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https://mdcourts.gov/data/opinions/coa/2019/6a18ag.pdf

ATTORNEY DISCIPLINE – DILIGENCE AND COMMUNICATION – CONFLICT OF INTEREST – ATTORNEY TRUST ACCOUNT – SUSPENSION.

Facts:

Raj Sanjeet Singh practiced immigration law in Montgomery County. In 2014, a Brazilian immigrant was referred to Mr. Singh for immigration assistance. Mr. Singh successfully helped him obtain a conditional green card as a result of the immigrant's recent marriage to an American citizen. Mr. Singh told the immigrant to contact him in 18 months, so they could file the relevant materials to remove the conditions on his green card.

The immigrant's marriage fell apart before this occurred, and he began regularly contacting Mr. Singh's office. In April 2016, Mr. Singh agreed to look into the possibility of pressing cyberstalking charges against the immigrant's spouse. In September 2016, Mr. Singh began work to remove the conditions on the immigrant's green card. He helped the immigrant write an affidavit and referred him to a psychologist to obtain a report supporting the immigrant's petition based on domestic abuse. After the immigrant canceled a meeting with Mr. Singh and met with another attorney, Mr. Singh ended his attorney-client relationship with the immigrant.

The immigrant in turn requested a refund of the money that he had paid as a legal fee. When Mr. Singh refused, the immigrant filed a complaint with Bar Counsel. He alleged that Mr. Singh had been unresponsive to his messages and procrastinated on removing the conditions on his green card. After consulting with another attorney, the immigrant ultimately received his green card following the strategy laid out by Mr. Singh.

Upon being informed of the complaint to Bar Counsel, Mr. Singh's assistant called the immigrant and told him he could pick up a check for a refund. When the immigrant came to the

office, he was asked to sign a release form. Mr. Singh then sent this release to Bar Counsel in an effort to halt the investigation. However, the release did not comply with the ethical rules governing attorney settlements.

During the course of Bar Counsel's investigation, Mr. Singh was asked in a deposition about his accounting practices with regards to his handling of client payments for filing fees in immigration cases. In his answer, Mr. Singh suggested that he usually complied with rules requiring the deposit of client funds into trust accounts. A later review of his bank records by Bar Counsel revealed that this was the exception rather than the rule for Mr. Singh.

Bar Counsel ultimately charged Mr. Singh with violations of Rule 1.1 (competence); Rule 1.2 (scope of representation); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.5 (reasonableness of fees); Rule 1.7 (conflict of interest – generally); Rule 1.8 (conflict of interest – specific rules); Rule 1.9 (duties to former clients); Rule 1.15 (safekeeping property); Rule 8.1 (false statement in connection with a disciplinary matter); Rule 8.4 (misconduct); as well as violations of Maryland Rules 19-404 (trust account – deposits) and 19-407 (trust account recordkeeping). Bar Counsel later withdrew the charges pertaining to the reasonableness of fees and trust account recordkeeping.

Following a hearing in October 2018, the hearing judge concluded that Mr. Singh had violated Rule 1.3, Rule 1.4, Rule 1.7, Rule 1.8, Rule 1.15(a) & (c), Rule 8.1, Rule 8.4(a), (c), & (d), and Maryland Rule 19-404. The hearing judge concluded that there was insufficient evidence of violations of Rule 1.1, Rule 1.2, and Rule 1.9.

Held:

The Court of Appeals largely sustained the hearing judge's findings of fact and conclusions of law. It found that several aggravating factors applied to Mr. Singh: a dishonest or selfish motive, obstruction of the disciplinary process, failure to acknowledge the wrongfulness of his conduct, and vulnerability of the victim. On the flip side, the Court of Appeals cited Mr. Singh's absence of prior discipline and the steps he took to rectify the consequences of his actions as mitigating factors.

The Court of Appeals emphasized that no one was harmed by Mr. Singh's misconduct. The shortcomings in his trust account practices apparently did not result in misuse of client funds, and Mr. Singh's inadequate handling of the immigrant's case still ended with the immigrant getting the conditions removed from his green card using the strategy proposed by Mr. Singh. The Court of Appeals also noted the important nature of Mr. Singh's practice, which includes serving immigrant clients of modest means.

Under these circumstances, a 60-day suspension was the appropriate sanction.

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Attorney Grievance Commission v. Garland Montgomery Jarrat Sanderson, Misc. Docket AG No. 3, September Term 2018, filed July 23, 2019. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2019/3a18ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – 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 Garland Montgomery Jarrat Sanderson violated the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"). The Petition alleged that Mr. Sanderson, during his representation of several clients, violated the following Rules and statutes: MLRPC 1.1 (Competence); MLRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Attorney); MLRPC 1.3 (Diligence); MLRPC 1.3 (Diligence); MLRPC 1.4 (Communication); MLRPC 1.5 (Fees); MLRPC 1.15 (Safekeeping Property); MLRPC 3.4 (Fairness to Opposing Party and Attorney); MLRPC 8.1 (Bar Admission and Disciplinary Matters); MLRPC 8.4 (Misconduct); Rule 19-407; Rule 19-408; Rule 19-410; and Business and Occupations Article ("BOP") § 10-306.

