court held that the plain language of the statutory exemption does not apply to vicarious liability claims against a lawyer's client. The Court's interpretation of the statutory exemption is consistent with Maryland jurisprudence relating to statutory immunities—a principal is not immune simply because an agent is immune; the principal must establish an independent basis to receive the benefit of immunity. The attorney-client relationship is a principal-agent relationship under which vicarious liability claims may be brought.

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Goshen Run Homeowners Association, Inc. v. Cumanda Cisneros, No. 3, September Term 2019, filed January 27, 2020. Opinion by Booth, J.

Hotten, Getty, and Raker JJ., dissent.

https://mdcourts.gov/data/opinions/coa/2020/3a19.pdf

HOMEOWNERS ASSESSMENTS – CONSUMER PROTECTION ACT

COLLECTION PROCEEDINGS – CONFESSED JUDGMENTS

RULES OF PROCEDURE – DISMISSAL OF COMPLAINT

Facts:

Goshen Run Homeowners Association ("the Association") sought to collect unpaid homeowners association ("HOA") assessments from one of its members, Cumanda Cisneros. The Association and Ms. Cisneros negotiated a promissory note that established a deferred payment plan for Ms. Cisneros to rectify the past-due assessments in exchange for the Association's forbearance from collection action. The promissory note included a provision whereby Ms. Cisneros authorized the entry of a confessed judgment if she defaulted on its terms. The note also included a provision purporting to state that Ms. Cisneros did not waive any legal defenses by authorizing judgment by confession.

Ms. Cisneros subsequently defaulted on the promissory note and the Association sought a confessed judgment pursuant to Maryland Rule 3-611, which the District Court of Maryland sitting in Montgomery County entered. The Association's complaint included the standard affidavit required by Maryland Rule 3-611(a) that the promissory note "does not evidence or arise from a consumer transaction as to which a confessed judgment clause is prohibited by [Maryland] Code, Commercial Law Article § 13-301."

After being served with notice of the judgment, Ms. Cisneros moved to vacate the confessed judgment because it violated the Maryland Consumer Protection Act's ("CPA") prohibition on the use of confessed judgment clauses in consumer contracts contained in § 13-301(12) of the Commercial Law Article ("CL"). The district court found that the promissory note evidenced a consumer transaction and vacated the confessed judgment. The district court then denied Ms. Cisneros's motion to dismiss the Association's complaint for breach of contract, severed the confessed judgment clause from the note, and proceeded to trial on the issue of breach. The district court ultimately found for the Association and entered judgment against Ms. Cisneros based on the amount of the promissory note. Ms. Cisneros appealed to the Circuit Court for Montgomery County.

The circuit court also found that the payments under the promissory note and the collection of HOA assessments constituted a consumer transaction under the CPA but determined that the

district court erred by severing the confessed judgment clause. The circuit court therefore reversed the district court and dismissed the Association's complaint with prejudice. The Association filed a petition for writ of certiorari, which this Court granted.

Held: Affirmed in part and reversed in part.

The Court of Appeals held that HOA assessments are incurred primarily for personal, household, or family purposes and therefore constitute "consumer debt" under CL § 13-101(d)(1). The Court further held that the promissory note constituted an extension of "consumer credit" as defined by CL § 13-101(d)(1) because the promissory note provided for the deferred repayment of a consumer debt.

The Court held that the plain language of CL § 13-301(12) prohibits the use of confessed judgment clauses in any contracts related to a consumer transaction. The Court concluded that, because authorization to confess judgment necessarily waives all pre-judgment defenses, the only reasonable interpretation of CL § 13-301(12) prohibits the use of confessed judgment clauses entirely. The phrase "that waives the consumer's right to assert a legal defense to an action" describes how confessed judgments operate and does not limit the prohibition in CL § 13-301(12). Therefore, the Court held, the non-waiver clause of the promissory note was ineffective and the use of the confessed judgment clause violated the CPA.

The Court held that because the entry of a confessed judgment was prohibited under the CPA, there was no legal basis for its entry and dismissal was required under Md. Rule 3-611(b). However, the Court held that the confessed judgment clause of the promissory note may be severed without destroying the promissory note's overall validity. For this reason, although dismissal was appropriate, the dismissal should have been without prejudice to the Association to file a separate breach of contract action based upon the promissory note with the confessed judgment clause severed.

Tshibangu Kazadi v. State of Maryland, No. 11, September Term 2019, filed January 24, 2020. Opinion by Watts, J.

McDonald, Hotten, and Getty, JJ., dissent in part.

https://www.mdcourts.gov/data/opinions/coa/2020/11a19.pdf

VOIR DIRE – FUNDAMENTAL RIGHTS – PRESUMPTION OF INNOCENCE – BURDEN OF PROOF – RIGHT NOT TO TESTIFY – *STARE DECISIS* – SIGNIFICANT CHANGES IN LAW AND FACTS – DISCOVERY – CROSS-EXAMINATION – IMMIGRATION STATUS

Facts:

In the Circuit Court for Baltimore City, the State, Respondent, charged Tshibangu Kazadi, Petitioner, with first-degree murder, use of a firearm in the commission of a crime of violence or felony, and wearing, carrying, or transporting a handgun. Kazadi requested that the circuit court ask during *voir dire* whether any prospective jurors were unwilling or unable to follow jury instructions on the presumption of innocence, the burden of proof, and the defendant's right not to testify. The circuit court declined to do so.

Before trial, Kazadi filed a motion to compel the State to disclose the Alien Registration Number, immigration case number, and immigration-related paperwork of one of the State's witnesses, S.L., who, according to Kazadi, was an undocumented immigrant subject to a deportation order and who, along with her son, M.L., were allegedly attempting to avoid complying with the deportation order. The State filed an opposition to the motion to compel and a motion *in limine* to preclude Kazadi from cross-examination about S.L.'s immigration status. The circuit court denied the motion to compel and granted the State's motion *in limine*.

After being convicted, Kazadi appealed, and the Court of Special Appeals affirmed. Kazadi filed a petition for a writ of *certiorari*, which this Court granted.

Held: Reversed and remanded for a new trial.

Upon consideration of developments that had occurred in the fifty-five years since the Court of Appeals decided *Twining v. State*, 234 Md. 97, 198 A.2d 291 (1964)—most importantly, the Court's subsequent holdings that jury instructions as to the law are binding and not advisory only, *see Stevenson v. State*, 289 Md. 167, 179-80, 423 A.2d 558, 565 (1980), and *Montgomery v. State*, 292 Md. 84, 91, 437 A.2d 654, 658 (1981)—the Court determined that its holding as to *voir dire* questions concerning jury instructions in *Twining*, 234 Md. at 100, 198 A.2d at 293, was based on outdated reasoning and had been superseded by significant changes in the law. The Court overruled the holding in *Twining*, and concluded that, on request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the

jury instructions on the long-standing fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify.

The Court explained that, although proper in its time fifty-five years earlier, its holding as to voir dire questions concerning jury instructions in *Twining*, 234 Md. at 100, 198 A.2d at 293, was outdated and no longer good law. In *Twining*, *id*. at 100, 198 A.2d at 293, the Court identified three reasons for its holding that the trial court did not abuse its discretion in declining to ask whether the prospective jurors "would give the [defendant] the benefit of the presumption of innocence and the burden of proof." First, the jury instructions "fully and fairly covered" the presumption of innocence and the burden of proof. *Id.* at 100, 198 A.2d at 293. Second, it was "generally recognized that it is inappropriate . . . to question [prospective jurors] as to whether or not they would be disposed to follow or apply stated rules of law." *Id.* at 100, 198 A.2d at 293 (citation omitted). Third, at the time, in Maryland, jury instructions were considered "only advisory." *Id.* at 100, 198 A.2d at 293. All three of these reasons had been essentially vitiated in the decades since the Court decided *Twining*, including, most significantly, the Court had explicitly overruled the premise that jury instructions are advisory only.

