Amicus Curiarum

VOLUME 37
ISSUE 6 JUNE 2020

A Publication of the Office of the State Reporter

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CORPORATIONS AND ASSOCIATIONS – DUE PROCESS OF LAW – SUBSTITUTED SERVICE – STATE DEPARTMENT OF ASSESSMENTS AND TAXATION

Facts:

Petitioner Mayor and City Council of Baltimore (the "City") initiated a receivership action against the Respondent Prime Realty Associates, LLC ("Prime Realty") when real property owned by Prime Realty had substantially deteriorated in condition. The City attempted several times to serve Prime Realty's resident agent at the address on file with the State Department of Assessments and Taxation ("SDAT"). On June 26, 2015, the City issued to Prime Realty a Code Violation Notice requiring Prime Realty to either raze or rehabilitate the property within thirty days. The Violation Notice was posted on the property and mailed to Prime Realty's Silver Spring post office box address. By June 2018, Prime Realty had not razed or rehabilitated the property as required. After the City petitioned the District Court of Maryland sitting in Baltimore City to appoint a vacant building receiver, the District Court issued a show cause order requiring Prime Realty to appear before the court on August 15, 2018. The City was required to serve the Petition for Appointment of a Vacant Building Receiver and the show cause order upon Prime Realty.

Service on a limited liability company ("LLC") can be accomplished by service on the resident agent of the LLC. The City served the resident agent an address located in Bel Air, Maryland—the address shown in SDAT's records as of July 10, 2018 when the District Court issued the show cause order. The resident agent had, however, relocated to Silver Spring, Maryland and filed a notice with SDAT of an address change. However, SDAT had issued a rejection notice to the resident agent's former address because the resident agent's new address used a post office box, which was prohibited. Prime Realty never responded to correct the filing. The City served the show cause order and the Petition to the address in Bel Air, Maryland, but Prime Realty never responded.

On September 5, 2018, the City made substitute service of the Petition and updated show cause order on the designated state agency, SDAT, in congruence with Maryland Rule 3-124(o). Prime

Realty did not appear for the rescheduled October 3, 2018 show cause hearing, so the District Court appointed One House At a Time, Inc. ("One House") as the receiver for Prime Realtor's vacated property.

The City sent a letter to Prime Realty, to both the address in Bel Air, Maryland and the post office box in Silver Spring, Maryland, indicating that a receiver had been appointed and the property would be auctioned. The Property was auctioned on December 11, 2018.

The District Court received report of the sale from One House on January 10, 2019, and the report was both mailed to Prime Realty at the address in Bel Air, Maryland and posted on the Property. The District Court then ratified the sale of the Property and the District Court received the final accounting on March 14, 2019.

Prime Realty then filed a Verified Motion to Vacate, Revise, and Strike Judgement ("Motion to Vacate"), arguing that the City inadequately provided service to Prime Realty, and the City violated Prime Realty's due process rights. The District Court issued an order denying Prime Realty's Motion to Vacate and ratified the final accounting. Prime Realty appealed to the Circuit Court for Baltimore City which granted Prime Realty's Motion to Vacate, emphasizing the City's knowledge of the resident agent's Silver Spring, Maryland post office box address. This Court granted a writ for certiorari.

Held: Reversed

The Court of Appeals first addressed if Maryland Rule 3-124(o)'s allowance for substitute service upon SDAT provided due process of law by analyzing the statute's legislative history. The Court of Appeals cited numerous predecessors to the substituted service statute that demonstrated a policy decision of both the General Assembly and the judiciary to implement efficient service of process procedures. The Court of Appeals further determined that the statutory requirements of an LLC, in light of the legislative history, showed that the substitute service to SDAT was a practical method of service which provided the litigant due process. The Court of Appeals emphasized that an LLC is required to file appropriate change of address notification with SDAT and is also required to understand and obey SDAT's procedures for filing. The Court of Appeals noted that because an LLC is required by statute to register an accurate resident agent address with SDAT, Rule 3-124(o) substituted service upon SDAT would provide proper notice of action to the interested parties.

The Court of Appeals additionally cited prior Maryland decisions, which ruled that Rule 3-124(o)'s sister rule for the circuit court, providing method of substituted service on SDAT, was a proper method of service where the resident agent could not be located. Because the City attempted to notify Prime Realty's resident agent numerous times before initiating substitute service with SDAT, and it is the LLC's obligation to accurately record its resident agent's address with SDAT, the City complied with the requirements of the statute. The Court of Appeals therefore concluded that Rule 3-124(o) provides litigants with due process and Prime

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Realty's failure to accurately update its resident agent's address with the SDAT did not invalidate the City's service attempts.

Baltimore City Police Department, et al. v. Ivan Potts, Misc. No. 6, September Term 2019; *Mayor and City Council of Baltimore v. Estate of William James, By Its Personal Representative, Menyonde Lewis*, No. 51, Septebmer Term 2019, filed April 24, 2020. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/6a19m.pdf

LOCAL GOVERNMENT TORT CLAIMS ACT – MD. CODE ANN., CTS. & JUD. PROC. (1974, 2013 REPL. VOL.) § 5-303(b)(1) – SCOPE OF EMPLOYMENT –ACTIONS BY LAW ENFORCEMENT OFFICERS

Facts:

In *Potts*, officers stopped Ivan Potts, Appellee, without reasonable articulable suspicion as he was walking, beat him, searched him, and found no contraband. Having found no contraband, the officers planted a handgun on Potts, arrested him, and falsely stated in police reports that he had possessed the handgun. The officers did not steal or take anything of value from Potts. At Potts's trial, the officers falsely testified that they had recovered the handgun from him. Potts was convicted and sentenced to eight years' imprisonment, the first five of which to be served without the possibility of parole, and he was incarcerated at various Maryland State prison facilities until his conviction was vacated. From the time of Potts's arrest to his release, he was in custody approximately nineteen months. In the United States District Court for the District of Maryland, Potts sued the officers and the Baltimore City Police Department ("the Department"), Appellant, and later the Mayor and City Council of Baltimore ("the City"), Appellant.

In *James*, officers stopped William James's vehicle without reasonable articulable suspicion and demanded that James provide the name of a person who possessed drugs or a gun. When James was unable to do so, the officers falsely alleged that a handgun, that they had provided, belonged to James and arrested him. The officers did not steal or take anything of value from James. James was in custody awaiting trial for more than seven months. After his release from custody, in the Circuit Court for Baltimore City, James sued the officers, the Department, and the City, Petitioner. During the proceedings in the circuit court, James died in an incident that was unrelated to the civil case. James's estate, Respondent, replaced him as the plaintiff.

In both cases, the plaintiffs and the officers agreed to a settlement of the lawsuits in the amount of $32,000 for the plaintiffs. As part of the settlements, the officers assigned to Potts and James's estate the right to indemnification from the City under Md. Code Ann., Cts. & Jud. Proc. (1974, 2013 Repl. Vol.) ("CJ") § 5-303(b)(1) and the collective bargaining agreement between the Department and its officers' union. Potts and James's estate filed supplemental complaints in their respective cases, seeking payment of the settlements by the City. In both cases, in connection with motions for summary judgment, the parties entered into a "Stipulated Statement of Undisputed Material Facts" ("the stipulation").

In *Potts*, while motions for summary judgment were pending in federal court, the parties filed a joint motion to certify a question of law to the Court of Appeals, which the United States District Court for the District of Maryland granted. In *James*, the circuit court granted James's estate's motion for summary judgment, finding that the officers acted within the scope of employment and that the City was required to compensate James's estate. The City appealed, and petitioned for a writ of *certiorari* while the case was pending in the Court of Special Appeals. The certified question of law in *Potts* and the question presented in the petition for a writ of *certiorari* in *James* were identical, and concerned whether the officers acted within the scope of employment during their encounters with Potts and James. The Court of Appeals accepted the certified question of law in *Potts* and granted the petition for a writ of *certiorari* in *James*.