The hearing judge found the following facts: During his representations of Mr. Odubanjo and Mr. Sangare, Mr. Sanderson failed to appear in court on their behalf on several occasions. Mr. Sanderson failed to comply with a Conditional Diversion Agreement he had previously entered into with Bar Counsel. Mr. Sanderson engaged in a pattern of making impermissible cash withdrawals from his attorney trust account and supplementing the deficient balances by transferring funds from his operating account to the trust account. In relation to his attorney trust account, Mr. Sanderson also failed to maintain client funds in trust until earned, used one client's funds to pay another, and failed to maintain adequate records. Throughout his representation of several clients, Mr. Sanderson failed to produce signed fee agreements. After Bar Counsel's investigation began, Mr. Sanderson repeatedly failed to reply to lawful requests for information from Bar Counsel and urged his former client, Ms. Ozel, to mislead Bar Counsel in attempt to interfere with the ongoing disciplinary investigation. During his representation of Ms. Ozel, Mr. Sanderson failed to promptly deliver settlement proceeds to her. Lastly, Mr. Sanderson used derogatory language towards a local Department of Social Services worker following a child in need of assistance hearing in the Circuit Court for Baltimore City.

The hearing judge concluded that Mr. Sanderson had violated MLRPC 1.1; 1.2; 1.3; 1.4; 1.5; 1.15; 3.4; 8.1; 8.4. The hearing judge also concluded that Mr. Sanderson violated Rules 19-407, 19-408, 19-410, and BOP § 10-306.

Held: Disbarred

The Court of Appeals sustained all of the hearing judge's conclusions of law. However, with respect to one of Mr. Sanderson's former clients, Ms. Brown, the Court held that the hearing judge's conclusion based on MLRPC 1.15 and 1.3 were improper because these allegations were not raised in Bar Counsel's Petition. The Court sustained exceptions to the hearing judge's factual findings made by both Mr. Sanderson and Bar Counsel concerning the amount due to Ms. Ozel at a specific point in time. The Court also sustained Mr. Sanderson's exception to the hearing judge's factual finding concerning his representation of Ms. Brown, because Bar Counsel did not present sufficient evidence. In addition, the Court sustained Bar Counsel's exception with respect to the hearing judge's failure to conclude that Mr. Sanderson violated MLRPC 8.4(d) and determined that Mr. Sanderson's conduct was prejudicial to the administration of justice.

The Court disbarred Mr. Sanderson based on the litany of violations he committed. Throughout Mr. Sanderson's representation of several clients, he performed deficiently and engaged in an overarching and widespread pattern of misconduct, making intentional misrepresentations to clients and Bar Counsel, failing to respond to inquiries by clients and Bar Counsel, failing to provide adequate oversight into his law practice, and misusing client funds. The Court also found the existence of numerous aggravating factors: (1) prior disciplinary offense; (2) a dishonest or selfish motive; (3) a pattern of misconduct; (4) multiple offenses; (5) bad faith obstruction of the disciplinary proceeding; (6) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (7) refusal to acknowledge wrongful nature of conduct; and (8) vulnerability of victim. Further, there existed no compelling mitigating factors to warrant a lesser sanction. As a result, Mr. Sanderson was disbarred.

Edinson Herrera Ramirez v. State of Maryland, No. 72, September Term 2018, filed July 12, 2019. Opinion by Watts, J.

McDonald, J., concurs and dissents.

https://www.mdcourts.gov/data/opinions/coa/2019/72a18.pdf

INEFFECTIVE ASSISTANCE OF COUNSEL – PERFORMANCE PRONG –DEFICIENT PERFORMANCE – PREJUDICE PRONG – PRESUMPTION OF PREJUDICE

Facts:

In the Circuit Court for Carroll County, the State, Respondent, charged Edinson Herrera Ramirez, Petitioner, with crimes that arose out of an armed robbery. During *voir dire*, the circuit court asked the prospective jurors whether they, their relatives, or their close friends had ever had experiences as victims of crime, defendants, or witnesses in criminal cases that would "affect[their] ability to render a fair and impartial verdict[.]" Juror 27 answered that, approximately a year-and-a-half earlier, his apartment had been "broken into[.]" The circuit court asked whether "that experience[would], in any way, affect [his] ability to render a fair and impartial verdict in this case[.]" Juror 27 responded: "I believe it would." Trial counsel did not ask Juror 27 any follow-up questions, or request that the circuit court do so. Juror 27 did not respond to any other questions during *voir dire*.