As to the Court's reasoning in *Twining* that jury instructions on the presumption of innocence and the burden of proof obviate the need to ask during voir dire whether any prospective jurors would not honor those fundamental rights, in Kazadi, the Court pointed out that, in the decades since the Court decided *Twining*, it had become apparent that not all jurors are willing and able to follow jury instructions on the presumption of innocence and the burden of proof. In the comment to Maryland Criminal Pattern Jury Instruction (2d ed. 2018) 1:00 (Pretrial Introductory Instructions), the Maryland State Bar Association's Standing Committee on Pattern Jury Instructions observed: "[S]tudies have shown that jurors routinely misunderstand or misapply" the presumption of innocence and the burden of proof. (Citations omitted). When the Court decided *Twining* in 1964, it did not have the benefit of the Committee's observation or the studies that the Committee identified. In fact, at the time, there had not yet been any empirical research on juror comprehension of instructions, which was initiated in the early 1970s.

Addressing the Court's statement in *Twining* that it was "generally recognized that it is inappropriate" to ask during *voir dire* whether any prospective jurors would be unwilling to follow jury instructions, in *Kazadi*, the Court pointed out that that statement was, even at the time, at best, tenuous, as, in *Twining*, the Court relied upon only a 1947 secondary source, which used the same language as a 1907 predecessor, which relied on a mere handful of cases. The citation of the secondary source in *Twining* did not effectively establish that the proposition in question was ever "generally recognized"—much less that it was "generally recognized" when this Court decided *Twining* in 1964. And even if it could be established that the proposition in question was "generally recognized" in 1964, it was no longer the case. Courts are not in agreement on the issue. The Sixth Circuit and several State courts have concluded that, during *voir dire*, a trial court must comply with a request to ask the prospective jurors whether they are willing and able to follow the jury instructions on the presumption of innocence, the burden of proof, and/or the defendant's right not to testify. By contrast, many United States Courts of Appeals and courts in other States and the District of Columbia have determined that, during *voir dire*, a trial court need not comply with a request to ask the prospective jurors whether they are

willing and able to follow the jury instructions on the presumption of innocence, the burden of proof, and/or the right not to testify. The Court explained that those cases were not persuasive because several of the courts in other jurisdictions relied, exclusively or almost exclusively, on the reasoning that other jury instructions obviate the need for *voir dire* questions concerning fundamental matters; and, giving jury instructions on the presumption of innocence and the burden of proof is, by definition, not an effective remedy for a prospective juror who is unwilling or unable to follow such jury instructions. Additionally, when the Court decided *Kazadi*, asking *voir dire* questions concerning certain fundamental rights was recommended by the Maryland State Bar Association.

Most significantly, as to the reasoning in *Twining* that there was no point in determining whether prospective jurors would follow jury instructions, given that jurors were free to disregard jury instructions anyway, *i.e*., jury instructions were advisory only, in *Kazadi*, the Court pointed out that that was no longer the case. Consistent with *Stevenson*, 289 Md. at 180, 423 A.2d at 565, and *Montgomery*, 292 Md. at 91, 437 A.2d at 658, by the time that the Court decided *Kazadi*, jury instructions about the law were binding and trial courts advised juries as much. That jury instructions were no longer advisory only invalidated the rationale that the Court offered for its holding in *Twining* that a trial court may decline a request to ask *voir dire* questions concerning the presumption of innocence and the burden of proof because the instructions are not binding, and unequivocally satisfied the exception to the doctrine of *stare decisis* that applies where a prior case has been superseded by significant changes in law.

The Court explained that *voir dire* questions concerning the three long-standing fundamental rights at issue met the criteria for *voir dire* questions that trial courts must ask on request. On request, a trial court must ask *voir dire* questions that are reasonably likely to reveal a cause for disqualification involving matters that are liable to have undue influence over a prospective juror. Such matters may be comprised of biases related to the crime or the defendant. Certainly, the belief that a defendant must testify or prove innocence, or an unwillingness or inability to comply with jury instructions on the presumption of innocence, burden of proof, or a defendant's right not to testify, otherwise would constitute a bias related to the defendant. As a matter of fact, the Court noted, it was difficult to conceive of circumstances that could be more prejudicial to a defendant's right to a fair trial.

The Court determined that, because the long-standing fundamental rights at issue—namely, the right to be presumed innocence, the right not to be convicted except upon proof beyond a reasonable doubt, and the right not to testify—are critical to a fair jury trial in a criminal case, on request, a defendant should be entitled to *voir dire* questions that are aimed at uncovering a juror's inability or unwillingness to honor these fundamental rights. By making such *voir dire* questions mandatory on request, the Court helped ensure that a juror's inability or unwillingness to follow instructions involving these three important fundamental rights will be discovered before trial, and that all defendants—not just ones whose trials are presided over by circuit court judges who chose to exercise the discretion to grant requests to ask such *voir dire* questions—will have the opportunity to move to strike prospective jurors for cause on the ground of an unwillingness or inability to adhere to these fundamental rights.

The Court pointed out that it continued to stand by the well-established principle that Maryland employs limited *voir dire*—that is, in Maryland, *voir dire*'s sole purpose is to elicit specific cause for disqualification, not to aid counsel in the intelligent use of peremptory strikes.

The Court noted that a trial court is not required, on its own initiative, to ask *voir dire* questions concerning fundamental rights. Instead, a trial court must ask such *voir dire* questions only if a defendant requests them. This was consistent with prior cases in which the Court had required trial courts to grant requests to ask certain *voir dire* questions, as opposed to requiring trial courts to ask those *voir dire* questions *sua sponte*.

As to the issue regarding immigration-related information, the Court held that, absent additional circumstances—such as allegations of *quid pro quo* or leniency in an immigration case giving rise to a motive to testify falsely or bias—a State's witness's status as an undocumented immigrant, or the existence of a deportation order to which the witness may be subject does not "show the character of the witness for untruthfulness[,]" Md. R. 4-263(d)(6)(A), is not "probative of a character trait of untruthfulness[,]" Md. R. 5-608(b), and does not show that the witness "has a motive to testify falsely[,]" Md. R. 5-616(a)(4). Without more, a State's witness's status as an undocumented immigrant, or any deportation order to which the person is subject, is not required to be disclosed by a prosecutor during discovery, and is not a proper subject of cross-examination.

The Court explained that, to be discoverable under Maryland Rule 4-263(d)(6)(A), information must be relevant to a State's witness's credibility. Generally, a witness's immigration status is not relevant to his or her credibility because, absent additional circumstances, a witness's status as an undocumented immigrant, or the existence of a deportation order to which the witness may be subject, does not make the witness any more likely to falsely testify than any person would be. The Court agreed with the Court of Special Appeals and multiple other courts that immigration status alone does not reflect upon an individual's character, and is thus not admissible for impeachment purposes.

Applying its holding to *Kazadi*'s circumstances, the Court of Appeals determined that the circuit court correctly denied the motion to compel the State to disclose S.L.'s Alien Registration Number, her immigration case number, and any paperwork concerning her immigration status, including a copy of the deportation order to which she was subject, and that the circuit court was correct in precluding Kazadi's counsel from cross-examining S.L. and M.L. about their immigration status, and about the deportation order to which S.L. was subject. Because there was no evidence that S.L.'s or M.L.'s immigration status, or the deportation order, reflected on their credibility, disclosure of the requested documents was not required and cross-examination regarding the same was not permitted.

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Romechia Simms v. Maryland Department of Health, et al., No. 20, September Term 2019, filed January 30, 2020. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2020/20a19.pdf

DUE PROCESS – CONDITIONAL RELEASE – HOSPITAL WARRANT – DANGEROUSNESS

Facts:

Under Maryland law, a person can be determined guilty of a crime but "not criminally responsible" for its commission. Under that circumstance, the person is committed to the Maryland Department of Health ("Health Department"). The statutory scheme provides, in appropriate circumstances, the option for a court order allowing for the committed person's "conditional release" into the community with specific conditions to which the committed person must adhere. Section 3-121 of the Criminal Procedure Article of the Maryland Code ("CP") spells out what occurs if a committed person, after having been placed on conditional release, is alleged to have violated one or more conditions of release. If a court has probable cause to believe that a person on conditional release violated a condition, the court issues a hospital warrant to recommit the person pending an expeditious hearing before an Administrative Law Judge ("ALJ"). Petitioner in this case, Ms. Simms, challenged the process for issuing a hospital warrant.

In February 2016, Ms. Simms appeared before the Circuit Court for Charles County and entered an I plea to the commission of involuntary manslaughter in causing the death of her three-year old son. After accepting the plea, the court made the additional finding that Ms. Simms was not criminally responsible at the time of the offense.