Held: In *Potts*, certified question of law answered. In *James*, affirmed.

The Court of Appeals held that the stipulations in *Potts* and *James* established that the officers' conduct in each case satisfied the test for conduct within the scope of employment that the Court set forth in *Sawyer v. Humphries*, 322 Md. 247, 255-57, 587 A.2d 467, 470-71 (1991). The officers' conduct in *Potts* and *James* was analogous to conduct in cases in which Maryland appellate courts had determined that government employees acted within the scope of employment. As such, the Court held that, in *Potts* and *James*, the officers acted within the scope of employment, and, under CJ § 5-303(b)(1), the City was responsible for compensating Potts and James's estate for the officers' actions by paying the settlements that Potts, James's estate, and the officers had reached.

Evaluating the first prong of the *Sawyer* test, the Court concluded that the officers' actions were in furtherance of the Department's business as their actions were at least partially motivated by "a purpose to serve the" Department, and because there was no indication that the officers were "acting to protect [their] own interests[.]" *Sawyer*, 322 Md. at 255-57, 587 A.2d at 470-71 (citations omitted). The Court's conclusion was supported by the well-established principle in Maryland case law that, generally, an officer's arrest of a person is within the scope of employment. *See Sawyer*, 322 Md. at 260, 587 A.2d at 473. Although it was despicable that the officers stopped Potts and James without reasonable articulable suspicion and arrested them based on fabricated evidence, these circumstances alone did not render it inconceivable that the officers were acting within the scope of their employment. The stipulations in *Potts* and *James* contained no indication that the officers took or received anything of value from Potts or James, or were otherwise serving their own personal interests in making the arrests. The officers' misconduct in *Potts* and *James* was distinguishable from their conduct in the conspiracy for which they were prosecuted in federal court. In contrast to the circumstances here, in furtherance of the federal conspiracy, in incidents that did not involve Potts or James, the officers seized money and drugs and kept the money and drugs for themselves and, as a result, were charged with racketeering. The lack of evidence of any personal benefit that the officers received from their conduct in these cases led to a determination that, in arresting Potts and James, the officers were acting at least in part in furtherance of the business of the Department.

In assessing the second prong of the *Sawyer* test, it was plain that the Department did not authorize (and, in fact, expressly forbade) the officers' misconduct involving Potts and James—which included disregarding a lack of reasonable articulable suspicion for the stops, planting handguns, beating Potts, making false statements in police reports, and testifying falsely at trial. In *Sawyer*, *id*. at 256, 587 A.2d at 471, though, the Court set forth ten factors for determining whether an employee's actions were incidental to those that the employer authorized and thus within the employee's scope of employment. Here, weighing the ten factors set forth in *Sawyer* led to the conclusion that the officers' conduct was incidental to conduct that the Department authorized. Although the Department clearly did not authorize the officers' misconduct, and indeed their conduct violated the Department's "express . . . orders[,]" under the factors set forth in *Sawyer*, the officers' actions were "incident[al] to the performance of the duties" that the Department entrusted to them, and those actions did not render the officers' overall conduct outside the scope of employment. *Id*. at 255, 587 A.2d at 470 (cleaned up).

State of Maryland v. Hayes Sample, No. 54, September Term 2019, filed May 11, 2020. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/54a19.pdf

MARYLAND RULE 5-901(a) AND (b)(4) – AUTHENTICATING SOCIAL MEDIA EVIDENCE THROUGH CIRCUMSTANTIAL EVIDENCE – "REASONABLE JUROR" TEST

Facts:

In the Circuit Court for Baltimore County, the State, Petitioner, charged Hayes Sample, Respondent, with attempted robbery with a dangerous weapon and other crimes. At trial, the State offered evidence that Sample and his accomplice, Claude Mayo, using guns, attempted to rob a liquor store. The liquor store's owner shot Mayo, who died a short distance outside the liquor store. Sample fled the scene.

While investigating the attempted armed robbery, a detective searched Facebook for a profile associated with the name Claude Mayo. The detective requested from Facebook, and received, "Facebook Business Records" regarding two Facebook profiles—"claude.mayo.5" and "SoLo Haze"— as well as a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity[.]" The Facebook Business Records regarding the SoLo Haze Facebook profile indicated that the e-mail address "mrsample2015@gmail.com" was registered to that profile. The SoLo Haze Facebook profile identified Baltimore as the "current city," and listed Edmondson-Westside High School and Towson University as the user's "[c]onnections[.]" The owner of the SoLo Haze Facebook profile was friends with the owner of a Facebook profile named "Skky DaLimit Lynn[.]" Prior to trial, Sample's counsel advised the circuit court that a Skkyla Lynn would be called as a defense witness.

The Facebook Business Records regarding the claude.mayo.5 Facebook profile listed Baltimore as the "current city," and listed Patterson High School as the user's "[c]onnection[.]" The owner of the claude.mayo.5 Facebook profile was friends with the owner of a Facebook profile named "Shantell Richardson[.]" Shantell Richardson is Mayo's mother's name.

The Facebook Business Records regarding the SoLo Haze profile indicate that, the day after Sample and Mayo allegedly attempted to rob the liquor store and Mayo was fatally shot, the claude.mayo.5 profile was unfriended from the SoLo Haze profile. During the seventeen-day period to which the Facebook Business Records pertained, the claude.mayo.5 profile was the only one, of 175 profiles with which the SoLo Haze profile was friends, to have been unfriended.

In the circuit court, Sample filed a motion *in limine* and a memorandum in support thereof, contending that the State would not be able to sufficiently authenticate the Facebook Business Records. The circuit court denied the motion. At trial, over Sample's counsel's objection, the

prosecutor elicited testimony from the detective concerning information from the Facebook Business Records, including that the Facebook Business Records regarding the SoLo Haze Facebook profile showed that, the day after the attempted armed robbery, the claude.mayo.5 Facebook profile had been unfriended.

The jury found Sample guilty of attempted robbery with a dangerous weapon and other crimes. Sample appealed, and the Court of Special Appeals reversed the convictions and remanded the case for a new trial, reasoning that the circuit court abused its discretion in admitting the Facebook-related testimony. The State filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Reversed and remanded.

The Court of Appeals held that the circuit court did not abuse its discretion in admitting the Facebook-related evidence, as there was sufficient circumstantial evidence under Maryland Rule 5-901(b)(4) for a reasonable juror to find that the SoLo Haze Facebook profile belonged to Sample, that the claude.mayo.5 Facebook profile belonged to Mayo, and that Sample used the SoLo Haze profile to unfriend the claude.mayo.5 profile the day after the shooting. The Court concluded that the standard of proof for authenticating social media evidence is the preponderance of evidence standard, *i.e.*, there must be sufficient circumstantial evidence for a reasonable juror to find that it is more likely than not that the social media evidence is what it is purported to be. Here, the circumstantial evidence supporting the conclusion that the profiles belonged to Sample and Mayo consisted of evidence that the SoLo Haze and claude.mayo.5 Facebook profiles listed Baltimore City as their current cities and the connections listed in the profiles included schools in Baltimore City and the Towson area. The profiles' lists of friends included people who were either a friend or relative of Sample and Mayo. Moreover, the SoLo Haze Facebook profile name consists of a homophone of Sample's first name "Hayes," the "mrsample2015@gmail.com" e-mail address registered for the SoLo Haze Facebook profile contains Sample's last name, and the SoLo Haze profile had been identified as a friend on the claude.mayo.5 profile. Without more, the evidence indicating that the SoLo Haze profile belonged to Sample and the claude.mayo.5 profile belonged to Mayo indicated that Sample used the SoLo Haze profile to unfriend the claude.mayo.5 profile.