Trial counsel did not move to strike Juror 27 for cause based on his response to the "crime victim" question, but rather moved to strike another prospective juror, Juror 25, for cause on the ground that his "home was broken into" and his "response as to whether it would affect them was, I believe it would." Juror 25, however, had not responded to any questions during *voir dire*. In addition to failing to move to strike Juror 27 for cause based on his response to the "crime victim" question, trial counsel did not exercise a peremptory challenge with respect to Juror 27, who was seated as a juror. After the jury had been selected and the circuit court dismissed the prospective jurors who had not been seated, trial counsel advised the circuit court that Juror 27 "just vehemently started shaking his head and just looked right at [her] with not a very pleasant face." At that time, trial counsel moved to strike Juror 27, stating that the juror was not "happy about the fact that he's sitting on [the] jury[.]" The circuit court reserved ruling on the motion to strike Juror 27 to "see how he [would] react[] during the course of the trial." The circuit court stated that it was up to trial counsel whether to re-raise the issue. Trial counsel did not renew the motion to strike Juror 27, or otherwise raise any issue as to Juror 27 after moving to strike him following jury selection.

The jury found Ramirez guilty of all eleven charges. After an unsuccessful direct appeal, Ramirez petitioned for postconviction relief, contending that trial counsel engaged in ineffective assistance of counsel by not moving to strike Juror 27 for cause based on his response to the "crime victim" question and by not using a peremptory challenge against Juror 27. The circuit

court denied the petition. Ramirez appealed, and the Court of Special Appeals affirmed. Ramirez filed a petition for a writ of *certiorari*, which the Court of Appeals granted.

Held: Affirmed.

The Court of Appeals held that Ramirez met the burden to prove that trial counsel's performance was deficient. No reasonable lawyer in trial counsel's position would have, as she did, refrained from asking or requesting any follow-up questions of Juror 27, refrained from moving to strike him for cause based on his response to the "crime victim" question, and refrained from exercising a peremptory challenge as to Juror 27. Trial counsel moved to strike for cause Juror 25 based on a purported response to the "crime victim" question that was the same as that given by Juror 27. This circumstance demonstrates that trial counsel was of the view that Juror 27's response to the "crime victim" question warranted a motion to strike for cause. Yet, trial counsel allowed Juror 27 to be seated without any follow-up inquiry, motion to strike for cause, or peremptory challenge. This conduct fell below an objective standard of reasonableness under prevailing professional norms.

The Court also held that, in assessing a petitioner's allegation of ineffective assistance of counsel, a court should presume that trial counsel's performance prejudiced the petitioner only if: (1) the petitioner was actually denied the assistance of counsel; (2) the petitioner was constructively denied the assistance of counsel; or (3) the petitioner's counsel had an actual conflict of interest. Absent these three circumstances, the presumption of prejudice does not apply, and the petitioner must prove prejudice.

The Court concluded that the presumption of prejudice did not apply in this case, and that Ramirez had not met the burden to prove that trial counsel's performance was prejudicial. The State offered strong direct and circumstantial evidence of Ramirez's guilt, including extremely inculpatory testimony not only by both victims of the armed robbery, but also by the getaway driver. The strength of the State's case against Ramirez led the Court to the conclusion that there was no substantial or significant possibility that the outcome of the trial would have been different had Juror 27 not served on the jury. Tellingly, the jury did not submit any questions during deliberations, deliberated for less than three hours, and found Ramirez guilty of all eleven charges. These circumstances supported the Court's determination that the State's evidence was strong—indeed, overwhelming—and that there was no substantial or significant possibility that the outcome of the trial would have been different but for Juror 27's presence on the jury.

Tomekia Conaway v. State of Maryland, No. 69, September Term 2018; *Luke Daniel Johnson v. State of Maryland*, No. 76, September Term 2018, filed July 11, 2019. Opinion by Harrell, J.

https://mdcourts.gov/data/opinions/coa/2019/69a18.pdf

COURTS AND JUDICIAL PROCEEDINGS – TECHNICAL VIOLATIONS OF PROBATION – POST-CONVICTION APPEALABILITY

CRIMINAL PROCEDURE – JUSTICE REINVESTMENT ACT – PRESUMPTIVE INCARCERATION LIMITS FOR TECHICAL VIOLATIONS OF PROBATION

Facts:

Tomekia Conaway was charged, in the Circuit Court for Dorchester County in 2008, with first-degree murder and related charges. She entered a negotiated guilty plea to second-degree murder and was sentenced to 30 years in prison, with all but 20 years suspended. Conaway, after filing a request for evaluation pursuant to Md. Code, Health-Gen. § 8-505, was released from prison in 2016 and began her probationary period.

