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https://www.courts.state.md.us/data/opinions/coa/2020/52a19.pdf

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Facts:

In 1989, Petitioner Maryland Reclamation Associates, Inc. ("MRA"), contracted to purchase 62 acres of land ("the Property") located on Gravel Hill Road, in Harford County, Respondent, to construct a rubble landfill. Prior to purchase, MRA began the process to obtain a rubble landfill purchase from the Maryland Department of the Environment ("MDE") and successfully sought inclusion in Harford County's Solid Waste Management Plan ("SWMP"). After MRA purchased the property, the County Council introduced Resolution 4-90 to remove MRA's property from the SWMP. MRA challenged the resolution and the Court of Special Appeals held that the resolution was an invalid exercise of the Council's power, as it was preempted by State law governing the issuance of rubble landfill permits. *Holmes v. Md. Reclamation Assocs., Inc.*, 90 Md. App. 120, *cert. dismissed sub nom. Cty. Council of Harford Cty. v. Md. Reclamation Assocs., Inc*., 328 Md. 229 (1992) ("*MRA I*").

While litigation was pending over the resolution, the County Council introduced and passed Bill 91-10 to amend the requirements for a rubble landfill by increasing the minimum acreage requirements, buffer requirements, and height requirements. The Council also introduced and passed Bill 91-16, which allowed the Council to remove a specific site from the County's SWMP if the site did not comply with certain zoning regulations, if a permit had not been issued by MDE within 18 months of the site being placed in the County's SWMP, or if the owner of the site had not placed the site in operation within the same 18-month period. In 1991, the Council passed Resolution 15-91, which purported to interpret Harford County law and determine that that Property was not in compliance with county law.

MRA filed suit seeking a declaration that Bill 91-10 and Bill 91-16 were "null and void" with respect to the property, an injunction preventing enforcement of the three laws, and an injunction staying all further action by the Harford County Board of Appeals. The suit ultimately reached

the Court of Appeals, which held that MRA failed to exhaust its administrative remedies, including appealing the Zoning Administrator's ruling to the Board of Appeals, and applying to the Zoning Administrator for variances. *Md. Reclamation Assocs., Inc. v. Harford Cty*., 342 Md. 476 (1996) ("*MRA II*").

Following *MRA II*, MRA filed requests for interpretation of Bill 91-10 and 91-16 from the Zoning Administrator and subsequently appealed the adverse rulings to the Harford County Board of Appeals. MRA's appeal ultimately reached the Court of Appeals, which once again held that MRA failed to exhaust its administrative remedies by seeking a variance form the applicable requirements. *Md. Reclamation Assocs., Inc. v. Harford Cty*., 382 Md. 348 (2004) ("*MRA III*").

In 2005, MRA requested, and was denied, several variances from the provisions of Bill 91-10 arguing that it satisfied the variance standards under the Harford County Code. However, MRA failed to allege or assert that the application of Bill 91-10 to the Property, and the denial of a variance, would deprive MRA of all beneficial uses of the Property. Again, the case reached the Court of Appeals, which upheld the Board's denial of the variances and held that (1) the County was not preempted from enacting zoning laws addressing rubble landfills; (2) MRA did not have a constitutionally protected vested right to operate the rubble landfill; (3) the application of Bill 91-10 to MRA's Property was not arbitrary or capricious, and MRA did not have any substantive or procedural due process right in a rubble fill operation under the Maryland Constitution, the Maryland Declaration of Rights, or 42 U.S.C. § 1983; and (4) the County was not estopped from applying Bill 91-10 to MRA's Property because MRA had no vested right. *Md. Reclamation Assocs., Inc. v. Harford Cty*., 414 Md. 1 (2010) ("*MRA IV*").

Almost six years after the denial of its variance, MRA filed the instant action in the circuit court for Harford County alleging a "cause of action for inverse condemnation" and seeking just compensation from a jury pursuant to Article III, Section 40 of the Maryland Constitution. At trial, MRA presented the same operative facts and legal arguments presented and specifically rejected by the Court of Appeals in the previous iterations of the case. The jury found that "MRA's inability to operate a rubble landfill" was a "regulatory taking" and awarded MRA damages in the amount of $45,420,076.

On appeal, the Court of Special Appeals held that MRA exhausted its administrative remedies, but that MRA's takings claim is barred by the statute of limitations because it was filed more than three years after it accrued on June 5, 2007, the date of the Board's final decision denying MRA's variance requests.

Held: Affirmed.

The Court of Appeals held that, MRA was required, and failed, to exhaust its administrative remedies by submitting all state constitutional claims to the Board of Appeals. Our jurisprudence does not carve out an "takings exception" from the exhaustion requirement. Under established

Maryland case law, where a property owner is asserting an unconstitutional taking of its property arising from the application of a zoning regulation, as part of the administrative proceeding, the property owner is required to establish that he or she will be deprived of all beneficial use of the property.

Whether a property owner will be deprived of all beneficial use of a property is an initial factual determination that is within the original jurisdiction of the Board of Appeals, subject to judicial review As part of the administrative proceeding, the Board of Appeals has original jurisdiction to make the initial determination of whether the application of a zoning regulation to a property, and the denial of a variance to permit the use, will deprive the property owner of all beneficial use of the property. Moreover, the Board of Appeals is vested with the authority to grant the necessary relief on either constitutional or non-constitutional grounds. The fact that an administrative agency does not have the ability to award just compensation if a regulatory taking is established and relief in the form of a variance is not granted, does not negate the requirement that the landowner must exhaust its administrative remedies.

Despite the Court's clear directive in the previous iterations of the case and the established caselaw, MRA failed to present evidence or argue before the Board of Appeals that the failure to grant a variance would deprive MRA of all beneficial use of its Property. The Court held that MRA could not circumvent the exhaustion requirement by withholding its takings argument from the Board's consideration and later presenting the claim to a jury under the court's original jurisdiction. Accordingly, the Court held that the case should have been dismissed because MRA never raised its takings claim in the administrative proceeding.

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Attorney Grievance Commission of Maryland v. Mohamed Alpha Bah, Misc. Docket AG No. 3, September Term 2019, filed April 10, 2020. Opinion by Barbera, CJ.

https://mdcourts.gov/data/opinions/coa/2020/3a19ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

On April 29, 2019, Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Mohamed Alpha Bah. The Petition concerned ten separate complaints filed by former clients against Bah and alleged violations of the Maryland Attorneys' Rules of Professional Conduct ("MARPC") 19-301.1 (Competence), 19-301.2(a) (Scope of Representation), 19-301.3 (Diligence), 19-301.4 (Communication), 19-301.15(a) and (c) (Safekeeping of Property), 19-301.16(d) (Declining or Terminating Representation), 19-303.2 (Expediting Litigation), 19-305.5(a) (Unauthorized Practice of Law), 19-308.1(b) (Bar Admission and Disciplinary Matters), and 19-308.4(a), (c), and (d) (Misconduct). Additionally, Bar Counsel alleged that Bah violated Maryland Code §§ 10-304(a) (Deposit of trust money) and 10-306 (Misuse of trust money) of the Business Occupations and Professions Article.