The court determined that Ms. Simms would not be a danger to herself or others if released with certain conditions. Pursuant to CP § 3-111 and § 3-112, the circuit court issued an Order of Conditional Release that detailed specific conditions of release. A term of the conditional release mandated that Ms. Simms attend regularly scheduled therapy appointments.

In September 2017, Ms. Simms' therapist expressed concerns to the Health Department that Ms. Simms was exhibiting a "decrease in psychological functioning." The State conducted an investigation pursuant to CP § 3-121 and concluded that Ms. Simms had missed required therapy appointments.

The State filed a petition for revocation of conditional release based on Ms. Simms' missed therapy appointments, which violated a term of the conditional release order. The Circuit Court for Charles County found probable cause to believe that Ms. Simms violated a term of her conditional release and issued a hospital warrant pursuant to CP § 3-121(e). The hospital

warrant required Ms. Simms be recommitted to the Clifton T. Perkins Hospital Center ("Perkins") for evaluation and examination pending the outcome of the hearing.

On September 27, 2017, while confined at Perkins pending the ALJ's determination and ruling from the Circuit Court for Charles County, Ms. Simms filed a petition for writ of habeas corpus in the Circuit Court for Howard County seeking her immediate release from confinement at Perkins.[1] Ms. Simms asserted that the process for issuing a hospital warrant and her recommitment pending the ALJ hearing violates constitutional due process under either or both the Federal Constitution or Maryland Declaration of Rights. Ms. Simms argued that recommitment of a person alleged to have violated conditional release must be based not only upon the stated requirement that the court find "probable cause to believe that the committed person has violated a conditional release," CP § 3-121(e), but must also include a finding, not mentioned in that subsection or elsewhere in Title 3 of the Criminal Procedure Article ("Title 3"), that the committed person was currently a danger to self or to the person or property of others.

The Circuit Court for Howard County issued a memorandum opinion and order denying the habeas petition on October 31, 2017. The Court of Special Appeals affirmed the circuit court's denial of the writ of habeas corpus.

Held: Affirmed.

The Court of Appeals affirmed and held that the legal standard for a court issuing a hospital warrant pursuant to CP § 3-121 is whether the court has probable cause to believe that an individual violated conditional release. Because a committed person is presumed dangerous if she violates a term of her conditional release, a separate finding of dangerousness is not required for the issuance of a hospital warrant. The Court of Appeals concluded that CP § 3-121 does not violate due process under the Federal Constitution or the Maryland Declaration of Rights.

[1] Perkins is in Howard County.

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Anthony Marlin Tunnell v. State of Maryland, No. 28, September Term 2019, filed January 16, 2020. Opinion by McDonald, J.

Watts, J., dissents.

https://www.courts.state.md.us/data/opinions/coa/2020/28a19.pdf

CRIMINAL PROCEDURE – SPEEDY TRIAL – DEADLINE FOR TRIAL

CRIMINAL PROCEDURE – SPEEDY TRIAL – POSTPONEMENT OF TRIAL DATE – APPELLATE REVIEW

CRIMINAL PROCEDURE – SPEEDY TRIAL – POSTPONEMENT OF TRIAL DATE – DETERMINATION OF GOOD CAUSE

Facts:

Maryland Code, Criminal Procedure Article ("CP"), § 6-103 and Maryland Rule 4-271 collectively impose a requirement known as the "Hicks rule," under which a criminal trial in a Maryland circuit court must begin within 180 days of the first appearance of the defendant or defense counsel in that court. This deadline is known as the "Hicks date." Unless the defendant consents to a trial date beyond the Hicks date, a continuance of the trial beyond the Hicks date may be granted only for "good cause."

In this case, Anthony Marlin Tunnell faced various murder and firearms charges in the Circuit Court for Worcester County. An Assistant Public Defender entered his appearance on behalf of Mr. Tunnell on February 2, 2017, meaning that the Hicks date was August 1, 2017. The Circuit Court set a pretrial motions hearing for April 7, 2017 and scheduled trial for May 9, 2017.

At the April 7 hearing, the administrative judge postponed the trial after finding good cause for a continuance based on the State's need to provide additional discovery to the defense. However, both the court and the State's Attorney were apparently under the impression that the *Hicks* date was "tolled" for the period of time during which evidence was at a laboratory for DNA analysis, and the administrative judge also referred to the DNA examination as a basis for the continuance. At the time of postponement, the court did not set a new trial date. Instead, the court converted the original May 9 trial date to a status conference. Around this time, the Assistant Public Defender representing Mr. Tunnell withdrew his appearance and Mr. Tunnell retained private defense counsel.

On May 9, 2017, the State's Attorney moved to continue the ongoing postponement because he had just given Mr. Tunnell's new counsel a large amount of prior discovery and additional discovery remained pending. Defense counsel joined the motion but expressed interest in scheduling a trial date as soon as possible. The Circuit Court granted the motion to continue the postponement and directed the parties to seek a new trial date from the clerk's office.

The parties appeared for another status conference on August 8, 2017. The State's Attorney sought to schedule a new trial date prior to September 12, 2017, which he believed was the "new Hicks date" based on his understanding that the delay in obtaining the DNA report "tolled" the Hicks date for a period equivalent to the delay. At this time, defense counsel questioned whether the Hicks date could be tolled and argued that the original August 1 Hicks date still applied. The Circuit Court tentatively accepted the State's Attorney's tolling theory, but also found that the administrative judge's finding of "good cause" for a postponement on April 7 was valid irrespective of the tolling analysis. The court scheduled a pretrial motions hearing for September 1, 2017 and scheduled trial to begin on September 11, 2017. On September 11-12, 2017, Mr. Tunnell was tried before a jury on the three murder- and firearms-related counts. The jury found Mr. Tunnell guilty of first-degree murder.

Mr. Tunnell appealed his conviction, alleging, among other grounds for reversal, a violation of the Hicks rule. The Court of Special Appeals rejected Mr. Tunnell's arguments and affirmed his conviction.

Held: Affirmed.

As a threshold matter, the Court of Appeals determined that the Hicks date issue was adequately preserved for appellate review. An appellate court "ordinarily" will only address an issue if "it plainly appears by the record to have been raised in or decided by the trial court." Maryland Rule 8-131(a). Alternatively, an appellate court may address an unpreserved issue "if necessary or desirable to guide the trial court." *Id.* Here, given that defense counsel repeatedly questioned the validity of the "tolling" theory at the August 8 status conference and the judge at the September 1 motions hearing deemed the tolling issue an "appellate issue to raise," the Court of Appeals found that the parties and the court believed that defense counsel had raised and lost the issue of compliance with the Hicks rule.

The Court of Appeals held that the Hicks rule does not incorporate a mechanism for "tolling" or extending the Hicks date. Although a request for a DNA analysis of evidence, or the need to make a timely disclosure under Maryland Code, Courts & Judicial Proceedings Article ("CJ"), §10-915 of intent to use DNA evidence, may constitute "good cause" for granting a continuance that extends a trial date beyond the Hicks date, these circumstances do not automatically toll the Hicks date.

The Court of Appeals next considered whether, putting the tolling theory aside, the circumstances of this case require dismissal of Mr. Tunnell's indictment under the Hicks rule. To assess postponements of criminal trials beyond the Hicks date, courts evaluate the delay in two steps: (1) Was there "good cause" for the administrative judge to grant a postponement of the scheduled trial date? (2) Was there an inordinate delay from the scheduled trial date to the new trial date in commencing the trial? First, the Court held that the administrative judge did not abuse his discretion or err as a matter of law when he found good cause on April 7 for postponing Mr. Tunnell's originally scheduled trial date based on the State's recent provision of

discovery to the defense and the anticipated provision of additional discovery. The justifications for postponement also existed when the administrative judge continued the postponement on May 9, as Mr. Tunnell had obtained new defense counsel and additional discovery remained outstanding. Second, given the administrative judge's finding of good cause and the appearance of new defense counsel shortly before the originally scheduled trial date, the Court held that Mr. Tunnell did not carry his burden of showing that there was an inordinate delay in the commencement of trial approximately one month beyond the Hicks date. Therefore, dismissal of Mr. Tunnell's indictment under the Hicks rule is not required.