Conaway failed to show up for her drug treatment program, as required by the conditions of her probation, and was discharged ultimately from the program. Her probation officer filed a Violation of Probation Request for Warrant in July 2017, recommending a 15-day sanction for a first-time technical violation of her probation, consistent with the Maryland Justice Reinvestment Act. The trial judge postponed sentencing.

Conaway, by failing to attend and complete drug treatment programs, committed additional technical violations of her probation on at least two subsequent occasions. The trial judge revoked her probation and sentenced her to 15 years in prison.

In response to her sentence, Conaway filed a "Notice of Appeal or Alternatively Application for Leave to Appeal." The Court of Special Appeals, in June 2018, issued an order directing the case to proceed as an application for leave to appeal. After considering Conaway's application for leave to appeal, the Court of Special Appeals issued a mandate denying her application for leave to appeal as "read, considered and denied."

Luke Daniel Johnson was charged and convicted, in the Circuit Court for Washington County in 1980, with first-degree rape and third-degree sexual offense. The trial judge sentenced him to life in prison. In 2015, a judge granted post-conviction relief to Johnson. Johnson received credit for time served and was released from prison with five years of supervised probation.

Johnson's supervising agent reported that Johnson had traveled to West Virginia on three separate occasions without her permission, in violation of the conditions of his probation. At

that time, the supervising agent recommended that no action be taken. Johnson violated the conditions of his probation approximately two months later by traveling to Ocean City and taking a job at a carnival without the agent's permission. He was arrested in 2017.

The circuit court judge, finding that Johnson committed technical violations of his probations and that they were "a public safety violation," revoked his probation and sentenced him to ten years in prison. Johnson appealed directly to the Court of Special Appeals and filed an application for leave to appeal. The intermediate appellate court dismissed Johnson's direct appeal. His application for leave to appeal remains pending.

The flagship question, presented by both Conaway and Johnson, asked whether Md. Code, Crim. Proc. § 6-223(e)(4), which provides that a finding under paragraph (2) of that subsection is subject to appeal under Title 12, Subtitle 3 or 4 of the Courts Article, gives a right of direct appeal to a probationer or defendant who receives an enhanced sentence based on a finding under paragraph (2) of § 6-223(e)?

Held:

Order of the Court of Special Appeals directing Conaway to proceed by application for leave to appeal affirmed. Order of the Court of Special Appeals dismissing Johnson's direct appeal affirmed.

The Court of Appeals looked first at the State's contention that certiorari review was granted improvidently in Conaway's case. It chose ultimately to exercise its discretion and consider the merits of her question. In reaching this conclusion, the Court, looking at *Scott v. State*, 454 Md. 146, 164 A.3d 177 (2017), cert. denied, 138 S. Ct. 652, 199 L. Ed. 2d 531 (2018) and *Montgomery Cty. v. May Dep't Stores Co*., 352 Md. 183, 721 A.2d 249 (1998), decided to exercise its discretion and engage Conaway's question on the merits because the question on which it granted certiorari was important, likely to recur, and would provide guidance to the bench and bar.

The Court then provided an overview of how technical probation violations are treated under the Justice Reinvestment Act, codified in Md. Code, Corr. Servs. § 6-101. It discussed additionally presumptive limits of incarceration for probationers that commit technical violations of their probation, codified in Md. Code, Crim. Proc. § 6-223(d). The presumptive limits are rebuttable, however, if the circuit court finds, based on the facts and circumstances of the crime for which the defendant was convicted and the defendant's history, that adhering to the presumptive incarceration limits would "create a risk to public safety, a victim, or a witness." Md. Code, Crim. Proc. § 6-223(e)(2). The Justice Reinvestment Act contains specific appealability provisions for probationers found to be in violation of their probation.

Next, the Court utilized statutory interpretation principles to engage the flagship question on appeal. Using a plain meaning analysis, the Court first determined that the appealability provisions in § 12-302 of Md. Code, Cts. And Jud. Proc. are not ambiguous, in light of the

statutory structure of Subtitle 12. Using the same principles, the Court examined also Md. Code, Crim. Proc. §§ 6-223 and 6-224. The Court reached ultimately the conclusion that viewing the interplay between Title 6 of the Criminal Procedure Article and Title 12 of the Courts and Judicial Proceedings Article through a wider lens ameliorates any concerns regarding potential ambiguity. Both Articles contain appealability provisions, but the Court found that probationers in Conaway and Johnson's position must seek an application for leave to appeal, and as such do not have a right of direct appeal.

Consistent with its holding that Johnson does not have a right of direct appeal and must file an application for leave to appeal, the Court abstained from deciding Johnson's two additional questions.