The Court explained that there were, moreover, additional circumstances surrounding the unfriending that established that a reasonable juror could find more likely than not that Sample was the person who unfriended the claude.mayo.5 profile. Those circumstances included the temporal proximity of the attempted armed robbery to the unfriending, and that Sample had a motive to distance himself from Mayo. Indicative of a motive to distance himself from Mayo, while speaking with detectives, Sample did not acknowledge being friends with Mayo despite surveillance video that showed Sample and Mayo walking together approximately fourteen minutes before the crime occurred and cellular telephone records that showed that there was a call made by Sample to Mayo approximately an hour before the crime. And, importantly, during the seventeen-day period after the attempted armed robbery, of 175 Facebook profiles listed as

friends on the SoLo Haze Facebook profile, the claude.mayo.5 profile was the only one that was unfriended.

Court of Appeals reaffirmed its holding in *Sublet v. State*, 442 Md. 632, 678, 113 A.3d 695, 722 (2015), and concluded that, to authenticate social media evidence, there must be proof from which reasonable juror could find that it is more likely than not that evidence is what proponent purports it to be. Court of Appeals concluded the State was not required to eliminate all possibilities that were inconsistent with authenticity, or prove beyond any question that defendant was one who used Facebook profile to unfriend accomplice's Facebook profile.

Dana T. Johnson, Jr. v. State of Maryland, No. 9, September Term 2019, filed February 28, 2020. Opinion by Getty, J.

Booth, J., concurs.
Watts, J., dissents.

https://mdcourts.gov/data/opinions/coa/2020/9a19.pdf

CRIMINAL LAW – SENTENCING – CONTROLLED DANGEROUS SUBSTANCES – VOLUME POSSESSION

Facts:

Two Baltimore County Police Officers on routine patrol observed a silver Acura with abnormally dark, tinted windows. The window tint entirely obscured the officers' line of sight into the vehicle, leading them to believe that the level of tint exceeded the permissible amount allowable under Maryland law. A Motor Vehicle Administration record check revealed that the registered owner of the vehicle did not have a Maryland driver's license. The officers activated their patrol car's emergency equipment to stop the vehicle. The driver, Petitioner Dana T. Johnson Jr. ("Mr. Johnson"), initially complied, but sped away as the officers approached the vehicle. The officers pursued Mr. Johnson as he crossed into oncoming traffic and failed to stop at a red traffic light. However, treacherous roadways and poor weather conditions increased the danger to the public and forced the officers to abandon the chase.

The officers deactivated their patrol car's emergency equipment, resumed normal driving speeds and proceeded in the same direction where they last saw the Acura flee. At the next intersection, the officers spotted the Acura stopped at a red light. Mr. Johnson again drove away and the officers followed. From approximately one-half mile behind the vehicle, the officers watched as the Acura ran another red light and collided with another vehicle. The officers approached the crash scene and attended to Mr. Johnson and the other driver. Baltimore County Fire and Rescue arrived on scene, extracted Mr. Johnson from the Acura and transported him to Sinai Hospital of Baltimore ("Sinai Hospital").

A third officer accompanied Mr. Johnson to the trauma unit of Sinai Hospital. While tending to Mr. Johnson, Sinai Hospital employees removed Mr. Johnson's clothes and placed them on the hospital bed. The officer concurrently searched each article of clothing and discovered a large plastic bag of off-white powder in Mr. Johnson's undergarments, which he believed to be heroin. A forensic chemist from the Baltimore County Crime Lab later confirmed the substance to be 47.18 grams of heroin.

The State charged Mr. Johnson with volume possession of a controlled dangerous substance pursuant to Maryland Code ("Md. Code") (1957, 2012 Repl. Vol., 2019 Supp.), Criminal Law ("CR") § 5-612.

On August 28, 2017, Mr. Johnson proceeded before a bench trial in the Circuit Court for Baltimore County. Pertinent to the instant appeal, Mr. Johnson was found guilty of possession of heroin in violation of CR § 5-601(a)(1) and volume possession of heroin in violation of CR § 5-612. The circuit court merged the simple possession conviction into the conviction for volume possession. Mr. Johnson was sentenced to fourteen years' imprisonment, the first five without the possibility of parole. Mr. Johnson appealed, and the Court of Special Appeals affirmed the convictions. Mr. Johnson then petitioned this Court for a writ of certiorari to determine the maximum allowable period of imprisonment for a violation of CR § 5-612.

Held: Affirmed

Informed by the legislative history of former Article 27, § 286 and the current version of CR § 5-612, the Court of Appeals held that the maximum allowable period of imprisonment for a violation of CR § 5-612 is twenty years. Therefore, the circuit court did not impose an illegal sentence when it sentenced Mr. Johnson to fourteen years' imprisonment.

In reaching this result, the Court of Appeals began with the plain language of CR § 5-612. The statute's use of the phrase "not less than" established a "floor" of the potential amount of incarcerable years. The Court noted that it would be absurd and illogical to read "not less than 5 years" to be the stated mandatory minimum penalty and also double as the maximum penalty under CR § 5-612. Next, the Court examined the legislative history of former Article 27, § 286 and CR § 5-612.

The General Assembly clearly established the maximum term of imprisonment for felony possession of a Schedule I narcotic drug when Article 27, § 286 was originally enacted in 1970: "[a]ny person who violates [Article 27, § 286(a)] with respect to[a Schedule I narcotic drug] shall, upon conviction, be deemed guilty of a felony and sentenced to a term of imprisonment for not more than twenty (20) years." Article 27, § 286(b)(1) (1970). This maximum penalty provision in the broader penalty scheme remained unchanged through several amendments to Article 27, § 286, the recodification of the Criminal Law Article, and CR § 5-612. Until 2005, CR § 5-612 indicated that the maximum penalty associated with volume possession of a Schedule I narcotic drug was twenty years' imprisonment. Senate Bill 429 (2005), a well-intentioned bill passed to conform certain criminal laws with U.S. Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), had the unintended effect of severing the mandatory minimum penalty in CR § 5-612 from the base penalty for possession of a narcotic drug in CR § 5-608. The Fiscal and Policy Note accompanying Senate Bill 429 noted that "[t]he bill is not expected to alter eventual penalty determinations for the affected offenses." Yet, this statutory foible went unnoticed for nearly fifteen years. The Court found additional support for its holding in several versions of the Maryland Sentencing Guidelines Manual ("MSGM"). The MSGMs in effect at the time of recodification, during Mr. Johnson's conduct, and present day, all indicated that a violation of CR § 5-612(a) stemming from a volume amount of Schedule I or II narcotic drug—i.e., heroin—permit a maximum sentence of twenty years' imprisonment, of which five becomes mandatory.

Jimmie Rogers v. State of Maryland, et al., No. 32, September Term 2019, filed March 31, 2020. Opinion by Watts, J.