Motor Vehicle Administration v. Brian Barrett, No. 22, September Term 2019, filed January 24, 2002. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2020/22a19.pdf

ADMINISTRATIVE LAW – DUE PROCESS – RIGHTS AFFORDED TO DETAINEES

Facts:

Respondent, Brian Barrett, was detained on suspicion of driving while under the influence of alcohol after a law enforcement officer observed Respondent commit traffic violations. The detaining officer conducted standardized field sobriety tests on Respondent, and Respondent performed poorly. The detaining officer arrested Respondent and placed him inside a patrol vehicle.

Inside the vehicle, the detaining officer began reading the Motor Vehicle Administration ("MVA") Advice of Rights form DR-15 ("DR-15") aloud to Respondent. Respondent was given a copy of the DR-15 to read along. While the DR-15 was being read, another police officer approached the vehicle. Through the passenger-side window, the second police officer repeatedly asked Respondent whether he would submit to a blood alcohol concentration test. Respondent claimed he could not hear and understand the DR-15 as it was read aloud due to the simultaneous questioning by the second officer. When the detaining officer finished reading the DR-15, the officers asked Respondent approximately seven times whether he would submit to a blood alcohol concentration test. Respondent gave noncommittal responses, and the detaining officer ultimately interpreted those responses as a refusal. After returning to the police station, Respondent signed the DR-15, acknowledging his refusal to take the test.

As a result of his refusal to take the test, Respondent's driver's license was suspended for 270-days and his commercial driver's license was suspended for one year. Respondent appealed the suspension. At the hearing before an Administrative Law Judge ("ALJ"), Respondent argued that MD. CODE, ANN., TRANS. ("TR") § 16-205.1(b) (Lexis Nexis Supp. 2018) requires police officers to fully advise detained motorists of the sanctions attendant to refusing a blood alcohol concentration test. Those sanctions are contained within the DR-15. Because the second officer distracted Respondent while the DR-15 was read aloud, Respondent was not fully advised.

After hearing testimony from the detaining officer and Respondent, the ALJ upheld the suspensions. The ALJ made a credibility determination and found that Respondent was not inhibited from understanding the DR-15 despite the second officer's simultaneous questioning. The ALJ came to this conclusion because the detaining officer read the DR-15 aloud, Respondent possessed his own copy of the DR-15 to read, and Respondent signed the DR-15 at the station. As such, the ALJ reasoned that Respondent was fully advised of the sanctions attendant to a test refusal.

Respondent appealed the ALJ's decision to the Circuit Court for Anne Arundel County and argued that the simultaneous questioning violated his due process rights and prevented him from being fully advised as required by TR § 16-205.1. The MVA countered that the ALJ's decision was supported by substantial evidence, thus it must stand absent clear error. The circuit court reversed the decision of the ALJ. The circuit court held that a detained motorist cannot be expected to understand the advice of rights as they are given when another officer is asking questions.

Held: Reversed.

The Court of Appeals reversed the circuit court and reiterated that the DR-15 contains all the information police officers are mandated by TR § 16-205.1 to provide detained motorists. The ALJ determined that the simultaneous questioning, as a matter of fact, did not prevent Respondent from understanding the DR-15, and that determination was supported by substantial evidence. The Court of Appeals held that, where a motorist refuses a blood alcohol concentration test, if an ALJ finds that the motorist was fully advised of his or her rights despite being distracted while the DR-15 was being read aloud, that determination will not be disturbed if it is supported by substantial evidence.

COURT OF SPECIAL APPEALS

Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City, No. 2910, September Term 2018, filed January 29, 2020. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2020/2910s18.pdf

EXCISE TAX – FIRST AMENDMENT – BILLBOARDS

Facts:

A Baltimore City Ordinance imposes an excise tax on outdoor advertising displays. Balt. City Code Art. 28, § 29. Clear Channel Outdoor, Inc., owns or operates the majority of the billboards in Baltimore City, which are subject to the Tax. The Tax is triggered when an outdoor advertising company charges fees to a third party. Clear Channel initially challenged the Baltimore City Ordinance in the United States District Court for the District of Maryland claiming that the Ordinance violated its First and Fourteenth Amendment rights. The District Court granted summary judgment in favor of the City holding that the Ordinance was a tax, and therefore, it lacked subject matter jurisdiction to determine the merits of the claim.

Clear Channel subsequently paid the Tax, under protest, for the 2014, 2015, and 2016 fiscal years. It demanded refunds for each year, which were denied by the City. Clear Channel appealed the denial in the Maryland Tax Court, challenging the constitutionality of the Ordinance under the First and Fourteenth Amendment and Article 40 of the Maryland Declaration of Rights. The Maryland Tax Court held that an excise tax on Clear Channel's privilege to do business in Baltimore did not implicate the First Amendment. Clear Channel sought judicial review of the Tax Court's decision in the Circuit Court for Baltimore City. The Circuit Court for Baltimore City affirmed the Tax Court's decision and Clear Channel Appealed.

Held: Affirmed.

Clear Channel first asserted that the Ordinance unconstitutionally burdens billboard speech, which is protected by the First Amendment and Article 40 of the Maryland Constitution. As such, Clear Channel argued that the Ordinance should be analyzed using the strict scrutiny

standard of review. The City, however, argued that the Ordinance validly enacted an excise tax on Clear Channel's privilege to do business and did not implicate the First Amendment. The Court of Special Appeals held that the outdoor advertising tax is a valid excise tax enacted within the City's taxing powers on the privilege to do business, and that it does not implicate the First Amendment.

The Court first considered the broad taxing power of the City and the presumption that exists in favor of the constitutionality of legislative enactments. The Court observed that an excise is "a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege." *Weaver v. Prince George's Cty.*, 281 Md. 349, 357 (1977). The Court explained that here, the City has imposed an excise tax on Clear Channel's privilege to charge others a fee to use billboard space. In rejecting Clear Channel's assertion that the Ordinance violated its First Amendment rights, the Court observed that Clear Channel's economic activity was not expressive or communicative. It reasoned that that the advertisements and messages displayed on Clear Channel's billboards were entitled to some level of First Amendment protection. Nevertheless, Clear Channel's privilege to receive financial compensation for those messages is not entitled to the same protection. The Court further observed that the Ordinance was content neutral and applied regardless of the message displayed or who paid Clear Channel to display it. The Court concluded that the outdoor advertising tax is a valid excise tax enacted within the City's taxing powers on the privilege to do business, and that it does not implicate the First Amendment. Thus, the Court analyzed the Ordinance under a rational basis review. It explained that the Tax was rationally related to the City's interest in raising revenue for Baltimore City, and therefore, satisfied the rational basis test.

Assuming *arguendo*, that the Tax did implicate the First Amendment, the Court explained that it was vastly different from the other taxes that have been struck down by the Supreme Court on First Amendment Grounds. The Court considered the Supreme Court's holdings in *Leathers v. Medlock*, 499 U.S. 439 (1991), *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). In distinguishing these cases, the Court held that each of the stricken taxes involved freedom of the press and a concern that the taxes would serve as a way for the government to censor "critical information and opinion[s]," published by the press. *Leathers, supra*, 499 U.S. at 447. The Court concluded that the Ordinance here, presented no such concern of censoring particular viewpoints or ideas. It does not target a particular speaker or message; it merely taxes the privilege of doing business in the City.

In rejecting Clear Channel's argument that the targets a platform for speech and a small group of speakers within that platform, the Court distinguished the tax in *Minneapolis Star, supra*, 460 U.S. 575. *Minneapolis Star* involved a special use tax on the paper and ink used in publications, which provided an exemption that in effect, only applied to smaller newspapers with less wide-spread circulation. *Id*. at 578, 591. The Supreme Court held the tax unconstitutional because it singled out the press and further, that it targeted only a small group of newspapers due to the exemption provision. *Id*. at 591. The Court of Special Appeals distinguished *Minneapolis Star* by explaining that Clear Channel is not akin to a newspaper, which publishes its own thoughts

and ideas. It also reasoned that the ordinance does not target a small group of individuals within a particular group because all off-premise billboard owners and operators are assessed the tax based on the dimensions of their billboards.