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Board of County Commissioners of Washington County, Maryland v. Perennial Solar, LLC, No. 66, September Term 2018, filed July 15, 2019. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2019/66a18.pdf

MUNICIPAL CORPORATIONS – IMPLIED PREEMPTION – CONCURRENT AND CONFLICTING EXERCISE OF POWER BY STATE AND LOCAL GOVERNMENT

Facts:

Perennial Solar, LLC ("Perennial") filed an application with the Washington County Board of Zoning Appeals ("Board") for a special exception and variance to construct a Solar Energy Generating System ("SEGS") adjacent to the rural village of Cearfoss in Washington County, Maryland. After the Board granted the variance and special exception, a group of aggrieved landowners sought judicial review of the Board's decision in the Circuit Court for Washington County. The Board of County Commissioners of Washington County, Maryland ("Washington County" or "the County") intervened in the case.

While the petition for judicial review was pending, Perennial filed a motion for pre appeal determination challenging the subject matter jurisdiction of the Circuit Court for Washington County on the ground of state law preemption by implication. Prior to considering the merits of the Board's decision, a hearing was held on Perennial's motion. The Circuit Court for Washington County granted the motion and determined that Maryland Code, § 7 207 of the Public Utilities Article ("PU") preempts the Washington County Zoning Ordinance and that the Maryland Public Service Commission ("PSC") has exclusive jurisdiction to approve the type of SEGS proposed by Perennial. Washington County appealed the case to the Court of Special Appeals. In a reported opinion, the intermediate appellate court affirmed the judgment of the circuit court. *Bd. of Cty. Comm'rs of Washington Cty., et al. v. Perennial Solar*, LLC, 239 Md. App. 380 (2018).

Held: Affirmed.

The Court of Appeals held that PU § 7-207 preempts by implication local zoning authority approval for the siting and location of generating stations which require a Certificate of Public Convenience and Necessity ("CPCN") issued by the PSC. The statute is comprehensive and grants the PSC broad authority to determine whether and where SEGS may be constructed. Local land use interests are specifically designated by statute as requiring "due consideration" by the PSC. This includes the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station is proposed to be

located, as well as due consideration by the PSC of the consistency of the application with the comprehensive plan and zoning for the respective local jurisdiction.

Under the plain language of the statute, local government is a significant participant in the process, and local planning and zoning concerns are important in the PSC approval process. However, the ultimate decision-maker is the PSC, not the local government or local zoning board. Although local zoning laws are preempted and therefore not directly enforceable by the local governments as applied to generating stations such as SEGS, they are nevertheless a statutory factor requiring due consideration by the PSC in rendering its ultimate decision.

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Comptroller of the Treasury v. Richard Reeves Taylor, No. 56, September Term 2018, filed July 29, 2019. Opinion by Hotten, J.

Watts, J., concurs.
Getty, J., dissents.

https://mdcourts.gov/data/opinions/coa/2019/56a18.pdf

QUALIFIED TERMINABLE INTEREST PROPERTY – ESTATE TAXES

ESTATE TAXES – LATE PENALTY WAIVER

AGENCY DECISIONS – PRESERVATION OF ISSUES

Facts:

John Wilson Taylor ("Mr. Taylor") died in 1989 when he and his wife ("Ms. Taylor") were residents of Wayne County, Michigan. Mr. Taylor died with a valid Will dated September 1, 1982. The Will created a "residuary marital trust" and directed that the net income from the residuary marital trust be paid to Ms. Taylor at least annually for and during her lifetime.

Upon the death of Mr. Taylor, the personal representative for his estate filed a timely federal tax return with the Internal Revenue Service, in which the estate claimed a deduction for the marital trust, known as a qualified terminable interest property ("QTIP") election.

In 1993, Ms. Taylor moved to Washington County, Maryland. After she died testate on January 15, 2013, the personal representative filed a federal Estate (and Generation-Skipping Transfer) Tax Return with the Internal Revenue Service, which included the value of the property in the marital trust. On the federal estate tax return, the personal representative reported an Estate value of $5,582,245. The personal representative also filed a Maryland estate tax return, in which he excluded the value of the marital trust, decreasing the reported value of Ms. Taylor's federal gross estate by $4,108,048.02. In a statement attached to the Maryland return, the personal representative explained his deduction of Ms. Taylor's interest in the marital trust.

After examining the Maryland estate tax return, the Comptroller of the Maryland Treasury disallowed the claimed exclusion of Ms. Taylor's interest in the marital trust, adding back the value to the federal gross estate and the corresponding Maryland estate. The Comptroller then sent the personal representative a Deficiency Notice, which added interest, a 10% late penalty, and imposed a 25% penalty "due on underpayment attributable to substantial estate tax valuation."