Barbera, C.J., Hotten and Biran, JJ., dissent.

https://www.mdcourts.gov/data/opinions/coa/2020/32a19.pdf

MARYLAND SEX OFFENDER REGISTRY – REGISTRATION REQUIREMENTS – MD. CODE ANN., CRIM. PROC. (2001, 2008 REPL. VOL., 2016 SUPP.) § 11-701(p)(2) – HUMAN TRAFFICKING – MD. CODE ANN., CRIM. LAW (2002, 2012 REPL. VOL., 2016 SUPP.) § 11-303(a) – VICTIM'S AGE – STANDARD OF PROOF

Facts:

On October 20, 2015, in the Circuit Court for Anne Arundel County, Jimmie Rogers, Petitioner, pled guilty to one count of human trafficking under Md. Code Ann., Crim. Law (2002, 2012 Repl. Vol., 2016 Supp.) ("CR") § 11-303(a). The age of the victim was not established during the statement of facts at the plea proceeding. Rogers was sentenced pursuant to a plea agreement that did not include registration as a sex offender as a requirement. Later, Rogers was notified by the Department of Public Safety and Correctional Services ("the Department"), Respondent, that he was required to register as a Tier II sex offender with the Maryland Sex Offender Registry ("the Registry") for a period of twenty-five years. Rogers registered as instructed but filed in the circuit court a complaint for declaratory judgment against the State of Maryland, Respondent, and the Department (together, "the State"), seeking a declaration that he was not required to register as a Tier II sex offender, and an order compelling the Department to remove him from the Registry. The circuit court granted Rogers's motion for summary judgment on the ground that the victim's age had not been proven. The circuit court issued an order declaring that Rogers was not required to register as a Tier II sex offender and requiring the State to remove Rogers's name from the Registry. The State appealed. The Court of Special Appeals reversed and remanded the case to the circuit court for a determination of the victim's age by a preponderance of the evidence.

Held: Reversed and remanded.

Reversed and remanded to the Court of Special Appeals with instruction to affirm the judgment of the circuit court.

The Court of Appeals held that, where Rogers pled guilty to violating CR § 11-303(a), an offense whose elements did not require proof of the victim's age, and where no proof of the victim's age was established at the plea proceeding, Rogers was not required to register as a Tier II sex offender pursuant to CP §§ 11-701(p)(2) and 11-704(a)(2), and the Department lacked the

authority to determine that the victim was a minor and to order registration. No statute or regulation gives the Department the authority to make a factual determination as to the victim's age for purposes of determining that registration as a Tier II sex offender is required. The Court concluded that determination of a fact necessary for placement on the Registry—*e.g.*, the victim's age—must be made by the trier of fact beyond a reasonable doubt during the adjudicatory phase of the criminal proceeding prior to sentencing.

The Court of Appeals concluded that, although, under CP § 11-701(p)(2), a conviction of either CR § 11-303(a) or CR § 11-303(b)(1) triggers Tier II sex offender status if the victim is a minor, a person is not a Tier II sex offender simply by virtue of a conviction under CR § 11-303(a); there must also be proof that the victim was a minor. The Court stated that what can be gleaned from the plain language of CP § 11-701(p)(2) is that the General Assembly intended Tier II sex offender registration where there was conviction of an identified crime and where the victim was a minor. The plain language of the statute indicates that the General Assembly did not intend registration under CP § 11-701(p)(2) simply because there was a conviction under CR § 11-303(a).

The Court of Appeals stated that, although CP § 11-701(p)(2) sets forth two conditions for someone to qualify as a Tier II sex offender—conviction under CR § 11-303 and the intended prostitute or victim is a minor—the statute does not indicate how a determination is to be made as to whether the victim is a minor if that fact is not established during the underlying criminal proceeding. CP § 11-701(p)(2) does not state whether a determination of the victim's status as a minor is to be made by the trier of fact (either the trial court or a jury), or if, as in this case, the Department may make such a determination. After a thorough review of relevant law, the Court concluded that the trier of fact, not the Department, must make the determination. As such, the Department did not have the authority in this case to determine that the victim was a minor and to order Rogers to register as a Tier II sex offender. The Court explained that looking at the sex offender registration statutes and regulations revealed that there is no explicit delegation anywhere authorizing the Department to make such a determination, and the Court knew of no case in which the Court had recognized that the Department has such authority. Absent an express delegation of authority to the Department to make such a determination, the Court declined to read into the statutes and regulations the authority to permit the Department to take the action.

The Court of Appeals held that applying the intent-effects test and the *Mendoza-Martinez* factors led to the conclusion that sex offender registration under the current statutory scheme is sufficiently punitive, *i.e.*, serving as more than a mere civil regulation, to require determination of a fact necessary for placement on the Registry—such as the victim's age—be made beyond a reasonable doubt by the trier of fact during the adjudicatory phase of the criminal proceeding prior to sentencing. The Court was satisfied that establishment of the victim's age and placing a defendant who is convicted of violating CR § 11-303(a) on the Registry essentially increases the punishment or penalty for that crime, and that the determination of the victim's age must be submitted to the trier of fact and proven beyond a reasonable doubt.

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Patrick Rossello v. Zurich American Insurance Company, No. 24, September Term 2019, filed April 3, 2020. Opinion by Getty, J.

https://www.courts.state.md.us/data/opinions/coa/2020/24a19.pdf

INSURANCE LAW – INDEMNITY – COMPREHENSIVE GENERAL LIABILITY POLICIES – APPORTIONMENT – PRO RATA – TRIGGER OF COVERAGE – INJURY-IN-FACT TRIGGER – CONTINUOUS TRIGGER

Facts:

In 1974, Petitioner Patrick Rossello ("Mr. Rossello") worked in the Union Trust Bank Building in which Lloyd E. Mitchell, Inc. ("Mitchell") was performing renovations. Mr. Rossello unknowingly inhaled asbestos that came from products Mitchell was using. In 2013, Mr. Rossello was diagnosed with mesothelioma. Mr. Rossello brought a strict liability and negligent failure to warn claim against Mitchell in the Circuit Court for Baltimore City. The case proceeded to trial in 2016, and the jury brought back a judgment in favor of Mr. Rossello for $8,114,166.79. The trial court reduced the judgment to $2,682,847.26.

In order to collect the judgment, Mr. Rossello initiated garnishment proceedings against Respondent Zurich American Insurance Company ("Zurich"). Both parties filed motions for summary judgment. The court was tasked with determining how much Zurich, successor to the company that had insured Mitchell when Mr. Rossello worked there, was required to pay. Mr. Rossello maintained that Zurich was required to pay all of the judgment. Zurich argued that they were only required to pay for the period for which Mitchell had insurance ending with the last year asbestos insurance was made available to the company—a twelve-year period between 1974 and 1985. The court, applying Maryland pro rata allocation principles, rejected Mr. Rossello's argument and ruled that Zurich was responsible for payments for the twelve-year period from 1974 to 1985. The circuit court entered a judgment in favor of Mr. Rossello for $613,233.00.

Two weeks later, Mr. Rossello appealed to the Court of Special Appeals. While that appeal was pending, this Court granted certiorari, bypassing the Court of Special Appeals. The question before this Court is whether the circuit court properly prorated a bodily injury judgment to the insurer instead of applying a joint-and-several approach that would have granted the judgment in full.

Held: Affirmed

After examining multiple theories of when an insurance policy is triggered to take effect, the Court reasoned that when exposure or injury stretches over many years, multiple insurance policies come into effect. This, therefore, implicates a continuous or injury-in-fact trigger,

meaning that the Court needed to determine how to allocate the loss over the multiple polices that were triggered. The Court adopted the pro rata allocation approach and refused to adopt the joint and several liability approach used in a minority of jurisdictions. The Court ruled that in cases of multiple insurance policies such as the present one, the obligation to indemnify an insured will be prorated among all carriers based on their time covering the risk. This Court relied on decades of Court of Special Appeals opinions saying the same. The Court concluded that Zurich was liable for the pro rata portion allocable to each of its four policy periods. The Court ordering garnishment for the amount of $223,570.60 within the occurrence limit of the 1974 policy and $223,570.60 for each policy year 1975, 1976, and 1977, subject to the aggregate limits for each year.