H.C. Utilities, LLC v. Song Y. Hwang, et al., No. 2423, September Term 2018, filed January 29, 2020. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2020/2423s18.pdf

CONTRACT – PERSONAL LIABILITY FLOWING FROM DECLARATION RECORDED IN LAND RECORDS

CONTRACT – STATUTE OF FRAUDS – DECLARATION NOT SIGNED BY THE PARTY TO BE CHARGED

Facts:

Appellant owns the rights to a declaration (the "Declaration") recorded in the Land Records for Howard County, giving it the right to recover utility charges related to Water and Sewer facilities. The Declaration provides that owners of property covered by the Declaration must make annual utility payments to H.C. Utilities for the Water and Sewer facilities, and that owners are also responsible for charges unpaid and due upon taking title to such property. On October 23, 2006, Olasumbo Agbe-Davies purchased property subject to the Declaration. Agbe-Davies failed to pay the Water and Sewer charges, and apparently also failed to make mortgage payments.

After foreclosure, on April 6, 2016, appellee Hwang purchased the Agbe-Davies property. H.C. Utilities then sought payment of Agbe-Davies's unpaid Water and Sewer charges from Hwang pursuant to the Declaration and filed a contract action to recover those charges. Hwang moved for summary judgment, and the circuit court found that although the Declaration constituted a binding contract between the parties, the debts associated with the unpaid charges were discharged in Agbe-Davies's foreclosure. The court therefore granted summary judgment in favor of Hwang. H.C. Utilities appealed.

Held: Affirmed.

Although the Declaration constitutes a "contract" for purposes of the Maryland Contract Lien Act, that Act does not provide a statutory cause of action creating personal contractual liability. Instead, the Act simply provides the procedures for obtaining a lien on property.

Having established that the Maryland Contract Lien Act does not create a cause of action for personal contractual liability, the Court applies basic principles of contract law to determine whether the Declaration creates personal contractual liability. The statute of frauds requires a contract to be signed in writing by the party to be charged where, relevant here: 1) the contract cannot be completed within one year, and 2) the contract concerns an interest in land. Here, the Declaration requires property owners to pay the annual Water and Sewer charges over the course

of forty years. Additionally, the Declaration concerns an interest in real property. Because Hwang never signed the Declaration, Hwang is not personally liable for charges set forth in the Declaration.

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Jose O. Canales-Yanez v. State of Maryland, No. 2209, September Term 2018, filed January 29, 2020. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2020/2209s18.pdf

CRIMINAL LAW – BRADY VIOLATION – MATERIALITY

Facts:

After a non-jury trial, defendant was convicted of first-degree murder, conspiracy to commit murder, and other related offenses. Defendant moved for a new trial on the basis that the State failed to provide the recording and transcript of a police interview of the parents of a State's witness prior to trial. The witness spoke with police the day after the undisclosed interview with her parents and changed her version of events from what she had previously told police. Defendant alleged that failure to disclose the interview was a *Brady* violation.

The judge who presided over the trial denied the motion, stating that even if the witness's testimony were completely removed from the trial, there was still sufficient evidence to convict the defendant. The defendant appealed.

Held: Affirmed.

Accepting that the interview was favorable to the defendant and had been withheld by the State, the evidence was nonetheless not material as it would not have affected the outcome of the case. When a case is tried without a jury and the trial judge is the one ruling on a motion for new trial, the trial judge's finding that the evidence was not material should only be set aside if it is patently unreasonable.

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Nathan Joseph Johnson v. State of Maryland, No. 109, September Term 2018, filed January 31, 2020. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2020/0109s18.pdf

CRIMINAL LAW – INVOLUNTARY MANSLAUGHTER – GROSS NEGLIGENCE

Facts:

Nathan Johnson and Brandon Roe were friends and heroin users. Mr. Johnson bought heroin and split the purchase with Mr. Roe, and Mr. Roe died of a heroin and acrylfentanyl overdose. Mr. Johnson described the drugs using the fire emoji in texts with Mr. Roe on the day of the overdose. Mr. Roe texted two other individuals earlier that day, "Josh D" and "JJ Moore," but those messages did not fit the timeline for when the State believed the sale occurred. Additionally, there was no evidence that Mr. Johnson engaged in any other drug sales or that he was a routine drug dealer. Mr. Johnson was convicted of involuntary manslaughter, reckless endangerment, possession with intent to distribute heroin and fentanyl, and possession of heroin and fentanyl after a bench trial.

Mr. Johnson appealed, arguing that the evidence was insufficient to support a finding that he acted with gross negligence because he was not a routine drug dealer, Mr. Roe did not have a "special vulnerability" to the sale, and he sold only 0.4 grams of heroin to Mr. Roe. Further, he argued that the evidence was insufficient to support his convictions for distribution of heroin and fentanyl and that the court erred when it admitted his text messages with Mr. Roe.

The State responded that Mr. Johnson knew that heroin was inherently dangerous because he described the heroin using a fire emoji and he did not know either the heroin's contents or what else Mr. Roe may have ingested that day. It argued that the evidence was sufficient to support the distribution charges and the texts were admitted properly.

Held: Affirmed in part and reversed in part.

The Court of Special Appeals reversed Mr. Johnson's conviction for gross negligence involuntary manslaughter and affirmed all other convictions.

First, the Court held that Mr. Johnson's conduct did not rise to the level of reckless disregard for human life. The Court of Appeals held in *State v. Thomas*, 464 Md. 133 (2019), that although "a *per se* rule providing that all heroin distribution resulting in death constitutes gross negligence involuntary manslaughter is unwise and not in keeping with our precedent," a "holistic view of the risk factors at play" could help the court determine whether the accused's conduct rose to the level of a "high degree of risk to human life." *Thomas*, 464 Md. at 167, 157, 161. The Court, noting that heroin is inherently dangerous but not so dangerous that distribution alone always

amounts to gross negligence, established that we must determine whether external risk factors raise the level of risk to a reckless disregard for human life. *Id*. at 166–69.

Applying *Thomas*, the Court of Special Appeals held that Mr. Johnson's conduct did not rise to the level of gross negligence. The Court *first* applied the risk factors identified in *Thomas*: (1) the buyer's desperation and vulnerability and (2) the dealer's knowledge and experience. The Court found that Mr. Johnson was not in a position of power over Mr. Roe, that Mr. Roe did not show signs of desperation, that Mr. Johnson was not a frequent or high-volume drug dealer, and that Mr. Johnson had no greater opportunity to know the drugs' content than Mr. Roe did.

Further, the Court could not identify any other risk factors that would elevate the inherent dangerousness of the sale. The State argued that when Mr. Johnson described the heroin as "🔥" in a text message, he acknowledged a heightened risk in the sale. But the State's expert witness in drug jargon did not go that far—he testified that the use of the fire emoji meant that the drugs were "really good", not that the drugs were really strong. The State's other argument for elevated risk was that Mr. Johnson did not know the contents of the drugs, but that lack of knowledge was not enough to establish reckless disregard. Mr. Johnson was not a routine dealer like the one in *Thomas* who would have an opportunity to know the drugs' contents.

Second, the Court held the evidence was sufficient to support Mr. Johnson's convictions for possession with intent to distribute heroin and fentanyl. The circuit court, sitting as the fact-finder in Mr. Johnson's bench trial, found that Mr. Johnson's explanation to police was not credible and that his text messages with Mr. Roe were consistent with the sale of heroin. It also found that the State's expert witness was credible when he testified that the text messages were consistent with the sale of heroin. The Court held that the circuit court's findings were sufficient to support the convictions.

Finally, the Court held that the circuit court did not err when it admitted Mr. Johnson's text messages with Mr. Roe. Mr. Johnson argued that on fairness grounds and under the doctrine of completeness, his texts should have been excluded because the State was unable to produce the contents of a text exchange between Mr. Roe and another individual named "JJ Moore." However, the court was aware that Mr. Roe had communicated with others on the day of his overdose and therefore was able to place Mr. Roe's texts with Mr. Johnson into context.

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Oswald Traynham v. State of Maryland, No. 2687, September Term 2018, filed December 20, 2019. Opinion by Adkins, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/2687s18.pdf

EVIDENCE – HEARSAY – PRIOR IDENTIFICATION EXCEPTION – PHOTO ARRAY PROCEDURES

CRIMINAL LAW – HARMLESS AND REVERSIBLE ERROR – HEARSAY

DUE PROCESS – IDENTIFICATION – IMPROPER POLICE INFLUENCE

Facts:

A Baltimore City jury convicted Oswald Traynham of armed robbery, robbery, theft of property with a value of $100–$1500, and carrying a concealed weapon. Prior to trial, the Baltimore City Police Department ("BPD") conducted a photo array procedure with the victim, Karen Lawson. On her first look-through of the photos, Lawson commented "beard yes" when looking at Traynham's photo. During her second look at Traynham's photo she commented, "don't think so—not skinny enough."