In a letter to the Comptroller dated January 20, 2014, the personal representative protested the Deficiency Notice and objected to the Comptroller's demands. On May 28, 2014, the

Comptroller sent a revised Deficiency Notice, waiving the 25% penalty, but retaining the 10% late penalty. On June 24, 2014, the personal representative filed a Petition of Appeal.

The Tax Court affirmed the estate tax assessed on the trust assets, as well as the assessed interest. In an amendment to its memorandum and order, the Court waived and abated the 10% late penalty fee. The personal representative filed an appeal with the Circuit Court for Washington County on September 17, 2015. The Comptroller filed a cross-petition for review of the Tax Court's decision to abate the late penalty payment.

The circuit court reversed the Tax Court's assessment of taxes and interest against the Estate. The Court of Special Appeals affirmed.

Held: Reversed in part and affirmed in part.

The Comptroller appealed to the Court of Appeals to determine: (1) whether the value of Ms. Taylor's interest in the QTIP trust, created in Michigan, should be included in her Maryland estate, and therefore subject to the Maryland estate tax; and (2) whether the Tax Court improperly waive the late-filing penalty. The personal representative filed a cross petition, seeking to determine: (1) whether the Comptroller's taxation of the QTIP trust on Ms. Taylor's Maryland Estate was constitutional; and (2) whether the Court had a sufficient basis to permit review of the constitutionality question.

The Court of Appeals concluded that Ms. Taylor had a property interest in the full value of the marital trust by operation of the fictional transfers created through the federal statutory scheme. Pursuant to the federal scheme, Ms. Taylor's interest was treated as outright ownership of the QTIP property and the marital deduction was allowed for the entire value of the QTIP trust. By operation of the Maryland tax code, the Court concluded that Ms. Taylor's federal gross estate was the same as her Maryland estate, such that the entire value of the marital trust was rightfully taxed by the State. The Court of Appeals concluded that the Tax Court did not improperly waive the late penalty because it had broad discretion to waive the penalty for "reasonable cause," which the personal representative sufficiently demonstrated. Regarding the personal representative's cross-appeal, the Court noted that its review was limited to the Tax Court's findings and to the reasons for those findings. Because the Tax Court did not expressly make a finding regarding the constitutionality of the tax, the issue was not preserved for appeal and the Court therefore declined to consider the personal representative's constitutional arguments on the merits.

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Wallace & Gale Asbestos Settlement Trust v. William Edward Busch, Jr., et ux., No. 58, September Term 2018. Opinion by Harrell, J.

Getty, J., dissents.

https://www.mdcourts.gov/data/opinions/coa/2019/58a18.pdf

ASBESTOS – LIABILITY – CIRCUMSTANTIAL EVIDENCE – REASONABLE INFERENCES

EVIDENCE – "OPENING THE DOOR" DOCTRINE

Facts:

William Edward Busch worked, for 30 years, for Honeywell Corporation, installing heating, ventilation, and air conditioning equipment in buildings. He was exposed to asbestos at various jobsites, including the site of alleged exposure in this case, Loch Raven High School. He was diagnosed with mesothelioma in 2016.

At Loch Raven, Mr. Busch performed work in the boiler room for approximately three or four months in late 1971 into early 1972, in the final phase of construction. Mr. Busch did not work directly with asbestos-containing insulation, but averred in his testimony that other workers in the boiler room cut large blocks of insulation and created a "snow storm" of asbestos dust, inhaled inevitably by those nearby.

Mr. Busch brought suit against multiple defendants, including Wallace & Gale, for which the Wallace & Gale Asbestos Settlement Trust was formed, and McCormick Asbestos Company. Wallace & Gale asserted cross-claims against McCormick Asbestos Company, alleging McCormick's responsibility for the asbestos work. McCormick was dismissed (by grant of summary judgment) from the proceedings before trial commenced.

In response to pre-trial defense interrogatory requests, Mr. Busch identified McCormick and Georgia-Pacific, LLC as the responsible sources of products leading to his asbestos exposure at Loch Raven. Two other Honeywell workers, who had supposed personal knowledge of the asbestos exposure at Loch Raven, identified McCormick as responsible for the asbestos-containing insulation as well. At trial, Mr. Busch testified that he did not remember who installed, supplied, or manufactured the asbestos-containing insulation used to insulate the pipes and boilers in the boiler room.

In response to Mr. Busch's interrogatories, Wallace & Gale produced documents that supported the existence of a contractual relationship between it and a mechanical contractor at Loch Raven. Although the contract itself was not produced, the inferred contract provided $145,250.00 as the total consideration due to Wallace & Gale to insulate the "plumbing, heating and ventilating surfaces" at Loch Raven. Other documents produced included partial billing statements relating

to the job, time sheets which showed that Wallace & Gale workers spent over 4,500 person-hours at Loch Raven, invoices, order forms, and shipment records. None of the documents referred specifically to Wallace & Gale with regard to asbestos-containing products used or installed at Loch Raven in the boiler room or elsewhere.