On May 14, 2019, pursuant to the Maryland Rules, the Court of Appeals transmitted this matter to the Circuit Court for Baltimore City and designated the Honorable Althea M. Handy ("the hearing judge") to conduct an evidentiary hearing and make findings of fact and conclusions of law. On August 5, 2019, Bar Counsel filed a Motion for Order of Default after Bah failed to respond to the Petition for Disciplinary or Remedial Action, Petitioner's Interrogatories, Petitioner's Request for Production of Documents, and Petitioner's Request for Admission of Facts and Genuineness of Documents. On August 14, 2019, the hearing judge issued an Order of Default and scheduled a hearing for September 24, 2019. Bah failed to file any response.

The circuit court held a hearing on September 24, 2019. Jessica T. Ornsby, Esquire appeared at the hearing for the limited purpose of requesting a continuance on behalf of Bah, who did not appear. The hearing judge, having found that Bah had been properly served and had already been afforded ample time to retain counsel prior to the hearing date, denied the continuance request. Pursuant to Maryland Rule 2-424(b), the hearing judge admitted and received as evidence Petitioner's Request for Admissions. According to the Maryland Rules, Bah is deemed to have admitted both the averments in the Petition and the facts set forth in the exhibits attached to Petitioner's Request for Admission of Facts and Genuineness of Documents, so those matters are treated as conclusively established.

The hearing judge issued written findings of fact and proposed conclusions of law, concluding that Bah had violated the aforementioned provisions of the MARPC and the Business

Occupations and Professions Article. These violations arose from Respondent's pattern of neglect of client affairs, including his failure to communicate with his clients or respond to Bar Counsel; failure to deposit and maintain client funds in an attorney trust account until earned; failure to provide clients with refunds of unearned fees; and deceitful and dishonest conduct related to the misappropriation of funds. Neither party filed exceptions.

Held: Disbarred

The Court of Appeals disbarred Bah following oral argument on March 5, 2020. The Court later filed an opinion in which it accepted the factual findings of the circuit court and agreed with the hearing judge's recommended conclusions of law that Bah had violated MARPC 19-301.1 (Competence), 19-301.2(a) (Scope of Representation), 19-301.3 (Diligence), 19-301.4 (Communication), 19-301.15(a) and (c) (Safekeeping of Property), 19-301.16(d) (Declining or Terminating Representation), 19-303.2 (Expediting Litigation), 19-305.5(a) (Unauthorized Practice of Law), 19-308.1(b) (Bar Admission and Disciplinary Matters), and 19-308.4(a), (c), and (d) (Misconduct), and §§ 10-304(a) (Deposit of trust money) and 10-306 (Misuse of trust money) of the Business Occupations and Professions Article.

The Court held that disbarment is the appropriate sanction for Bah's numerous and severe violations of the MARPC and Business Occupations and Professions Article. Bah abandoned the representation of seven clients. In those matters, Bah collected fees and then abandoned the client before completing the objective of the representation. In ten client matters, Bah failed to respond to his clients' requests for information and even sent a mass email implying that his clients should not contact him regarding the status of their matters. Bah failed to deposit and maintain client funds in an attorney trust account until earned in several instances, and Bah failed to provide his clients with refunds of unearned fees. Bah engaged in deceitful and dishonest conduct by knowingly and intentionally misrepresenting that he needed additional funds for "filing fees" and subsequently misappropriating one of those payments.

Furthermore, Bah failed to provide responses to the majority of Bar Counsel's numerous requests for information and documentation. When Bah did provide a response, his responses were untimely and incomplete. Bah failed to participate in the attorney grievance proceeding by failing to: file an answer to the Petition for Disciplinary or Remedial Action; respond to Bar Counsel's discovery requests; and appear at the September 24, 2019, hearing or the hearing before the Court of Appeals.

Accordingly, the Court determined that the multiple infractions involving multiple client matters warranted disbarment.

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Larry Daniel Bratt v. State of Maryland, No. 39, September Term 2019, filed April 28, 2020. Opinion by Hotten, J.

https://www.courts.state.md.us/data/opinions/coa/2020/39a19.pdf

CRIMINAL LAW – SENTENCING – CREDIT FOR TIME SERVED – CORRECTION TO COMMITMENT RECORD – MOTION TO CORRECT AN ILLEGAL SENTENCE

Facts:

Following a jury trial in August 1983 in the Circuit Court for Anne Arundel County, Larry D. Bratt ("Petitioner") was convicted of two counts of first-degree murder and sentenced to two consecutive life terms. The trial judge did not apply credit for time served in pronouncing the sentence, nor did Petitioner assert that he was entitled to credit for time served. In 1992, Petitioner sent a communication to the trial judge requesting credit for time served pre-trial in the Anne Arundel County Detention Center and a DeKalb County, Georgia jail, as well as the modification of his sentence from consecutive to concurrent terms of imprisonment. Petitioner did not provide documentation indicating that he was entitled to the requested time. The trial judge denied both his requests.

In 1995, the commitment records specialist for the Maryland Division of Corrections sent a letter to the court, which reflected that Petitioner was entitled to 48 days of "good conduct" credits. These "good conduct" credits were not the equivalent of pre-trial credit for time served. She also inquired whether Petitioner's sentence should commence on the day of sentencing or the date of his detention in Anne Arundel County. The court subsequently issued an amended commitment record, reflecting that Petitioner had earned 48 "good conduct credit." The amended commitment record did not specify the date Petitioner's sentence should commence. The trial court then entered another order noting that Petitioner was entitled to the 48 days of credit for good conduct and credit for time served in the Anne Arundel County Detention Center.

Decades later, Petitioner filed the two motions underlying this appeal. In 2017, Petitioner filed a Petition for Pre-Trial Incarceration Credit and Correction of the Commitment Record ("Petition for Credit"), arguing that he was entitled to 102 days of credit for pre-trial time served in Georgia preceding his transfer to Maryland, and that the credit awarded to date only reflected time served pre-trial after his transfer. In his Petition for Credit, Petitioner requested a hearing pursuant to Rule 4-345(f), which governs the correction of an illegal sentence. In response, the court ordered the clerk of the court to amend the commitment record to reflect time served in Georgia. No hearing was held on the Petition for Credit.