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Carlos Couret-Rios v. Fire & Police Employees' Retirement System of the City of Baltimore, No. 36, September Term 2019, filed May 1, 2020. Opinion by Getty, J.

https://www.courts.state.md.us/data/opinions/coa/2020/36a19.pdf

LOCAL CODES – DISABILITY RETIREMENT SYSTEMS

Facts:

Carlos Couret-Rios suffered a concussion in an automobile accident on duty as a Baltimore City police officer. After exhibiting symptoms of memory issues, Officer Couret-Rios visited a licensed psychologist who prepared a report that determined Couret-Rios had developed cognitive symptoms connected to the concussion, including short term memory loss and attention deficit.

Under the Fire and Police Employees' Retirement System (the "F&P Retirement System") compensation statute, police officers can be potentially eligible for two different disability benefit levels: a less substantial ("NLOD") level of benefits or a more substantial line-of duty ("LOD") level of benefits. An officer can only receive LOD benefits if his disability arose from an injury that happened in the line of duty and the injury caused a permanent "physical incapacity." Officers are eligible for NLOD benefits if the injury caused a permanent mental or physical incapacity that prevents the officer from performing their job duties, whether or not the injury occurred in the line of duty. Officer Couret-Rios timely applied for a LOD disability retirement ("Application"), where he stated he had both a "Physical" and "Mental" incapacity. He included various doctors' statements verifying his cognitive symptoms connected with the physical brain injury.

At the administrative hearing for F&P Retirement System compensation benefits, the hearing examiner found that Officer Couret-Rios was permanently incapacitated due to a brain injury during his performance of duties. The hearing examiner found Officer Couret-Rios had a "physical incapacity" because of "problems related to attention and memory," from the brain injury, which were documented in the psychologist's report. The hearing examiner concluded Officer Couret-Rios met the criteria for LOD disability benefits.

The Circuit Court for Baltimore City affirmed the hearing examiner's conclusion. However, the Court of Special Appeals reversed and concluded that Officer Couret-Rios's "incapacitation is mental, rather than physical, as those terms are commonly understood." The court rejected the hearing examiner's attempt to converge the mental nature of the incapacity (attention and memory deficits) with the physical nature of the injury (concussion/brain injury). The court held that the examiner erred in concluding that Officer Couret-Rios was eligible for LOD benefits because he did not have a "physical incapacity."

Officer Couret-Rios filed a petition for writ of certiorari which the Court of Appeals granted.

Held: Reversed

The Court of Appeals rejected the Court of Special Appeals plain meaning analysis that terms "incapacity" and "physical" are unambiguous and the conclusion that the statutory analysis should end there. The Court of Appeals found the F&P statute language was in fact ambiguous as to whether a "physical incapacity" includes post-concussion manifestations. The Court of Appeals further concluded that the medical distinction between "physical" and "mental" incapacity regarding the brain has not been solved, and the statute instead requires deference to the expertise of the hearing examiner.

Beyond the plain meaning analysis of the F&P statute, the Court of Appeals further analyzed the legislative intent of the F&P statute and found it would be contrary to the remedial nature of the statute to punish an officer for a incapacity related to the brain, which "can often be more physically debilitating than other clear-cut 'physical' incapacities." Notwithstanding the Court of Special Appeals' statutory interpretation, the Court of Appeals therefore concluded that the "physical incapacity" was ambiguous as written in the statute.

The Court of Appeals additionally distinguished this case from prior case law and found that a physical injury to the brain leading to mental incapacities such as attention and memory deficit is unique within the context of the F&P statute because of the brain's complexity. The Court of Appeals discussed the F&P statute and medical developments since the statute has been enacted, specifically that a brain injury such as the one Officer Couret-Rios suffered, can lead to a "physical incapacity."

Thus, the Court of Appeals held that proper deference to the hearing examiner was required. The Court of Appeals noted that the hearing examiner clearly understood that a "physical incapacity" was a prerequisite for LOD benefits when she concluded Officer Couret-Rios was entitled to LOD benefits. The Court of Appeals concluded that the definition of "physical incapacity" can include manifestations of a physical incapacity caused by a brain injury, and Officer Couret-Rios's brain was physically injured which resulted in memory and attention deficits. The Court of Appeals ultimately held that Officer Couret-Rios was therefore entitled to LOD retirement benefits.

Gables Construction, Inc. v. Red Coats, Inc., et al., No. 23, September Term 2019, filed May 26, 2020. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2020/23a19.pdf

RIGHT OF CONTRIBUTION – JOINT TORT-FEASOR LIABILITY

Facts:

During the evening of March 31, 2014, and early morning of April 1, 2014, a fire damaged a near-completed 139-unit apartment building causing approximately $22,150,000 in damage. The project's owner, Upper Rock II, LLC ("Upper Rock"), brought suit against Red Coats, Inc. ("Red Coats"), a firm hired to perform security and fire watch, alleging gross negligence and breach of contract. Red Coats filed a third-party claim against Gables Construction, Inc. ("GCI"), the project's general contractor, as well as other parties, seeking contribution under the Maryland Uniform Contribution Among Joint Tort-Feasors Act, Md. Code (1974, 2013 Repl. Vol., 2019 Cum. Supp.), Courts & Judicial Proceedings Art. ("CJ") § 3-1401, *et. seq.* ("UCATA").

Prior to construction, Upper Rock and GCI entered into a contract ("the Prime Contract"), which included a waiver of subrogation, which required Upper Rock to purchase property insurance and transfer all risk of loss for fire-related claims to the insurer, rather than Upper Rock and GCI. As a result of the waiver of subrogation, Upper Rock could not hold GCI liable for any damages from the fire. Through a motion for summary judgement, GCI argued that, because it was not liable to Upper Rock, GCI did not fit the definition of joint tortfeasor under the UCATA and, therefore, Red Coats' action for contribution must fail as a matter of law. The circuit court denied the motion for summary judgment, the case proceeded to trial, and the jury found that the fire was a direct and foreseeable consequence of GCI's negligence and that Red Coats was entitled to contribution from GCI in the amount of $7 million.

The Court of Special Appeals affirmed Red Coat's ability to recover contribution under the UCATA, but reduced the amount to $2 million, half of what Red Coats paid out of pocket in its settlement with Upper Rock.

Held: Reversed.

The Court of Appeals held that, where a waiver of subrogation precludes liability to the injured party, the third-party defendant does not fall within the definition of a "joint tortfeasor" under the UCATA and there is no statutory right of contribution. The UCATA defines joint tortfeasors as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." CJ § 3-1401(c). This

Court previously considered the terms "liable in tort" and "common liability" under other circumstances as they are used in the UCATA. In each instance, the Court held that under the UCATA, the statutory right to contribution is derivative and will not arise where there is no liability to the injured party in the first instance. In other words, "liable in tort" requires legal responsibility and common liability, not mere culpability to the injured party for a wrong.

Turning to the Prime Contract, the Court explained that the waiver of subrogation precluded Upper Rock's claims against GCI from arising in the first instance. Therefore, under our established case law, because Red Coats' statutory claim for contribution is not an independent right, but is a derivative right flowing from the injured party, Red Coats has no right of contribution because GCI was not "liable in tort" to the injured party.

COURT OF SPECIAL APPEALS

John Fitzgerald, et al. v. Tatyana S. Bell, Personal Representative of the Estate of John Thurman Bell, No. 3499, September Term 2018, filed April 30, 2020. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2020/3499s18.pdf

STATUTE OF LIMITATIONS – ACCRUAL OF CLAIMS – DISCOVERY RULE – CONTINUATION OF EVENTS THEORY

MARYLAND UNIFORM COMMERCIAL CODE – NEGOTIABLE INSTRUMENTS – STATUTE OF LIMITATIONS – ACCRUAL OF CLAIMS – DISCOVERY RULE

Facts:

John Thurman Bell died testate on June 17, 2017. From some time prior to 1976 until his death, Mr. Bell, an attorney, rendered legal services to John Fitzgerald and his company, JJF Management Services, Inc. ("JJF Management") (collectively, the "Fitzgerald Parties"). Mr. Bell and Mr. Fitzgerald also developed a close personal friendship. During the course of their four-decades-long professional relationship and friendship, Mr. Bell would occasionally request loans from Mr. Fitzgerald.