Shortly after the photo array procedure was conducted, Traynham was arrested. The BPD detective working the case recovered Lawson's stolen property in Traynham's apartment, and while returning it, discussed Traynham with Lawson and her husband. The detective stated that he believed Traynham: was the robber; "smokes crack"; has "lost 70 pounds in the past few months" because of the drug use; and had a gun.

During trial, the circuit court admitted the photo array procedure, and Lawson's in-court testimony that she positively identified Traynham during the procedure, accepting the State's argument that both are statements of prior identification and thus fall within the Maryland Rule 5-802.1(c) exception to hearsay. The court also admitted Lawson's in-court identification of Traynham, overruling the defense's objection that any in-court identification by Lawson was irretrievably tainted by her conversation with the BPD detective.

Held: Reversed and remanded.

The Court of Special Appeals held that the photo array procedure did not result in a positive identification that satisfies the Maryland Rule 5-802.1(c) exception to hearsay, thus the circuit court erred in admitting evidence of the procedure and Lawson's testimony regarding it. The erroneous admission of this hearsay evidence was not harmless.

"Beard yes" and "don't think so—not skinny enough" are not a positive identification. The Court held that because procedures in place to verify positive identifications—including the witness signing the photo she positively identified, and the officer asking a direct clarification question—were not followed here, the photo array procedure did not satisfy the prior identification exception to the rule against hearsay.

Lawson's in-court identification of Traynham was improperly influenced by her conversation with the BPD detective. When an identification is infected by improper police influence, the evidence must be screened for reliability to prevent a tainted future identification of the defendant by the victim. A source independent of the tainted conversation—Lawson's encounter with Traynham—rendered the in-court identification sufficiently reliable for admission.

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Laser Womack v. State of Maryland, No. 2962, September Term 2018, filed January 30, 2020. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2020/2962s18.pdf

CRIMINAL LAW – WAIVER OF COUNSEL – KNOWING AND INTELLIGENT WAIVER

Facts:

Appellant was convicted in the Circuit Court for Baltimore City of one count of second-degree murder and two counts of attempted second-degree murder. On appeal, appellant argued that the circuit court failed to strictly comply with Md. Rule 4-215(a) because the court did not advise him of the mandatory consecutive sentences with respect to certain firearms charges and did not properly advise him of the nature of all charges prior to allowing him to discharge assigned counsel and proceed pro se. Although it was uncontested that the court failed to comply with Md. Rule 4-215(a) at this initial hearing, the State argued this error did not warrant reversal because the court cumulatively satisfied the Rule when it held a subsequent hearing and provided appellant, a self-represented litigant, with the proper advisements.

Held: Reversed and remanded for a new trial.

The circuit court did not strictly comply with Rule 4-215 prior to appellant's discharge of counsel, and despite the court's attempt to fix the initial failure to comply with the Rule, subsequent advisements did not "cure" the initial error. Although advisements under Rule 4-215(a) may be given in a piecemeal fashion, compliance with the Rule must be established *before* a valid waiver.

We are not suggesting that, if a trial court fails to strictly comply with Rule 4-215, the error can never be cured. It would be illogical to hold that a circuit court that fails to strictly comply with Rule 4-215 prior to a defendant's discharge of counsel can never remedy that failure, but instead must proceed with a trial that is guaranteed to be reversed on appeal. Rather, we construe Rule 4-215 to permit a court to "cure" an initial failure to comply with Rule 4-215 with subsequent advice to the defendant after the defendant has discharged counsel, but only if the court gives the defendant a chance to reconsider the discharge of counsel after the full advice is given.

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Ashley Hector, et al. v. Bank of New York Mellon, No. 3100, September Term 2018, filed January 29, 3030. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2020/3100s18.pdf

TRUSTEE – REPRESENTATIVE CAPACITY SEPARATE FROM INDIVIDUAL CAPACITY

TRUSTEE LIABILITY – PERSONAL LIABILITY – PERSONALLY AT FAULT

Facts:

While they were young children, appellants lived from 2001 to 2002 at a property which allegedly contained lead paint. Appellants supposedly consumed lead paint at the property and contracted lead poisoning, causing them serious permanent injuries.

At the time that appellants lived at the property and were allegedly exposed to lead paint, Bank of New York Mellon ("BNYM") served as the trustee of the Trust that owned the property (and numerous other properties and loans). The Trust was created when BNYM and other parties executed a Pooling and Servicing Agreement ("PSA") which defined the roles and responsibilities of each of the parties to the Trust.

In April 2016, appellants filed an amended complaint against Bank of New York Mellon ("BNYM"), alleging BNYM's negligence as the "owner" of the property pursuant to the Baltimore City Housing Code. BNYM moved for summary judgment, arguing that appellants had conflated BNYM in its individual capacity with BNYM in its trustee capacity. BNYM also argued that it was not an "owner" under the Housing Code and was therefore not personally liable to appellants for any injuries they sustained.

The circuit court granted BNYM's motion for summary judgment on the basis that appellants had sued the wrong party, i.e., that appellants should have pursued their claim against BNYM as Trustee, not BNYM individually. The court then granted appellants' request for leave to amend their amended complaint. Appellants amended their complaint, and BNYM moved to strike or dismiss the amended complaint. The court granted BNYM's motion, essentially affirming the prior ruling that appellants had sued the wrong party. Appellants timely appealed.

Held: Affirmed.

There is a distinction between a party in its capacity as a trustee and that same party in its individual capacity. Although the Maryland Trust Act [Md. Code (1974, 2017 Repl. Vol.), § 14.5-908 of the Estates and Trusts Article] recognizes that a trustee may be held personally liable in tort, it does not address the circumstances that may give rise to such personal liability. The

Restatement (Third) of Trusts, however, provides that a trustee may be held personally liable for claims sounding in tort "only if the trustee is personally at fault." To be "personally at fault," the trustee must have personally committed, inspired, or participated in the alleged torts in accordance with *Allen v. Dackman*, 413 Md. 132, 155 (2010).

Even assuming BNYM as Trustee were an "owner" of the property pursuant to the Baltimore City Housing Code, appellants failed to produce any facts tending to show that BNYM was personally at fault by personally committing or participating in negligence related to the lead paint. Contrarily, BNYM produced evidence showing that, pursuant to the PSA, its role as trustee was passive, and that it was "not empowered to manage or improve" the property. Instead, BNYM as Trustee was simply responsible for "safekeeping of cash and collateral, distribution of cash flows from the collateral, and relaying trust asset and performance information received from the servicer to the certificateholders."

Because appellants failed to produce any facts showing that BNYM as Trustee was personally at fault, they could not maintain their action against BNYM for personal liability. Accordingly, the court correctly granted summary judgment in favor of BNYM

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Jimmie B. Allred v. Passaporn P. Allred, No. 672, September Term 2018, filed November 21, 2019. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/cosa/2019/0672s18.pdf

DIVORCE – MARITAL PROPERTY – DIVISION OF RETIREMENT BENEFITS

Facts:

Jimmie B. Allred ("Husband") and Passaporn P. Allred ("Wife") were married in October 2004, and divorced on July 30, 2014. In April of 2013 the parties signed a Marital Settlement Agreement which entitled the Wife to receive a specific sum of Husband's 401(k) plus or minus investment experience, dating from March 1, 2013 to the date of Judgement of Divorce.

More than three years later, Wife filed a Complaint for Entry of a Qualified Domestic Relations Order ("QDRO"), claiming that she was entitled to "investment experience" on her share of the 401(k) after the date of the divorce. The circuit court agreed with Wife, and the parties were ordered to submit a new QDRO reflecting Wife's terms. Husband appealed the order.

Held: Reversed.