In 2018, Petitioner filed a Motion to Correct an Illegal Sentence ("Motion to Correct"). He again argued that the sentencing judge failed to apply credits for time served and that the failure to award credit for time served rendered his sentence illegal. He also argued that the failure to hold a hearing on the matter in 2017 was a separate sentence illegality that entitled him to the relief

sought. The trial judge granted the request for a hearing and later determined that the sentence was in fact illegal. Thus, the 2017 amendment was "of no legal force or effect." Thereafter, the court vacated the sentence, resentenced Petitioner to two consecutive life terms, and issued a new commitment record so that the imposed sentence began on July 16, 1982—the date of Petitioner's detention in Georgia.

The State appealed to the Court of Special Appeals, arguing that the failure to award credit was not a substantive sentence illegality, and therefore the issue was not the appropriate subject a Rule 4-345 Motion to Correct. The Court of Special Appeals reversed the trial court and held that although a Rule 4-345 motion to correct an illegal sentence was an appropriate mechanism to request an adjustment to the commitment record, the alleged sentence illegality had been remedied by his prior Petition for Credit, which did not require a hearing.

Held:

The Court of Appeals affirmed the Court of Special Appeals, but for different reasons. The Court held that the failure to award credit for time served against a sentence was not an illegality to which Rule 4-345 applies. Rather, Rule 4-345 applies to substantive illegalities that exist in the sentence itself. Failure to award credit is a procedural defect because the credit has no impact on the substance of the sentence or whether the sentence is permitted by law. Accordingly, the Court held that Petitioner was not entitled to a hearing under Rule 4-345.

Instead, Rule 4-351 is the appropriate vehicle to address the failure to award credit for time served. Rule 4-351 governs the maintenance of commitment records and dictates that the commitment record shall reflect any credit "allowed to the defendant by law[.]" Therefore, to achieve a correction or change of the commitment record mandated by Rule 4-351, the appropriate vehicle is a motion to amend the commitment record.

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State of Maryland v. Hussain Ali Zadeh, No. 25, September Term 2019, filed April 3, 2020. Opinion by Hotten, J.
Watts, J., joins in judgment only.
McDonald and Getty, JJ., dissent in part.

https://mdcourts.gov/data/opinions/coa/2020/25a19.pdf

CRIMINAL LAW—JOINDER OR SEVERANCE OF CO-DEFENDANTS—LIMITING INSTRUCTIONS AND OTHER REMEDIES

CONSTITUTIONAL LAW—FOURTH AMENDMENT—SEARCHES AND SEIZURES—SUPPRESSION OF EVIDENCE—WARRANT EXCEPTIONS—PLAIN-FEEL DOCTRINE

Facts:

Respondent, Hussain Ali Zadeh, was tried and convicted in the Circuit Court of Montgomery County along with co-defendant, Larlane Pannell-Brown, for the murder of Ms. Pannell-Brown's husband, Cecil Brown. Both defendants were convicted of second-degree murder and sentenced to 30 years in prison. On appeal to the Court of Special Appeals, Respondent argued that (1) his trial should have been severed from that of Ms. Pannell-Brown because a substantial amount of the evidence against Ms. Pannell-Brown was not admissible against, or even relevant to him and (2) the trial court should have suppressed a cell phone that was seized from his person in violation of the Fourth Amendment of the United States Constitution and Article 26 of the Maryland Declaration of Rights.

On August 5, 2014, the Takoma Park Police Department obtained a vehicle search warrant for a 2007 silver Jaguar station wagon registered to Ms. Pannell-Brown, in connection with the murder of Mr. Brown. When the police stopped the vehicle to execute the warrant, Respondent was driving the vehicle. Respondent was asked to exit the vehicle and a protective frisk was conducted for "officer safety." During the frisk, the officer felt what he believed was a cell phone in Respondent's pocket, and seized it. At the suppression hearing, the trial judge denied the Respondent's motion, finding that the vehicle search warrant, which authorized the seizure of "electronic equipment[,] which stores data[,]" from the vehicle, encompassed the seizure of the cell-phone from his person. The trial court also found that, even if the vehicle search warrant did not authorize the seizure, the plain-feel doctrine applied to the search of Respondent's pocket.

On appeal, the State argued that the officer was permitted to seize the phone under the plain-feel doctrine because the vehicle search warrant established the probable cause sufficient to seize the phone. The Court of Special Appeals rejected that argument and held that the police improperly seized the cell phone while executing a vehicle search warrant. The Court of Special Appeals also applied the Hines test to determine whether the introduction of non-mutually admissible evidence warranted severance or a mistrial. The Court held that non-mutually admissible

evidence was in fact introduced at trial, and the trial court abused its discretion in denying the motions for severance and a mistrial.

Held: Affirmed.

The Court of Appeals affirmed the Court of Special Appeals. Regarding the severance question, the Court held that the cumulative effect of the introduction of non-mutually admissible evidence unfairly prejudiced Respondent. The trial court abused its discretion in denying the motion for severance, because the limiting instructions were insufficient to cure the prejudice that resulted from the introduction and admission of the non-mutually admissible evidence. Under Hines, severance is appropriate where (1) non-mutually admissible evidence will be introduced; (2) the admission of the evidence causes unfair prejudice; and (3) such prejudice cannot be cured by other relief, such as limiting introductions or redactions. A reasonable juror would not have been able to determine which evidence was admissible against which defendant. The motion for a mistrial should have been granted. Respondent was prejudiced by the joinder of his trial with his co-defendant and the trial court abused its discretion in denying the respective motions for severance and a mistrial.

The Court of Appeals also held that the seizure of a cell phone from Respondent was unlawful because (1) the vehicle search warrant and the probable cause sufficient to obtain that warrant did not authorize the seizure of the cell phone from his person, (2) the officer exceeded the parameters of the plain-feel doctrine, and (3) none of the other delineated exceptions to the warrant requirement applied. Accordingly, the cell phone and any evidence obtained from it should have been suppressed, as the seizure of the phone without a warrant or applicable exception to the warrant requirement violated the Fourth Amendment to the United States Constitution and Article 26 of the Maryland Declaration of Rights.