The jury returned a verdict in favor of Mr. Busch, awarding him $318,528.33 for past medical expenses, $1,250,000.00 for past and future economic loss, and $10,000,000.00 for non-economic losses. The jury rewarded his wife $3,000,000 for loss of consortium.

The Court of Special Appeals affirmed, holding first that that sufficient evidence existed for the jury to infer that it was likely or probable that Wallace & Gale performed the insulation work (with asbestos-containing products) in the boiler room at Loch Raven during the time Mr. Busch worked there. The intermediate appellate court held also that the trial judge did not abuse her discretion in allowing the Mr. Busch to inform the jury that McCormick had been dismissed as a defendant.

Held: Affirmed.

The Court of Appeals determined that the evidence presented at trial regarding Wallace & Gale's work at Loch Raven was sufficient, by the preponderance of the evidence standard (more likely so than not), to allow the case to go to the jury and for the jury to conclude that Wallace & Gale was liable for Mr. Busch's mesothelioma. Additionally, the Court found that the trial judge did not abuse her discretion by allowing Mr. Busch to inform the jury of McCormick's dismissal from this litigation.

The Court, guided by *Eagle-Picher Industries, Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445 (1992), looked at the "frequency, proximity, and regularity" of Mr. Busch's exposure to the asbestos-containing insulation used allegedly by Wallace & Gale. It focused on reasonable inferences that could have been drawn by the factfinder from the direct and circumstantial evidence presented at trial. The Court discussed the documents moved into evidence, including but not limited to: time sheets showing that Wallace & Gale spent over 4,500 person-hours in the construction at Loch Raven; partial billing statements indicating that Wallace & Gale had insulated plumbing and heating surfaces at Loch Raven; invoices reflecting partial payment for work performed at Loch Raven; and, partial invoices for the fire lines work Wallace & Gale performed in the boiler room. The documents and their fragmentary nature, according to the Court, left room for a reasonable inference from the jury that Wallace & Gale was the primary, if not only, insulation contractor working in Loch Raven. No evidence, other than deposition testimony, was adduced to identify any other asbestos contractor that performed work in Loch Raven.

The Court then turned to Wallace & Gale's contention that the trial judge abused her discretion in informing the jury that McCormick had been dismissed from the lawsuit. Wallace & Gale moved successfully into evidence historical Baltimore City Asbestos Personal Injury Master

Complaints and Amendments by Interlineation, dating from the late 1980s and early 1990s. The documents identified all of the parties sued initially by Mr. Busch, as well as at least 23 other entities not being tried in his case. In response to these admissions, Mr. Busch sought to admit the circuit court's order granting summary judgment, dismissing McCormick. Looking to the "opening the door doctrine," the Court reasoned that the trial judge considered carefully the evidence. The introduction of the historical documents, with nothing more, invited the jury to speculate why McCormick was no longer a party of the lawsuit. As such, the Court found no error in allowing the jury to be informed of McCormick's dismissal.

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COURT OF SPECIAL APPEALS

John Vigna v. State of Maryland, No. 1327, September Term 2017, filed July 31, 2019. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2019/1327s17.pdf

CRIMINAL LAW – CHARACTER EVIDENCE – CHARACTER OF ACCUSED

Facts:

John Vigna was a long-time elementary school teacher in Montgomery County. In 2016, a student reported that Mr. Vigna had touched her inappropriately in his classroom. The subsequent investigation revealed that Mr. Vigna had sexually abused elementary aged students as far back as the 2001-2002 school year. Mr. Vigna invited students to sit in his lap and gave them frequent hugs and kisses, claiming that his behavior was simply that of a warm and affectionate teacher. In fact, Mr. Vigna was creating excuses to get physically close to his students and using the opportunity to molest them. Mr. Vigna was convicted of one count of Child Abuse, three counts of Sex Abuse of a Minor, and five counts of Sex Offense in the Third Degree. He was sentenced to eighty years in prison, all but forty-eight suspended.

Mr. Vigna raised several issues on appeal. He argued, *first*, that the circuit court improperly excluded evidence that Mr. Vigna has a reputation in the community for interacting appropriately with children under his care. He argued, *second*, that the circuit court improperly admitted reprimands from previous school years for behaving inappropriately with students in his classroom. He argued, *third*, that the circuit court improperly admitted a school counselor's hearsay testimony relaying on of his victim's reports of her sexual abuse. And he argued, *finally*, that the circuit court's evidentiary rulings violated his right to a fair trial under the Sixth Amendment to the U.S. Constitution.