On October 10, 1992, Mr. Bell executed a "Money Loaned Deed of Trust" ("1992 Deed of Trust") in favor of John J. Fitzgerald, Jr. as security for debt owed to Mr. Fitzgerald in the amount of $255,000.00 plus accrued interest. Neither the Estate nor Mr. Fitzgerald produced the four promissory notes referenced in the 1992 Deed of Trust or testified as to their content before the orphans' court. Mr. Bell allegedly never paid Mr. Fitzgerald any amounts on notes secured by the 1992 Deed of Trust. Mr. Fitzgerald never demanded payment.

On July 8, 1998, JJF Management loaned Mr. Bell the sum of $281,649.00, as reflected in a "Confessed Judgment Note" ("1998 Note"). JJF Management received a copy of the 1998 Note, and the 1998 Note provides that payment is due on demand. Mr. Bell allegedly never paid JJF Management any amounts on the 1998 Note, and JJF Management never demanded payment.

After Mr. Bell's death, Mr. Fitzgerald and JJF Management filed claims based, respectively, on the 1992 Deed of Trust and the 1998 Note. Tatyana S. Bell, in her capacity as personal representative of the Estate of Mr. Bell (the "Estate"), disallowed the claims. In response, the Fitzgerald Parties petitioned to allow the claims, and the Estate filed a motion for summary

judgment on the grounds that both claims were barred by the applicable statute of limitations. The orphans' court granted summary judgment in favor of the Estate and disallowed both claims. The Fitzgerald Parties timely noted an appeal.

Held: Affirmed in part, reversed in part.

The Court of Special Appeals reached three holdings. First, the Court held that the grant of summary judgment on statute of limitations grounds was improper as to the 1992 Deed of Trust because the record does not establish when the Fitzgerald Claim accrued. Quite simply, nothing in the record indicated whether the notes referenced in the 1992 Deed of Trust had become due.

Second, in the absence of fraudulent concealment, the discovery rule does not apply to toll the statute of limitations for an action to enforce a note payable on demand under Maryland Code (1975, 2013 Repl. Vol.), Commercial Law Article ("CL") § 3-118(b). Consequently, because JJF Management did not assert that Mr. Bell fraudulently concealed the note or its terms, its claim under the 1998 Note was time-barred.

Third, because JJF Management had actual knowledge, or, at a bare minimum, inquiry notice of its claim under the 1998 Note after receiving a copy when it was executed, the existence of a confidential relationship could not serve to toll the limitations period.

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Richard W. Williams v. State of Maryland, No. 858, September Term 2019, filed May 29, 2020. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2020/0858s19.pdf

CRIMINAL LAW – FOURTH AMENDMENT – *TERRY* FRISK

CRIMINAL LAW – FOURTH AMENDMENT – ARREST

CRIMINAL LAW – FOURTH AMENDMENT – RESISTING ARREST

CRIMINAL LAW – JURY SELECTION – RIGHT TO FAIR AND IMPARTIAL JURY

Facts:

Richard W. Williams was driving and talking on his cell phone in Pocomoke City when Sergeant Rudell Brown initiated a traffic stop. Mr. Williams stopped his car and pulled onto the edge of someone's lawn because the road had no shoulder, and Sgt. Brown pulled in behind him. They both got out of their vehicles and Mr. Williams faced forward. Sgt. Brown approached Mr. Williams quickly, and as he approached he saw that Mr. Williams had his hands clenched. Sgt. Brown grabbed Mr. Williams, wrestled him to the ground, told him to put his hands behind his back, and pepper sprayed him. Mr. Williams stopped struggling and tossed two small baggies of marijuana under his car. Sgt. Brown placed Mr. Williams in handcuffs and searched Mr. Williams's person, finding $443 and a third baggie of marijuana. All three baggies were collectively non-criminal in amount. Sgt. Brown searched Mr. Williams's car and found empty plastic baggies in the center console, a cell phone, and a larger, criminal amount of marijuana in the trunk along with a scale.

Mr. Williams was charged and convicted of possession with intent to distribute marijuana, possession of marijuana, resisting arrest, and driving on a suspended license. Before trial, the trial court conducted an abbreviated version of Maryland's already shortened *voir dire* process, bypassing any venireperson who responded to a *voir dire* question without further questioning to determine whether he or she was biased. Mr. Williams appealed, arguing that Sgt. Brown violated his Fourth Amendment right against unlawful searches and seizures when he was arrested without a warrant. He also argued that the evidence was insufficient to support his conviction for resisting arrest and the trial court violated his right to a fair and impartial jury because its method of jury selection excluded significant parts of the community.

The State responded that Sgt. Brown's use of force was "reasonable to further a lawful *Terry* stop," Sgt. Brown had probable cause to search the vehicle, and the evidence was sufficient to find Mr. Williams guilty of resisting arrest. It also contended that the trial court acted within its discretion when it selected the jury and that no cognizable group was excluded from the jury.

Held: Reversed in part, affirmed in part.

The Court of Special Appeals reversed Mr. Williams's convictions for possession with intent to distribute marijuana, possession of marijuana, and resisting arrest. It affirmed his conviction for driving on a suspended license.

First, the Court held that Mr. Williams's Fourth Amendment Rights were violated and the evidence gathered from the car should have been suppressed at trial. Warrantless searches are presumed unreasonable, and the State has the burden to overcome this presumption. One exception to the warrant requirement is the stop and frisk method outlined in *Terry v. Ohio*, 392 U.S. 1 (1968). However, for a frisk to be permissible under *Terry*, the police officer must believe the subject to be "armed and dangerous," *Norman v. State*, 452 Md. 373, 387 (2017), and the frisk must be supported by "particularized suspicion at its inception," *Thornton v. State*, 465 Md. 122, 142 (2019).

The Court held that here, Sgt. Brown's testimony failed to rebut the presumption that the search was unreasonable when he testified that Mr. Williams was talking on his cell phone while driving, got out of his car during the traffic stop, faced forward, and had his hands clenched. Sgt. Brown didn't explain how Mr. Williams's actions led him to believe that Mr. Williams was armed and dangerous, and the *Terry* frisk was improper. The Court held that Sgt. Brown's use of force was a *de facto* arrest unsupported by probable cause because Sgt. Brown had no reason to believe that Mr. Williams had committed a crime when he wrestled him to the ground. The Court held that the evidence obtained should have been suppressed at trial as fruits of the poisonous tree.

Second, the Court held that the evidence was insufficient to find Mr. Williams guilty of resisting arrest. Under Maryland Code, (2002, 2012 Repl. Vol.), § 9-408 of the Criminal Law Article, "[a] person may not intentionally resist a *lawful* arrest." (emphasis added). Here, the arrest was unlawful and the evidence wasn't sufficient to find him guilty of resisting arrest.

Finally, the Court held that the trial court's jury selection method was not impermissible *per se*, but that it was nonetheless ill-advised. Defendants have a right to "an impartial jury" under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights. Additionally, the jury must be drawn from a fair cross-section of the community. The Court held that the trial court's jury selection method runs the risk of being overly-exclusive because it bypasses any venireperson who responded to a *voir dire* question from selection. And although Mr. Williams was unable to show that his constitutional rights were violated on this record, the Court held that the method used has the unnecessarily risky potential to skew the demographics of the jury illegally.