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Teddy Shannon v. State of Maryland, No. 46, September Term 2019, filed April 24, 2020. Opinion by McDonald, J.

https://mdcourts.gov/data/opinions/coa/2020/46a19.pdf

CRIMINAL PROCEDURE – CHARGING DOCUMENT – FIREARMS OFFENSE – EFFECT OF DRAFTING ERROR

Facts:

Teddy Shannon was charged in the Circuit Court for Baltimore City with, among other offenses, unlawful possession of a regulated firearm in violation of Maryland Code, Public Safety Article ("PS"), §5-133(c)(1). Pursuant to that statute, a person is disqualified from possessing a regulated firearm following conviction of certain offenses, which the statute groups into three categories: (1) a "crime of violence," defined as one of 19 enumerated offenses under Maryland law; (2) certain drug offenses, including as pertinent to this case, possession with intent to distribute a controlled substance, in violation of Maryland Code, Criminal Law Article §5-602; and (3) an out-of-state or federal offense equivalent to an offense in the first two categories. PS §5-133(c)(1)(i)-(iii).

Mr. Shannon was arrested pursuant to a Statement of Charges that referenced two prior convictions that prohibited Mr. Shannon from possessing a firearm: a second-degree assault conviction, which constitutes a "crime of violence," and a conviction for possession with intent to distribute a controlled substance.

However, the Fifth Count of the subsequent indictment alleged that Mr. Shannon illegally possessed a specific regulated firearm after "having been convicted of a crime of violence . . . Possession with Intent to Distribute . . ." and provided further details relating to the drug offense. As "crime of violence" as defined in PS §5-133(c)(1) does not include drug offenses, this was clearly a drafting error. This mistake went unnoticed, likely because the parties agreed to a Stipulation of Fact, stating that Mr. Shannon had previously "been convicted of a crime for which he is prohibited from possessing a regulated firearm." Mr. Shannon did not concede the element of possession in the stipulation, which remained a question for the jury. Following a three-day trial, the jury found Mr. Shannon guilty of the firearm offense and was sentenced by the Circuit Court to a term of incarceration.

Mr. Shannon appealed, arguing for the first time that the Fifth Count failed to charge him with a cognizable crime because PS §5-133(c)(1) does not prohibit "possession of a forearm based on a prior conviction for a crime of violence defined as possession with intent to distribute a controlled dangerous substance" and accordingly the Circuit Court did not have jurisdiction to try him. The Court of Special Appeals held that the Fifth Court contained sufficient detail as to charge Mr. Shannon with violating PS §5-133(c)(1) but that the inclusion of the term "crime of violence" constituted a substantive mistake, which pursuant to the Maryland Rules required that

an amendment of the indictment with the assent of Mr. Shannon. The intermediate appellate court concluded that by agreeing to the Stipulation of Fact, Mr. Shannon had implicitly agreed to correct this mistake (otherwise known as a "constructive amendment") and as such the Court of Special Appeals affirmed his firearm conviction.

Held: Affirmed.

The Court of Appeals held that the drafting error in the indictment did not mean that the Fifth Count failed to allege a cognizable offense or to show jurisdiction in the circuit court. The Court first explained that for purposes of sufficiently charging an offense and vesting a court with jurisdiction to adjudicate the offense, Article 21 of the Maryland Declaration of Rights and Maryland Rule 4-202(a) require that an indictment provide a defendant with adequate notice of the crime charged and with reasonable particularity the basic set of facts supporting the elements of the crime. The Court next explained that the gravamen of a PS §5-133(c)(1) violation is the possession of the regulated firearm and that the unit of prosecution is the firearm, irrespective of the number of prior disqualifying convictions. This means that even if an indictment would include a detailed description of two different disqualifying convictions as the predicate offense for one charge of PS §5-133(c)(1), the indictment would not be found to have failed to charge a cognizable offense and deprive the circuit court of jurisdiction. The Court noted that the proper vehicle for challenging the presence of such language is a motion pursuant to Maryland Rule 4-252(a), which must be filed within 30 days of the defendant's, or the defendant's counsel's, initial appearance before the court. Finally, having concluded that in this case it was not necessary to have amended the indictment with the consent of the defendant, the Court of Appeals did not address whether Maryland Rule 4-204 allows for a constructive amendment of an indictment.

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Bibi Khan v. The Law Firm of Paley Rothman, No. 3050, September Term 2018, filed April 7, 2020. Opinion by Reed, J.

https://mdcourts.gov/data/opinions/cosa/2020/3050s18.pdf

APPEAL AND ERROR – REVIEW – SCOPE AND EXTENT OF REVIEW – STATUTORY OR LEGISLATIVE LAW

STATUTES – CONSTRUCTION – CLARITY AND AMBIGUITY; MULTIPLE MEANINGS – WHAT CONSTITUTES AMBIGUITY; HOW DETERMINED

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ATTORNEYS AND LEGAL SERVICES – LIEN OF ATTORNEY – SUBJECT-MATTER TO WHICH LIEN ATTACHES – JUDGMENT, SETTLEMENT, OR AWARDS

Facts:

On April 4, 2014, Bibi Khan ("Appellant") brought suit against her ex-husband Douglas Moore for custody and support of their minor son. Based on the parties agreed settlement, the court entered a custody and support order on March 4, 2015. Nonetheless, multiple motions were subsequently filed to modify that order. Appellant retained Tracey J. Coates, Esq. and the Law Firm of Paley Rothman, Goldstein, Rosenberg, Eig & Cooper, Chartered ("the Firm") to defend against Moore's third motion to modify the custody order.

Moore's motion sought to reduce his child support obligations; however the court denied the motions for failure to show a material change in circumstances to warrant such a modification. Days after the hearing, the Firm filed a petition for attorney fees on behalf of Appellant alleging a total of $74,538.97 in fees owed. The court granted the petition on May 31, 2018 and ordered Moore to pay Appellant $50,000 as contribution toward her attorney's fees.

After the award was ordered, Appellant received the $50,000 and deposited it in her personal Citibank account. The Firm promptly sent Appellant notice to remit payment in the amount of $50,000 within 10 days towards her balance with the firm. Although, neither party reached an agreement as to the amount of attorney fees Appellant actually owed.

The Law Firm subsequently filed a Motion to Adjudicate Rights in Connection with Attorney's Lien along with an affidavit reflecting the fees incurred by Appellant to the Firm in the amount of $57,379.12. The court heard the motion on October 3, 2018. Appellant argued that once the award was received and deposited in her Citibank account, the Firm lost any right to assert a lien against the award because the corpus no longer existed.

The circuit court was not convinced and held that the $50,000 did not lose its identity as a judgment award simply because Appellant deposited the money in her Citibank account. Moreover, the court held that the order awarding Appellant $50,000 was not a factual finding as to the amount of Attorney's fees Appellant actually owed; rather, the $50,000 was to be paid in contribution to the total amount of attorney's fees Appellant had incurred. The circuit court's ruling effectively validated Appellee's attorney's lien in the amount of $50,000 against the $50,000 fee award that Appellant deposited in her personal Citibank account, and ordered Citibank to pay the $50,000 in her account to the Firm.