Held: Affirmed

The Court of Special Appeals affirmed Mr. Vigna's convictions *in toto*. The Court held that a defendant's reputation for appropriate interaction with children is not a pertinent character trait under Maryland Rule 5-404(a)(2)(A). The Court reasoned that a defendant's public, appropriate

interactions with children have no bearing on whether they abuse children in private. And because the trait is not relevant, it is not admissible under Rule 5-404(a)(2)(A).

The Court of Special Appeals also found that the circuit court acted within its discretion in admitting Mr. Vigna's prior reprimands under Maryland Rule 5-404(b) for the purposes of demonstrating the Mr. Vigna was on notice that his actions were wrongful. The Court also found that the circuit court properly admitted the school counselor's hearsay testimony under the prompt complaint exception to the general prohibition on hearsay laid out in Maryland Rule 5-802.1(d). The Court finally held that there was no violation of Mr. Vigna's Sixth Amendment right to a fair trial and affirmed his convictions.

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Darrayl John Wilson v. State of Maryland, No. 436, September Term 2018, filed July 30, 2019. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2019/0436s18.pdf

SPOUSAL PRIVILEGE—SHAM MARRIAGES

WITNESS TAMPERING AND OBSTRUCTION OF JUSTICE—CORRUPT MEANS

Facts:

Defendant confessed to his girlfriend that he was responsible for a murder. Girlfriend subsequently informed the police, and defendant was charged with that murder. While awaiting the murder trial, defendant attempted to marry girlfriend via a telephone call so that she could invoke her spousal privilege and avoid being compelled to testify against him in defendant's pending murder trial.

In response to defendant's purported marriage to his girlfriend, the State charged defendant with "corrupt means" witness tampering and obstruction of justice—namely for seeking to silence the girlfriend's testimony. A jury convicted defendant of witness tampering and obstruction of justice, and defendant appealed.

Held: Reversed.

The prevailing rule throughout the country is to allow a spouse to invoke the spousal privilege regardless of the reasons for the marriage—including for the sole purpose of silencing a potential witness. Prior Maryland cases acknowledged the prevailing rule, but it is now expressly adopted.

In light of adopting the prevailing rule, there can be no "corrupt means" witness tampering or obstruction of justice for simply endeavoring to invoke a legally recognized evidentiary privilege.

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Schwan Food Co., et al. v. Ryan Frederick, No. 1289, September Term 2017, filed June 27, 2019. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2019/1289s17.pdf

WORKERS' COMPENSATION – ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT – QUESTIONS OF FACT AND LAW

Facts:

Ryan Frederick worked as a customer service representative for Schwan Food Company ("Schwan"), which is based in Minnesota with no local offices in Maryland. His job entailed traveling in his personal car to various grocery stores throughout Maryland to meet Schwan's delivery drivers and receive inventory deliveries for each of his accounts. As was his routine, on the morning of the incident, Mr. Frederick used his employer-provided handheld computer to download his route for the day from his home. His plan was to drop his son off at daycare on the way to his first account, the Walmart in Ellicott City. Unfortunately, he slipped on black ice on the sidewalk by his car in front of his home and suffered injury to his right leg. Mr. Frederick filed a claim with the Workers' Compensation Commission ("WCC"), which summarily denied his claim. Mr. Frederick petitioned for judicial review in the Circuit Court for Baltimore County and requested a jury trial. At the close of all evidence, the court granted Mr. Frederick's motion for judgment. The court concluded that Mr. Frederick had been working from his "home office" before he set out to travel to his first account, and consequently, the injury that he sustained "arose out of and in the course of his employment." Schwan timely appealed.

Held: Reversed

The Court of Special Appeals concluded that an employee's home may, under certain circumstances, constitute a work site under Maryland workers' compensation law. In so holding, the Court adopted Professor Arthur Larson's three indicia for determining whether the home constitutes a work site: (1) the quantity and regularity of work performed at home; (2) the presence of work equipment at home; and (3) the special circumstances of the employment rendering it necessary, and not merely personally convenient, to work at home. The Court specified, however, that Maryland decisional law requires a showing, under Larson's third prong, that the employer acquiesced to the employee regularly using his or her home as work site, or reasonably should have known the employee was regularly using the home as a work site.

Thus, the Court held that when an employee leaves his or her home work site after engaging in work-related activity there to which the employer has either acquiesced or reasonably should have known about, injuries sustained by the employee en route from the employee's home work site to another work-related site may arise out of and in the course of employment. *See Roberts*

v. Montgomery County, 436 Md. 591, 605 (2014). In Mr. Frederick's case, material facts informing the "in the course of" analysis in the case remained in dispute—namely, whether Mr. Frederick's home qualified as a home work site and whether he had commenced his work day and was fulfilling his work duties, or something incident thereto, at the time of his injury. Because it was for the jury to resolve these predicate factual issues, the Court remanded the case for a new trial.

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

https://mdcourts.gov/appellate/unreportedopinions

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