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The Mayor and City Council of Havre de Grace, et al. v. K. Hovnanian Homes of Maryland, LLC, et al., No. 796, September Term 2018, filed May 1, 2020. Opinion by Friedman, J.

https://www.mdcourts.gov/data/opinions/cosa/2020/0796s18.pdf

MUNICIPAL CORPORATIONS – PUBLIC CONTRACTS – EXECUTIVE POWER

Facts:

K. Hovnanian proposed to enter into a recoupment agreement with the City of Havre de Grace by which K. Hovnanian would install access and emergency roads, water and sewer lines, and storm water management ponds on its parcel, which would benefit the two adjoining parcels. The City would impose and collect the recoupment fee from the adjoining parcel owners.

The recoupment agreement was approved by the City Council. The Mayor, however, did not approve it. On the first appeal to the Court of Special Appeals, K. Hovnanian argued that the parties sufficiently executed the recoupment agreement and were bound by it. The Court of Special Appeals vacated the circuit court's grant of summary judgment in favor of the City.

On remand to the Circuit Court for Harford County, the parties filed cross-motions for summary judgment. The circuit court declared that the recoupment agreement was a binding and enforceable contract solely upon the City Council's approval.

Held: Reversed.

The City of Havre de Grace appealed to the Court of Special Appeals to determine whether the recoupment agreement was a binding, enforceable contract.

Because the recoupment agreement wasn't prepared in the form of an ordinance and did not proceed through the City Council as an ordinance must, based on the City of Havre de Grace Charter, the recoupment agreement could not have been approved using the legislative process.

The power to enter into contracts with a municipal corporation is an executive power. The City of Havre de Grace's charter requires that a contract regarding water and sewer systems and regarding roads be entered into by the Mayor, or a subordinate executive branch official, on behalf of the City of Havre de Grace. Under *Gontrum v. Mayor & City Council of Baltimore*, 182 Md. 370 (1943), a party contracting with a municipal government, like K. Hovnanian, is bound to take notice of limitations of its power to contract. As such, K. Hovnanian was responsible for understanding the nature and extent of authority of the City Council's power. Moreover, a municipal corporation is not bound by a contract entered into by the City Council, who had no

authority to enter into such contract on behalf of the City. The recoupment agreement was, therefore, not an enforceable contract.

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Whitney Wheeling, et al. v. Selene Finance LP, et al., No. 2128, September Term 2017, filed May 29, 2020. Opinion by Kehoe, J.

https://www.courts.state.md.us/data/opinions/cosa/2020/2128s17.pdf

REAL PROPERTY – SELF HELP – THREATENING TO TAKE POSSESSION OF PROPERTY

MARYLAND CONSUMER PROTECTION ACT – PLEADING DAMAGES

Facts:

Two properties are at issue in this case. The first property, located in Anne Arundel County, is owned by Donna Poole, and is occupied by her tenants: Eric and Whitney Wheeling, and their two minor children (hereinafter, the "Wheeling property"). Prior to the Wheelings' tenancy, Poole purchased the property through a mortgage loan. When Poole defaulted on that loan in 2013, the loan was acquired by a trustee.

Selene Finance LP is a mortgage lender and servicer licensed to operate in Maryland. Selene acted as the trustee's servicer for Poole's mortgage. On May 15, 2015, Selene posted a notice on the Wheeling property in accordance with Real Prop. § 7-113(c) (an "abandonment notice").

The second property at issue in this appeal is located in Baltimore City and was owned by Joanne Rodriguez during the relevant period (the "Rodriguez property"). Rodriguez purchased the property in 2008 through a mortgage backed by a federal housing program. After she was unable to make timely payments, the loan went into default and was eventually transferred to Sunset Mortgage Loan Trust, Series 2014- trustee.

Selene, acting on behalf of the trustee, filed a foreclosure action against the Rodriguez property. The trustee was the successful bidder at the foreclosure auction. The sale was ratified in September 2016.

In February 2017, Selene contracted with Century 21 Downtown, a real estate brokerage company operated by Gina Gargeu. Acting as Selene's agent, Gargeu scheduled a sheriff's eviction for the Rodriguez property on March 28, 2017. On February 10, the sheriff posted a notice on the property informing the occupants that they would be evicted pursuant to a court order on March 28, 2017.

A little less than two weeks later, on February 22, Gargeu posted an abandonment notice on the Rodriguez property that was identical to the notice posted on the Wheeling property, but for differences in names, addresses, and other incidental information.

Neither the Wheelings nor Rodriguez were ever deprived of possession of their respective properties.

On March 1, 2017, the Wheelings and Rodriguez (collectively, "appellants") filed a joint complaint in the Circuit Court for Baltimore City on behalf of themselves and a proposed class of persons similarly situated. On May 30, 2017, they filed an amended complaint.

The amended complaint asserted two claims against Selene and Gargeu. First, the complaint alleged that Selene and Gargeu violated Real Prop. § 7-113(b) by making threats of eviction without first making a reasonable inquiry as to whether the properties were, in fact, abandoned. Second, the complaint alleged that Selene and Gargeu violated the Maryland Consumer Protection Act ("MCPA") by threatening to take possession of their properties by way of the abandonment notices. Appellants asked the court to certify their claims as a class action, to grant declaratory and injunctive relief, and to award them monetary damages and attorneys' fees.

In support of those claims, the amended complaint alleged that, after Mr. Wheeling read the abandonment notice, he telephoned Selene on May 19, 2015. A representative of Selene told him that foreclosure proceedings had been initiated against the property, that Selene understood the property was abandoned because it was not owner-occupied, and that the Wheelings had to vacate the property by June 1, 2015, or else Selene would change the locks. However, the representative refused to provide any details of the alleged foreclosure proceedings to Mr. Wheeling because he was not the owner of the property. Additionally, the amended complaint alleged that neither Selene nor Normandy Mortgage had initiated foreclosure proceedings against Poole when the abandonment notice was posted and, indeed, never did so. According to the amended complaint, at the time that the abandonment notice was posted, Poole was negotiating with Selene for a short sale of the property and had been informed by Selene that her property was not subject to a foreclosure.

The amended complaint did not allege that the Wheelings vacated the home as a result of Selene's actions, nor did it allege that Selene took any steps other than posting the abandonment notice to force or induce them to move.

The amended complaint alleged that Rodriguez learned about the abandonment notice through her neighbor, Dermot Delude-Dix. After seeing the abandonment notice, Delude-Dix called Gargeu and told her that Rodriguez still occupied the property. Rodriguez also alleged that she consulted an attorney to learn about her rights. Despite the scheduled eviction date and the abandonment notice, Rodriguez was never evicted from the property.

The amended complaint also alleged that, as a result of both the abandonment notice and the statements made by Selene's representative, the Wheelings and Rodriguez suffered emotional distress and incurred attorney's fees by contacting an attorney to seek legal advice about their rights.

Gargeu and Selene filed motions to dismiss the amended complaint for failure to state a cause of action, and, on August 8, 2017, the circuit court held a hearing on the motions. On December 4, 2017, the circuit court granted both motions to dismiss without leave to amend, concluding that, as to Real Prop. § 7-113, the amended complaint failed to allege sufficient facts which state a claim upon which relief can be granted because appellants were not evicted or otherwise

deprived of their property, and so did not suffer an objectively identifiable actual injury. Then, the court concluded that the Wheelings' and Gargeu's MCPA claims fail because they did not sufficiently plead damages under that statute, and that, as to Gargeu specifically, the MCPA did not apply to her because Com. Law § 13-104 exempts real estate brokers from the provisions of the MCPA. The Wheelings and Rodriguez appealed.

Held: Affirmed.

The Court of Special Appeals held that appellants failed to state a claim under Real Prop. § 7-113.