Held: Affirmed.

Appellant appealed the circuit court's ruling to the Court of Special Appeals to determine whether the circuit court committed substantive and/or procedural error when it granted Appellee's Motion to Adjudicate Rights in Connection with Attorney's Lien pursuant to Md. Code Ann., Bus. Occ. & Prof. Art., § 10-501 and Maryland Rule 2-652.

She argued that the Firm did not have an enforceable attorney's lien against the $50,000 in her bank account and further contended that even if a valid attorney's lien remained after having deposited the award, the court erred by failing to adjudicate the disputed amount of attorney fees owed.

The Court of Special Appeals concluded that the plain language of § 10-501 and Maryland Rule 2-652 enables an attorney to assert and enforce an attorney's lien against an award of attorney's fees that a client received and deposited in his or her personal bank account. Accordingly, the corpus did not cease to exist when Appellant deposited the $50,000 in her Citibank account; rather, the award remained identifiable and subject to an enforceable attorney's lien. Moreover, the Court held that Appellant waived her argument that the circuit court erred by failing to adjudicate the disputed amount of attorney fees because she did not object to the manner of adjudication or the sufficiency of evidence considered. Because the issue was not preserved for appellate review, the Court declined to address the merits of Appellant's argument.

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Impac Mortgage Holdings, Inc. v. Curtis J. Timm, et al., No. 2119, September Term 2018, filed April 1, 2020. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2020/2119s18.pdf

BREACH OF CONTRACT – CONTRACT INTERPRETATION – OBJECTIVE VIEW – EFFECT GIVEN TO EACH CLAUSE

RULE 2-602(A)(3) MOTION TO MODIFY SUMMARY JUDGMENT – MOTION TO STRIKE AMENDED COMPLAINT – NO ABUSE OF DISCRETION

Facts:

Curtis Timm and Camac Fund LP ("Camac"), both owners of preferred shares in Impac Mortgage Holdings, Inc. ("Impac"), brought this action for monetary and injunctive relief against Impac arising from Impac's 2009 repurchase of certain preferred shares at a fraction of their value. The preferred shares were created in 2004, when Impac amended its charter with Articles Supplementary (the "Articles") to create "Series B" and "Series C" classes of preferred stock. At that time, Impac sold the shares for $25 per share in two public offerings that raised $161.7 million.

In 2009, after the real estate market tanked and the company hit hard times, Impac sought to buy back the Series B shares for approximately $0.29 per share and the Series C shares at approximately $0.28 per share. As a condition of buying back the stock, Impac also asked shareholders to agree to amend the Articles to, among other things, strip the shareholders of their right to collect dividends.

The vote was held (although some dispute this) and just over two-thirds of the Series B and Series C stockholders, collectively, agreed to the amendments and tendered their stock. But the two-thirds threshold wasn't met for each class on its own—just under two-thirds of the Class B shareholders tendered their shares. The question, then, is whether the approval of the amendments was valid. Impac says they were, and it filed the amendments with the United States Securities and Exchange Commission. But about two years later, Mr. Timm, a Series B and Series C preferred shareholder, filed a class action complaint, claiming, among other things, that the thresholds weren't met because Impac needed two-thirds of the shares in each class measured separately under the voting rights language in the Articles. Camac, which acquired Series B and C shares after the amendments, intervened as a plaintiff about three years later.

Among other things, Mr. Timm and Camac alleged that Impac breached the Series B Articles by amending them without the consent of two-thirds of the Series B shareholders. In the alternative, they also alleged that Impac breached both the Series B and Series C Articles because the language and terms of the documents in which Impac sought the consent of shareholders made the transaction improper under § 2-509(b) of the Corporations and Associations Article ("CA").

They argued that the transaction was structured in a way such that Impac would have bought back the shares before it had received the shareholder consents and was therefore improper under CA § 2-509(b), which prohibits corporations from voting shares of their own stock. They also asserted that the amendments were invalid because there was no evidence that Impac received any written consents from any shareholders. And finally, they alleged that the amendments were improper under various other theories, including breach of contract for violation of the covenant of good faith and fair dealing, illegal "vote buying," and self-dealing by the individual directors.

The circuit court held, *first*, that the voting rights provision concerning the "two-thirds" requirement was ambiguous, and that the ambiguity remained even after it considered extrinsic evidence. It ultimately construed the provision against Impac as the drafter under the doctrine of *contra proferentem*, holding that the amendments to the Series B Articles were improper because less than two-thirds of Series B shareholders voted in favor of them. It granted summary judgment in favor of Mr. Timm and Camac on that count and held that the 2004 Articles remained in effect. Accordingly, it ordered injunctive relief and damages in the form of payment of three quarters' worth of dividends pursuant to provisions in the 2004 Articles.

Second, the circuit court granted summary judgment in favor of Impac on all remaining counts and *third*, rejected Mr. Timm's and Camac's attempt to add a count to the complaint based on the "no written consents" theory. The court found that the language of the 2009 transaction documents did not violate the prohibition against corporations voting their own stock and that the other theories of liability were without merit.

Held: Affirmed.

The Court of Special Appeals affirmed. As to the *first* issue, the Court agreed with the circuit court in the outcome but disagreed with the circuit court that the voting rights provision was ambiguous. The Court held that the language of the voting rights was susceptible of only one meaning and was unambiguous, and therefore did not reach the question of whether the circuit court's consideration of extrinsic evidence and application of the doctrine of *contra proferentem* was proper.

As to the *second* issue, the Court held that Mr. Timm failed to present sufficient argument challenging the court's summary judgment rulings as to Counts II and III, which challenged the amendments to the Series B and Series C Articles based on the allegedly improper structure of the tender transaction and on various other legal theories. And *third*, the Court held that the circuit court did not abuse its discretion in denying plaintiffs' attempts to modify summary judgment and/or add a new count to complaint based on absence of evidence of written shareholder consents. The circuit court's conclusion that Mr. Timm and Camac had not alleged facts to support that theory of liability initially and their attempt to obtain discovery on that theory was based on speculation was not an abuse of discretion.