The Court of Special Appeals held that the circuit court erred by altering the gains and losses beyond the terms of the parties' marital separation agreement. The language of the agreement expressly addressed "investment experience," stating that Wife would receive a set sum "plus or minus investment experience," from a date certain "to the date of Judgement of Divorce." When interpreting a contract, the Court must determine what a reasonable person in the position of the parties would have meant at the time it was effectuated. It is clear the agreement's language indicates Wife was only entitled to investment experience until the date of Judgement of Divorce, and not after that. Wife was entitled to receive the agreed-upon set sum plus or minus the investment experience dating from March 1, 2013 to July 30, 2014.

The Court of Special Appeals recognized that under different circumstances, a QDRO may include the investment experience from the date of divorce until the date of segregation of the parties' interests. *See Salkini v. Salkini*, 243 Md. App. 277 (2019). Here, the express language of the marital separation agreement dictated otherwise.

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Pennsylvania National Mutual Casualty Insurance Company v. Tajah Jeffers, et al., No. 960, September Term 2017, filed January 31, 2020. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2020/0960s17.pdf

LIABILITY INSURANCE—INSURER'S OBLIGATION TO PAY DAMAGES AND POST-JUDGMENT INTEREST

Facts:

Penn National Mutual Casualty Insurance Company sold commercial general liability insurance to a property owner from 1991 through 1997. Two plaintiffs had elevated blood-lead levels while they lived at the property.

The older plaintiff had elevated blood-lead levels for several months before she moved into the property in 1994. The younger plaintiff began residing at the property after her birth in 1996. Both plaintiffs continued to have elevated blood-lead levels for several months after they moved out of the property in 1998.

The two plaintiffs sued the property owner for injuries resulting from their exposure to lead paint at the property. On December 14, 2014, the court entered judgments against the property owner in the amounts of $2,413,134.33 for the older plaintiff and $1,650,619.33 for the younger plaintiff.

In 2016, the plaintiffs filed suit in the Circuit Court for Baltimore City, seeking a determination that Penn National was obligated to pay the full amounts of the judgments, as well as all post-judgment interest on those judgments. Penn National contended that it was obligated to pay only a portion of the principal and post-judgment interest.

On April 21, 2017, Penn National made unconditional payments to the children. To the older plaintiff, Penn National paid 72% of the principal and 72% of the post-judgment interest. To the younger plaintiff, Penn National paid 36% of the principal and 36% of the post-judgment interest. The plaintiffs accepted the payments without prejudice to their right to contest the amounts owed.

The parties made cross-motions for summary judgment regarding the amount of Penn National's obligation. The court determined that Penn National was obligated to pay 84% of the principal and 84% of the post-judgment interest to the older child and to pay 53% of the principal and 53% of the post-judgment interest to the younger child. The court also ruled that interest would continue to accrue on the unpaid principal.

Penn National appealed. The children cross-appealed.

Held: Affirmed in part and reversed in part.

The Court of Special Appeals held that Penn National had no obligation to indemnify the insured for bodily injury that occurred before its policy periods began or after its policy periods ended. The Court also held that Penn National was obligated to pay post-judgment interest on the entire amount of the judgments against the insured, from the date of the judgments until the date that Penn National made unconditional payments of the principal amounts owed to the plaintiffs.

In cases involving bodily injury from continuous exposure to harmful substances, Maryland courts employ the "pro rata by time-on-the-risk" method of allocating liability among insurers. Under this method, an insurer is liable for the period of time that the insurer provided coverage compared to the entire period during which the bodily injury occurred. This method requires the court to identify a numerator (representing the duration of the coverage period) and a denominator (representing the duration of the period of bodily injury). The court then multiplies the resulting ratio by the judgment amount to determine the insurer's pro rata share of a judgment against its insured.

Because each elevated blood-lead level indicates a bodily injury, the denominator here is measured by the entire period in which the children had elevated blood-lead levels. The periods of bodily injury must include the periods of time in which the older child had elevated blood-lead levels before she moved into the property and in which both children had elevated blood-lead levels after they moved out of the property.

Under the facts of this case, the period of the younger plaintiffs' bodily injury did not include the time when she was *in utero* while her mother lived at the property. The evidence was insufficient to establish that she suffered bodily injury at any specific time before her birth.

Penn National's policies included a standard interest clause, stating that it would pay "[a]ll interest on the full amount of any judgment that accrues after entry of the judgment and before [it has] paid, offered to pay or deposited in court the part of the judgment that is within the applicable limits of insurance." Under this clause, Penn National was obligated to pay post-judgment interest on the full amounts of the judgments against the property owner, even though Penn National was obligated to pay only part of the principal amounts.

Under this standard interest clause, an insurer's obligation to pay post-judgment interest terminates when the insurer pays, unconditionally offers to pay, or deposits into court the principal amount of the judgment. The insurer need not tender all interest that it owes in order to toll its obligation for the payment of additional post-judgment interest. Here, Penn National's obligation to pay post-judgment interest terminated on the date that it made unconditional payments to the plaintiffs of all principal owed.

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Blue Buffalo Company, Ltd. v. Comptroller of the Treasury, No. 495, September Term 2018, filed December 20, 2019. Opinion by Adkins, J.

https://mdcourts.gov/data/opinions/cosa/2019/0495s18.pdf

CORPORATE TAXATION – IMMUNITY – SOLICITATION OF ORDERS:

Facts:

Blue Buffalo Co., Ltd., is a Delaware corporation, in the business of formulating and selling premium pet food. Though most of Blue Buffalo's business was conducted outside of Maryland in 2011 and 2012, the corporation maintained several employees inside the state. Blue Buffalo paid Maryland corporate income tax for those years based on the activities of its Maryland employees. The company later filed amended returns for those years, requesting a full refund on the grounds that its actions were limited to solicitation of orders, an activity protected from taxation under 15 U.S.C. § 381.

The Maryland Tax Court found that Blue Buffalo had not met its burden to show it qualified for protection under the statute. The Circuit Court for Baltimore City affirmed, and Blue Buffalo appealed.

Held: Affirmed.

The Court of Special Appeals held that Blue Buffalo was not entitled to 15 U.S.C. § 381 protection because its employees engaged in the collection of competitive information, which is not ancillary to the solicitation of business, nor is it a *de minimus* activity. 15 U.S.C. §381(a)(2) protects missionary sales: solicitation of ultimate consumers on behalf of a third-party retailer. There is no bright line distinguishing activities which are entirely ancillary to the solicitation of orders from those that also serve an independent business function, requiring them to be evaluated on an individual basis. The inquiry turns on both the substantiality and frequency of the activities in question.

The evidence shows Blue Buffalo's collecting of competitive information during trainings and retailer meetings was both substantial and deliberate. Their reports contained comments and more concrete details about competitors and their activities than trivial observations. While considered in isolation to be *de minimus*, the record shows that the collection was carried out on a regular basis. As a continuing matter of company policy, the intelligence constitutes a nontrivial business activity conducted in the State of Maryland, exceeding the scope of the protections in 15 U.S.C. § 381. The circuit court correctly upheld the tax court's order.

Adventist Healthcare, Inc., et al. v. Susan M. Mattingly, No. 2104, September Term 2018, filed January 29, 2020. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2020/2104s18.pdf

SPOLIATION – MEDICAL NEGLIGENCE – BREACH OF THE STANDARD OF CARE – CAUSATION – EXPERT TESTIMONY

Facts:

James Thomas Mattingly, Jr., died on August 5, 2014, five days after having colostomy reversal surgery. Mr. Mattingly had remained hospitalized following his surgery until his death. After Mr. Mattingly died, his mother, Susan Mattingly, obtained a private autopsy, which was performed at a funeral home. The autopsy determined that Mr. Mattingly died due to a failed surgical anastomosis. After the autopsy was completed, Ms. Mattingly chose to have Mr. Mattingly's remains cremated.

Ms. Mattingly filed suit, both individually and as Personal Representative of her son's estate, against surgeon Dr. Sarabjit S. Anand, M.D., and Adventist Healthcare, Inc. d/b/a Washington Adventist Hospital ("WAH"). Ms. Mattingly alleged that Dr. Anand's failure to timely diagnose a post-surgical bowel leak caused sepsis, resulting in Mr. Mattingly's death. Ms. Mattingly further alleged that WAH's employee, nurse Adebusola Matilukuro was negligent for failing to escalate Mr. Mattingly's situation pursuant to hospital policy after Dr. Anand failed to respond to multiple telephone calls on the morning of August 5, 2014, while Mr. Mattingly became progressively more ill. The jury returned a verdict in favor of Ms. Mattingly, and Dr. Anand and WAH appealed.