Real Property § 7-113(b)(2)(ii) permits a party to use non-judicial self-help to gain possession of residential real property if, and only if, the party is (1) a party claiming the right possession, as that term is defined in the statute; (2) reasonably believes the resident has abandoned or surrendered possession of the property; (3) has a basis for that reasonable belief based on a reasonable inquiry into the occupancy status of the property; (4) provides notice to the resident(s) of the property as provided in subsection (c) of the statute; and (5) receives no responsive communication to that notice within 15 days after the later of posting or mailing the notice as required by subsection (c) of the statute.

Subsection (d) of Real Prop. § 7-113 provides a cause of action for violations of subsection (b), and allows a resident to recover (i) possession of the property, if no other person then resides in the property; (ii) actual damages; and (iii) reasonable attorney's fees and costs.

The remedies of subsection (d) are available to a resident only when the party seeking possession locks a protected person out of the property, intentionally terminates or diminishes utility, water and sewer and similar services to the property, or takes any other action which deprives a protected resident of actual possession of the property. "Any other action" could include posting an abandonment notice without first conducting the "reasonable inquiry" required by subsections (b) and (c) of § 7-113 if, as a result of abandonment notice, a protected person vacates the property.

The operative complaint in this case alleged that defendants Selene Finance and Gina Gargeu did not conduct a reasonable inquiry into the occupancy status of the properties of the plaintiffs, Eric and Whitney Wheeling, and Joanne Rodriguez, before posting an abandonment notice. Further, Selene Finance was not a "party claiming the right of possession" as to the Wheelings because it had not initiated foreclosure proceedings against the Wheelings' property. However, neither the Wheelings nor Rodriguez were actually deprived of their property nor did the complaint allege that Selene Finance and Gargeu locked them out, terminated or diminished utility, water and sewer and similar services, or took any other action which deprived them of actual possession. The statutory cause of action of § 7-113(d) does not extend to them.

The Court also held that the amended complaint did not sufficiently plead damages to sustain a claim under the MCPA. In their amended complaint, appellants alleged that they suffered

"emotional damages and losses with physical manifestations such as fear (of losing their home), anxiety (with the threat of eviction through no fault of their own), [and] anger." Additionally, appellants alleged that they "incurred legal fees to know her rights as a former owner of the property based on Selene's and Gargeu's deceptive eviction threats[.]"

While these allegations may have satisfied the general pleading requirement of Md. Rule 2-203(b), they did sufficiently plead any observable physical manifestations of their emotional distress. *See Sager v. Housing Commission of Anne Arundel County*, 855 F. Supp. 2d 524, 548–49 (D. Md. 2012). The operative complaint did not allege that appellants manifested any observable physical manifestations of the emotional distress caused by Selene. Rather, the allegations regarding emotional distress amount to nothing more than assertions that Selene's actions upset them. The MPCA requires more in order for a complaint to survive a motion to dismiss for failure to state a cause of action.

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Justin Greer v. Montgomery County, Maryland, No. 3381, September Term 2018, filed May 28, 2020. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2020/3381s18.pdf

WORKERS' COMPENSATION – COMPENSABLE HERNIA – HERNIA AS OCCUPATIONAL DISEASE

Facts:

Justin Greer filed a workers' compensation claim on February 24, 2017 seeking benefits for an inguinal hernia caused by repetitive lifting during his ten years of employment as a Montgomery County firefighter. Mr. Greer had been diagnosed with a small hernia in July of 2015 and had surgery to repair the hernia on December 19, 2016. The Workers' Compensation Commission held a hearing on January 29, 2018. Mr. Greer argued, through counsel, that his inguinal hernia was a compensable occupational disease. Montgomery County, Mr. Greer's employer, asserted that hernias are not compensable as occupational diseases, and instead, are compensable only pursuant to the portion of the Act specifically addressing hernias set forth in Md. Code (1991, 2016 Repl. Vol.), § 9-504 of the Labor and Employment Article ("LE"). The Workers' Compensation Commission denied Mr. Greer's claim.

Mr. Greer sought judicial review *de novo* in the Circuit Court for Montgomery County. After a bench trial, the circuit court affirmed the commission. Mr. Greer subsequently noted an appeal to the Court of Special Appeals.

Held: Affirmed.

As he had before the Commission and the trial court, Mr. Greer asserted on appeal that his hernia was compensable as an occupational disease under the Workers' Compensation Act. Before turning to the specific statutory interpretation issue raised on appeal, the Court of Special Appeals considered the applicable standard of review, observing that the Commission is afforded a degree of deference in its formal interpretations of the Workers' Compensation Act. The Court observed that the Act is remedial and generally interpreted liberally in favor of the claimant, but nonetheless it was the court's task to consider the language used by the Legislature and give that language a plain and common sense meaning.

The Court of Special Appeals considered Section 9-504 of the Labor and Employment Article, which specifically addresses compensable hernias. Section 9-504 provides that hernias are compensable when caused by "an accidental personal injury or by a strain arising out of and in the course of employment if . . . the hernia did not exist before the accidental personal injury or strain occurred; or . . . as a result of the accidental personal injury or strain, a preexisting hernia

has become so aggravated, incarcerated, or strangulated that an immediate operation is needed; and . . . the accidental personal injury or strain was reported to the employer within 30 days after its occurrence." Mr. Greer did not assert that his hernia was compensable under LE § 9-504, but instead asserted that his hernia was compensable as an occupational disease.

The Court of Special Appeals observed that hernia injuries are a subset of workers' compensation claims that are subjected to different treatment under the law from other types of claims. The Court discussed the five categories of injuries and diseases under the Act: (1) accidental injuries; (2) occupational diseases; (3) heart disease, hypertension, lung disease, certain cancers, and Lyme disease for certain public safety employees; (4) hernias; and (5) occupational deafness. The Court emphasized that Mr. Greer had presented no evidence that would support a conclusion that his hernia satisfied the definition of "occupational disease" set forth in LE § 9-101(g), which defines an "occupational disease" as "a disease contracted by a covered employee: (1) as the result of and in the course of employment; and (2) that causes the covered employee to become temporarily or permanently, partially or totally incapacitated."

The Court found further support for the conclusion that hernias are not compensable as occupational diseases in LE § 9-754, which governs appeal proceedings in workers' compensation cases. The Court observed that LE §9-754(c) provides that, on appeal, "[t]he court shall determine whether the Commission . . . justly considered all of the facts about the accidental personal injury, occupational disease, or compensable hernia." The Court reasoned that the use of the disjunctive "or" suggests that compensable hernias and occupational diseases are two separate and independent bases for which workers' compensation benefits can be sought. The Court further found Mr. Greer's assertion that the reference to a "strain" in LE § 9-504 could refer to an occupational disease to be unpersuasive. The Court determined that the Commission correctly recognized that it only had the authority to award benefits for hernias that satisfied the requirements of LE § 9-504. Because Mr. Greer did not present a claim for a hernia that was compensable under LE § 9-504, and the Act does not permit compensation for a hernia as an occupational disease, the Court of Special Appeals affirmed.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated May 8, 2020, the following attorney has been suspended:

CHARLES ALEX MURRAY

*

By an Order of the Court of Appeals dated May 15, 2020, the following attorney has been disbarred by consent:

DALE EDWARD ROWLAND

*

By an Order of the Court of Appeals dated May 22, 2020, the following attorney has been disbarred by consent:

CRAIG HARRISON LANGRALL

*

By an Order of the Court of Appeals dated May 22, 2020, the following attorney has been temporarily suspended:

NANCY THERESA LORD

*

By an order of the Court of Appeals dated May 22, 2020, the following attorney has been disbarred by consent:

JAMES ALOYSIUS POWERS

*

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UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

https://mdcourts.gov/appellate/unreportedopinions

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