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Jamel Clark v. State of Maryland, No. 430, September Term 2019, filed April 30, 2020. Opinion by Reed, J.

https://mdcourts.gov/data/opinions/cosa/2020/0430s19.pdf

DOUBLE JEOPARDY – SENTENCTING AND PUNISHMENT – PROHIBITION OF MULTIPLE PROCEEDINGS OR PUNISHMENTS – EFFECT OF PROCEEDINGS AFTER ATTACHMENT OF JEOPARDY

SENTENCING AND PUNISHMENT – SENTENCE ON CONVICTION OF DIFFERENT CHARGE – SINGLE TRANSACTION OR COURSE OF – PROOF OF FACT NOT REQUIRED FOR OTHER OFFENSE – MERGER OF OFFENSES

CRIMINAL LAW – IN GENERAL – NATURE AND ELEMENTS OF CRIME – RULE OF LENITY – STATUTORY PROVISION – CONSTRUCTION AND OPERATION IN GENERAL – LIBERAL AND STRICT CONSTRUCTION

CRIMINAL LAW – IN GENERAL – NATURE AND ELEMENTS OF CRIME – SENTENCE ON CONVICTION OF DIFFERENT CHARGE – FUNDAMENTAL FAIRNESS

Facts:

On March 6, 2018, while in jail for reasons not disclosed by the record, Appellant called his girlfriend, Ms. McGregor. During the recorded conversation, Appellant questioned if she had "moved his stuff," she informed him that "the stuff was still wrapped up" and that she had moved it to the back closet "on top of the Christmas tree box." Detective Smith listened to this recorded call and based on what he heard Appellant say to his girlfriend, he applied for a warrant to search Ms. McGregor's house for contraband. The next day, Detective Smith executed the warrant at Ms. McGregor's house and found an Encom America 45-caliber semi-automatic pistol, which Ms. McGregor confessed belonged to Appellant. The Appellant was charged with possession of a firearm by a person previously convicted of a felony involving a controlled dangerous substance, in violation of Md. Code Ann., Crim. Law ("CL") § 5-622(b), and possession of an assault weapon, in violation of CL § 4-303(a)(2).

On March 29, 2019, a trial was held, and the State called Detective Smith and Ms. McGregor to testify. After the State played two video clips of their discovery of the weapon and Ms. McGregor's confession, the State read a stipulation between the state and defense into evidence, which stated that that the Defendant is prohibited from possessing a firearm because of a previous condition that prohibits his possession of a firearm and the firearm in question is classified as an assault pistol. The jury convicted Appellant of possession of a firearm by a person previously convicted of a felony involving a controlled dangerous substance, and possession of an assault weapon. Appellant was sentenced to two consecutive sentences, first for five years and then three years (the statutory maximums), for a total of eight years.

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Held: Affirmed.

Appellant appealed to the Court of Special appeals to determine (1) whether Appellant's sentences for possession of a firearm by a person previously convicted of a felony involving a controlled dangerous substance and possession of an assault weapon must be merged, where they were based on the possession of a single firearm.

The Court of Special Appeals holds that under the required evidence test, the Appellant's conviction for possession of an assault weapon was not required to be merged into the conviction for possession of a firearm by a person previously convicted of a felony involving a controlled dangerous substance, since each crime required proof that the other did not, and each offense can exist without the other. In review of the legislative history of CL § 4-303 and CL § 5-622, the Court did not find any indication of ambiguity in the application of the applicable statutes, and does not believe that it is "intrinsically unclear" as to the circumstances in which the statutes would be applicable. Therefore, the Court determines that the rule of lenity does not apply. Moreover, the Court holds that Appellant did not properly preserve his fundamental fairness argument for appellate review. Nevertheless, even if Appellant had not waived his contention regarding fundamental fairness, the Court is not persuaded that this principle would compel merger of Appellant's sentences. The Court found that the legislature obviously intended to punish these two acts separately, and not under one sentence and CL § 4-303 and CL § 5-622 punish separate instances of wrongdoing.

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In re: J.H., No. 2461, September Term 2018, filed April 29, 2020. Opinion by Reed, J.

https://mdcourts.gov/data/opinions/cosa/2020/2461s18.pdf

INDICTMENT AND CHARGING INSTRUMENTS – IN GENERAL – NATURE AND PURPOSES – BILL OF PARTICULARS

CRIMINAL LAW – JUVENILE JUSTICE – EVIDENCE – DEGREE OF PROOF

CRIMINAL LAW – SEX OFFENSES – BODILY CONTACT, PENETRATION

STATUTES – CONSTRUCTION – MEANING – IN GENERAL

INFANTS – SEX OFFENSES – CRIMINAL ACTS AGAINST CHILDREN – EVIDENCE ISSUES PARTICULAR TO OFFENSES AGAINST CHILDREN – WEIGHT AND SUFFICIENCY – INTENT, STATE OF MIND, AND MOTIVE

CRIMINAL LAW – EVIDENCE – HEARSAY IN GENERAL – EVIDENCE AS TO INFORMATION ACTED ON

CRIMINAL LAW – EVIDENCE – HEARSAY – HEARSAY IN GENERAL – PROMPT COMPLAINT EXCEPTION

SEX OFFENSES – EVIDENCE – ADMISSIBILITY OF VICTIM'S COMPLAINTS, STATEMENTS, AND DECLARATIONS – SCOPE OF TESTIMONY – DETAILS

CRIMINAL LAW – REVIEW – SCOPE OF REVIEW IN GENERAL – COMPETENCY IN GENERAL

EVIDENCE ADMISSIBLE BY REASON OF ADMISSION OF SIMILAR EVIDENCE OF ADVERSE PARTY

Facts:

Throughout the summer of 2017, the victim was dropped off at her grandmother's house for babysitting. In addition to the victim's grandmother, Appellant, his sister and his father also lived in this house. At some point between July 21st and mid-August of 2017, the victim's mother recognized that she (the victim) did not want to go to her grandmother's house, but she wouldn't say why. The mother eventually got a new babysitter, and three days later, on or about August 21, 2017, the victim informed her mother that Appellant "had inappropriate contact with her" at her grandmother's home. The victim stated that the contact occurred on a Saturday, when the victim had stayed overnight. The victim's mother testified that the victim had last stayed at her grandparents' house on a Saturday on either July 21 or July 28.

That same day, the mother took the victim to the hospital, where the victim stated that her "vagina . . . was hurting a lot." On August 23, 2017, the victim was interviewed by forensic social worker. During this interview, the victim stated that Appellant and Appellant's sister sexually assaulted her the last time that she went to her grandmother's house, which was a few days prior' to the interview. The victim was examined by forensic nurse examiner on August 31, 2017, where she was noted to have "a [pea size] partially healed tear" in her perineum, but no trauma to her hymen.