Held: Affirmed.

On appeal, WAH and Dr. Anand both raised issues relating to alleged spoliation of evidence by Ms. Mattingly. Specifically, the appellants asserted that Ms. Mattingly engaged in spoliation of evidence by having her son's remains cremated after obtaining a private autopsy and that the circuit court should have granted the appellants' motions for summary judgment and motions for judgment on this issue. The appellants further argued that the circuit court erred by declining to propound a jury instruction on spoliation.

The Court of Special Appeals rejected the appellants' spoliation argument. The Court explained that there is a critical difference between decisions made by a grieving family about a loved-one's remains and the intentional destruction of other evidence. The Court further explained that after the death of a loved-one, the surviving family members are faced with the task of determining the appropriate disposition of their loved one's remains and have the authority to

choose cremation. The Court observed that decisions relating to the proper disposition of a loved one's remains are inherently time-sensitive and often fraught.

The Court of Special Appeals concluded that the lawful cremation of a family member's remains is not an "act of destruction" in the spoliation context, nor did Ms. Mattingly's decision to cremate her son's remains evince an intent to destroy evidence in this case. The Court held that Ms. Mattingly had authority over the disposition of her son's remains and owed no duty to preserve "evidence" from her son's body. The Court of Special Appeals further held that Ms. Mattingly had no obligation to permit Dr. Anand and/or WAH to participate in the autopsy, nor was she required to notify Dr. Anand and/or WAH prior to having her son's remains cremated. Accordingly, the Court held that the circuit court properly denied the appellants' motions for judgment on the basis of spoliation and appropriately declined to propound a spoliation jury instruction.

WAH raised an additional individual appellate issue, arguing that the circuit court erred by denying WAH's motion for judgment on the basis that Ms. Mattingly failed to present expert testimony on the issue of whether Nurse Matilukuro's breach of the standard of care caused Mr. Mattingly's death. The Court of Special Appeals examined the record and determined that, although there was no single witness that testified that the nurse's breach caused Mr. Mattingly's death, the testimony from a nursing expert witness and the testimony from a surgeon expert witness, when considered together and in conjunction with other evidence presented at trial, was more than sufficient to establish the element of causation and permit the claim to go to the jury.

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Baltimore County, Maryland v. Charles Ulrich, No. 2541, September Term 2018, filed January 30, 2020. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2020/2541s18.pdf

WORKERS' COMPENSATION ACT – STATUTORY LIEN ON EMPLOYEE'S RECOVERY FROM THIRD-PARTY HEALTHCARE PROVIDER

Facts:

In 2011, Charles Ulrich injured his arm while working as an employee of Baltimore County. Initially, healthcare providers diagnosed him with an arm strain. Five weeks later, a specialist determined that he had suffered a complete tear of his tendon. He stopped working and promptly underwent surgery.

Pursuant to a workers' compensation claim, Baltimore County paid for the surgery and related medical services. The County also paid temporary total disability benefits for a period in which Mr. Ulrich was unable to work.

Separately, Mr. Ulrich pursued a medical malpractice suits, alleging that his healthcare providers negligently failed to diagnose his injury and that the misdiagnosis caused him to suffer permanent impairment. Mr. Ulrich reached a settlement agreement with the malpractice defendants. The net proceeds exceeded the total amount of disability benefits and medical expenses previously paid by Baltimore County pursuant to the workers' compensation claim.

Mr. Ulrich agreed to reimburse the County for temporary total disability benefits previously paid, minus a proportionate share of attorneys' fees and litigation expenses. The County demanded that Mr. Ulrich also reimburse the County for medical expenses previously paid in the amount of $17,152.42, minus a proportionate share of fees and expenses.

The Workers' Compensation Commission determined that the County was not entitled to reimbursement for those medical expenses. Baltimore County petitioned for judicial review in the Circuit Court for Baltimore County. The court granted summary judgment in favor of Mr. Ulrich. The court concluded that the County was not entitled to be reimbursed for medical expenses out of the proceeds from the malpractice settlement.

Baltimore County appealed.

Held: Affirmed.

The Court of Special Appeals affirmed the judgment of the circuit court upholding the decision of the Workers' Compensation Commission. The Court held that Mr. Ulrich was not required to

repay Baltimore County, out of the malpractice settlement proceeds, for the $17,152.42 of medical expenses.

Subtitle 9 of Chapter 9 of the Labor and Employment Article of the Maryland Code governs third-party liability for injuries that are compensable under the Workers' Compensation Act. Section 9-901 provides that "[w]hen a person other than an employer is liable for the injury . . . of a covered employee for which compensation is payable[,]" the employee may bring a workers' compensation claim against the employer or may bring an action for damages against the third-party tortfeasor. When an employee pursues a workers' compensation claim and also sues the third party, the employer retains a subrogation interest in the reimbursement of benefits previously paid. This subrogation interest acts as a statutory lien on the employee's recovery from the third-party tortfeasor. *See id*. § 9-902(e).

This reimbursement requirement must be understood within the context of the entire statutory scheme and in light of the statute's purpose of enforcing subrogation rights. Under sections 9-901 and 9-902 of the Labor and Employment Article, an employer's statutory lien arises only when an employee recovers damages in an action against a "third party who is liable for the injury" of an employee for which compensation is payable.

Requiring the employee to repay expenses that the employer alone was obligated to pay, and for which no third person was ever liable to pay the employee, fails to serve the purposes of the statute or of subrogation doctrine. When an employer pays for medical services to treat the part of an injury for which no third party other than the employer is liable, and where the employee recovers no sums for those medical expenses, the employer is not entitled to be reimbursed for those medical expenses out of the employee's recovery from a third party.

A third-party healthcare provider that treats a work-related injury, but does not cause that injury, is liable only for additional harm caused by negligent treatment. Where an employer pays for medical services exclusively to treat the compensable injury (not to treat any additional harm from medical negligence), the employer has no subrogation interest in the repayment of those medical expenses out of a third-party recovery for negligent treatment. The employer is not entitled to reimbursement from the employee for something that the employee has no legal right to recover from the third party.

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ATTORNEY DISCIPLINE

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By a Per Curiam Order of the Court of Appeals dated January 10, 2020, the following attorney has been disbarred:

ARLENE ADASA SMITH-SCOTT

*

By an Order of the Court of Appeals dated November 22, 2019, the following attorney has been disbarred by consent, effective January 15, 2020:

DMITRY DAVID BALANNIK

*

By an Order of the Court of Appeals dated January 23, 2020, the following attorney has been disbarred by consent:

PATRICK TODD WILLIAMS

*

By an Opinion and Order of the Court of Appeals dated January 24, 2020, the following attorney has been disbarred:

JASON EDWARD RHEINSTEIN

*

By an Opinion and Order of the Court of Appeals dated January 29, 2020, the following attorney has been disbarred:

ANNE MARGARET MILLER

*

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JUDICIAL APPOINTMENTS

*

On November 27, 2019, the Governor announced the appointment of **Hon. Bryon Seth Bereano** to the Circuit Court for Prince George's County. Judge Bereano was sworn in on January 6, 2020 and fills the vacancy created by the retirement of the Hon. Leo E. Green, Jr.

*

On November 27, 2019, the Governor announced the appointment of **Andrew Fisher Wilkinson** to the Circuit Court for Washington County. Judge Wilkinson was sworn in on January 10, 2020 and fills a new judgeship created by the General Assembly.

*

On December 9, 2019, the Governor announced the appointment of **James L. Tanavage** to the District Court – St. Mary's County. Judge Tanavage was sworn in on January 10, 2020 and fills a new judgeship created by the General Assembly.

*

On December 20, 2019, the Governor announced the appointment of **Carla Lynn Knight** to the Circuit Court for Queen Anne's County. Judge Knight was sworn in on January 15, 2020 and fills the vacancy created by the retirement of the Hon. Thomas G. Ross.

*

On December 9, 2019, the Governor announced the appointment of **Richard Robert Trunnell** to the Circuit Court for Anne Arundel County. Judge Trunnell was sworn in on January 17, 2020 and fills the vacancy created by the retirement of the Hon. Ronald A. Silkworth.

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