On April 25, 2018, a delinquency petition was filed in the circuit court, charging Appellant with second-degree sex offense and second-degree assault. On April 25, 2018, a delinquency petition was filed in the circuit court, charging Appellant with second-degree sex offense and second-degree assault. On June 28, 2018, the State amended the charge of second-degree sexual offense, substituting vaginal intercourse with "genital penetration with penis." Appellant then filed a bill of particulars, requesting more detail regarding the "genital area that was purportedly penetrated." The State responded that "the genital area" would include "the entire female genitalia area, including the anal area."

At the adjudicatory hearing held on August 1, 2018, the State presented testimony from the victim, the victim's mother, the social worker and the forensic examiner. The Appellant's only witness was his father. At the end of the adjudication proceeding the juvenile court found that the victim was in fact sexually abused, the juvenile court concluded that Appellant was involved in the delinquent act of second-degree sex offense and second-degree assault, placing him on supervised probation.

Held: Conviction of second-degree sexual offense reversed. Conviction of assault in the second degree affirmed.

Appellant appealed to the Court of Special appeals to determine (1) whether the juvenile court erred when it overruled Appellant's exceptions to the State's failure to respond to a demand for a bill of particulars; (2) whether the evidence legally sufficient to sustain the juvenile court's findings of delinquency pertaining to the act of sexual offense in the second degree; (3) whether the juvenile court erred when it admitted the statements of the victim's mother and social worker; and (4) whether the juvenile court erred when it admitted excerpts of the victim's recorded interview.

The Court of Special Appeals declines to define the perineum as a genital opening for the purposes of a second-degree sex offense. The Court reaches this conclusion through a review of the legislative history of CL § 3-306's statutory predecessor, Article 27, and an examination of the common understanding of the words "genital," "opening," and "perineum." The opinion extensively makes comparisons between Maryland and New Hampshire law, which define the perineum as a genital opening, in addition to other states, such as Mississippi, Hawaii, Connecticut, Michigan and California. Absent any mention of the perineum in jurisdictions that define genital opening in some form or fashion, save one, the Court does not extend the

definition of a genital opening to the perineum. In also considering the medical definition of perineum and the common understanding of opening, the Court acknowledges that the perineum does not have an entrance or exit. The Court notes that while it can be lacerated or torn, as it was in this case, it does not permit access to anything.

In the remainder of the opinion, the Court finds that the Appellant was not entitled to a demand for a bill of particulars in the juvenile proceedings, as a bill of particulars only applies in criminal proceedings, and juvenile proceedings are civil proceedings. The Court also holds that the juvenile petition was sufficient when it stated in clear, simple language the facts that constituted the delinquency. It was determined that the mother's statement's about why she took the victim to the hospital was offered for a purpose other than to assert the truth of its contents. Additionally, the Court finds that defense counsel did in fact open the door, permitting the State to introduce rebuttal evidence in response to questioning about victim's out of context statements, in order to assess to what degree the Appellant's assertion that the victim's trouble answering questions was a fair characterization.

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Matthew J. Lipp v. State of Maryland, No. 181, September Term 2019, filed April 30, 2020. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2020/0181s19.pdf

CRIMINAL LAW – HATE CRIMES – DEFACEMENT OF PROPERTY

Facts:

In 2018, appellant spray painted graffiti on the grounds of Glenelg High School. The graffiti included racial slurs, anti-religious phrases, and other offensive writings. Appellant was charged under the pertinent provision of Maryland's hate crime statute, Md. Code (2012 Repl. Vol., Supp. 2019) § 10-305 of the Criminal Law Article ("CR"). He filed a motion to dismiss in the circuit court arguing the statute violated his First Amendment right to freedom of speech. The motion was denied. Appellant was convicted of one count of violating CR § 10-305. He appealed the denial of the motion to dismiss on First Amendment grounds.

Held: Affirmed.

CR § 10-305 prohibits the defacement, damage, or destruction of property when "there is evidence that exhibits animosity against a person or group, because of the race, color, religious beliefs, sexual orientation, gender, disability, or national origin of that person or group[.]" The plain language of the statute makes clear that a conviction may not be based solely on speech. Rather, the statute permissibly regulates harmful conduct, not the content of the speech. Accordingly, CR § 10-305 does not violate the First Amendment right to freedom of speech.

Appellant may have had a First Amendment right to spray paint on his own property the offensive words and symbols used here. Once he combined that action with a criminal act, however, in this case defacing property of another, his criminal activity was not protected by the First Amendment.

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Christina Granados McCauley v. State of Maryland, No. 340, September Term 2018, filed April 29, 2020. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2020/0340s18.pdf

CRIMINAL LAW – INVOLUNTARY MANSLAUGHTER – GROSS NEGLIGENCE

CRIMINAL LAW – RECKLESS ENDANGERMENT – MANUFACTURE, PRODUCTION, OR SALE OF A PRODUCT OR COMMODITY

Facts:

Christina Granados McCauley was a routine drug dealer. On June 23, 2017, Ms. McCauley sold drugs to Joshua Wrightson and Mary Nell Miller. Mr. Wrightson believed the drugs were a mixture of heroin and fentanyl, but they contained carfentanil, a highly potent analog of heroin. Both overdosed that evening, and Ms. Miller passed away after resuscitation attempts failed. The State presented evidence that Ms. McCauley sold drugs to at least five people; that she knew that the drugs she sold had caused others to overdose and were strong; and that she warned her buyers to be careful and not use "too much" of the drugs. After Melissa Boswell, another one of her buyers, bought drugs from Ms. McCauley to share with her friends, her friends overdosed and were revived by police and medical personnel. Ms. Boswell than cooperated with police to arrange two drug purchases with Ms. McCauley and an undercover agent. Ms. McCauley told Ms. Boswell and the undercover agent to be careful while using the drugs and told them, "please don't die" and just use a "flake" of the drugs because they were "so strong."

Ms. McCauley was convicted by a jury of involuntary manslaughter, reckless endangerment, distribution of carfentanil, and possession of carfentanil. She appealed, arguing that the evidence was insufficient to support a finding that she acted with gross negligence under *State v. Thomas*, 464 Md. 133 (2019). She argued further that the trial court erred by failing to dismiss the involuntary manslaughter and reckless endangerment charges because (1) Maryland has not adopted a statute creating an offense for drug-induced homicide, and (2) the sale of carfentanil is exempted from the reckless endangerment statute because it's a "product" as outlined in Maryland Code (2002, 2012 Repl. Vol.), § 3-204(c)(1)(ii) of the Criminal Law Article ("CR").

The State responded that there was substantial evidence that Ms. McCauley knew the dangerous nature of the drugs that she distributed, and therefore the evidence was sufficient to find her guilty of gross negligence involuntary manslaughter. It also responded that the court did not err when it declined to dismiss the involuntary manslaughter and reckless endangerment charges because gross negligence involuntary manslaughter can be found in cases of fatal overdoses and the exception for the sale of "products" in CR § 3-204(c)(1)(ii) doesn't apply to the sale of controlled dangerous substances.

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Held: Affirmed.

The Court of Special Appeals affirmed Ms. McCauley's convictions. First, the Court held that Ms. McCauley's conduct rose to the level of gross negligence involuntary manslaughter, or a reckless disregard for human life. Following precedent set by the Court of Appeals in Thomas, the Court held that the elements of involuntary manslaughter were met because Ms. McCauley knew the risk of selling particularly dangerous drugs and the drugs were the actual and legal cause of Ms. Miller's death. Although there is no "*per se* rule providing that all heroin distribution resulting in death constitutes gross negligence," the inherent dangerousness of the sale *plus* environmental risk factors amounted to gross negligence. *See Thomas*, 464 Md. at 167, 169. The Court noted that Ms. McCauley's knowledge of the high level of danger of the drugs she sold--evidenced by her knowledge of buyers' overdoses and her warnings of the drugs' potency--plus her experience as a routine dealer with at least five buyers, was sufficient for a jury to find she acted with gross negligence.

Second, the Court held that the trial court did not err when it declined to dismiss the involuntary manslaughter charge. Ms. McCauley argued that there is no codified charge for drug-induced homicide and that applying involuntary manslaughter charges to fatal overdoses is against public policy. But the Court of Appeals's decision in *Thoma*s answered directly whether the State may bring an involuntary manslaughter charge following a fatal overdose, and accordingly the court did not err.

Finally, the Court held that CR § 3-204, which provides that "the manufacture, production, or sale of a product or commodity" is exempted from the reckless endangerment statute, does not apply to the sale of carfentanil. Under the plain meaning doctrine, we apply a reasonable interpretation of statute compatible with common sense. The Court held that the legislature didn't intend for the exception to protect drug dealers engaged in the illicit sale of controlled dangerous substances from being charged with reckless endangerment.

Karon Sayles v. State of Maryland, No. 2794, September Term 2018; *Dalik Daniel Oxely v. State of Maryland*, No. 2797, September Term 2018, *Bobby Jamar Johnson v. State of Maryland*, No. 2798, September Term 2018, filed April 1, 2020. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2020/2794s18.pdf

CRIMINAL LAW – JURY NULLIFICATION – SUPPLEMENTAL JURY INSTRUCTIONS - MOTION TO SUPPRESS – IMPERMISSIBLY SUGGESTIVE PHOTO ARRAY

Facts:

Karon Sayles, Dalik Daniel Oxely, and Bobby Jamar Johnson (collectively, the "appellants") were convicted of multiple offenses stemming from a home invasion and robbery that occurred in Silver Spring, Maryland in August of 2017. Two additional co-defendants entered guilty pleas. The appellants were tried together before a jury in the Circuit Court for Montgomery County. Prior to trial, appellant Sayles moved to suppress two photo array identifications. The motion was denied.

While the jury was deliberating, the jury sent out three notes inquiring about jury nullification. The first note asked, "Do we have the right to use jury nullification of a charge?" The court instructed the jury in response, "Your verdict must be based solely on the evidence. Your choices are not guilty or guilty. Reread your instructions." Later on the same day of deliberations, the jury sent another note, asking, "Can you answer the jury nullification with a yes or no response?" The court responded:

> Now, I am not a hundred percent sure that the juror or jurors that wrote the question have the same definition of jury nullification as the law has it.
>
> But if it is, then here's the answer. Here's what jury nullification is. Jury nullification, a juror's knowing and deliberate rejection of the evidence or refusal to apply the law, that's considered jury nullification.[ ] And the answer is no, you can't have jury nullification. You have to decide this case based on the evidence as you find it and apply the law as I gave it to you.
>
> You decide the facts, the weight of the evidence, you, the 12, then you apply the law. To say you can do jury nullification would be a miscarriage of justice because there'd be no reason reading you the law and no reason you considering the evidence. And that wouldn't make sense would it? You are the only ones that weigh the evidence. You decide what weight you want to give it, what you find.
>
> Once you get to where you are with the evidence, you take the law as I give it to you, you put it together and apply it and try and reach a verdict. So, your decision is going to be

> made on the evidence, applying your common sense, your past life experiences and you're going to take the law and apply it to all of that. So, nullification shouldn't even be a consideration. It's not on the verdict sheet. It's not in the instructions. Okay, I think I've said enough on that.

On the next day of deliberations, the jury sent out another note inquiring about jury nullification, which provided:

> Why if there is a legal definition of jury nullification where a juror can refuse to apply the law, there's no legal circumstances where that can occur. Can you please cite the specific law that does not allow a juror the right to jury nullification in the State of Maryland. From juror 112.

The court instructed the jury:

> Ladies and gentlemen of the jury you may not use, implement or resort to jury nullification. It is improper, it's contrary to the law [and] would be a violation of your oath to truly try and reach a verdict according to the evidence, which you all took that oath. Furthermore, nullification would violate this Court's order and it's the law of Maryland that "you must apply the laws I explained it in arriving at your verdict," sincerely me. I'll give you a copy of that.

The jury found the appellants guilty of several offenses, including multiple counts of home invasion, armed robbery, kidnapping, second-degree burglary, assault, false imprisonment, motor vehicle theft, and associated conspiracies.

Held: Reversed.

Judgment of the Circuit Court for Montgomery County reversed. Case remanded for a new trial.

The Court of Special Appeals considered the appellants' assertion that the trial court's responses to the jury's second and third nullification questions contained inaccurate statements of law that deprived the appellants of their constitutional rights to a fair trial. The Court first addressed preservation arguments raised by the State and concluded that at least some of the appellants objected to each instruction and that the circuit court had stated, in the record, that it believed all of the appellants were objecting to the third instruction. Furthermore, to the extent that any of the appellate issues were not preserved as to certain appellants, the Court elected to exercise its discretion to review all of the issues as to all appellants.

The Court of Special Appeals then turned its attention to the trial court's instructions regarding jury nullification. The Court observed that Black's Law Dictionary defines jury nullification as "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or

fairness." The Court discussed the long history of jury nullification and observed that the jury's power to nullify has been acknowledged by the United States Supreme Court over a century ago. The Court of Special Appeals observed that the United States Court of Appeals for the Second Circuit has explained that although the power of juries to nullify is well-established, that power should not be encouraged or permitted by a judge if it is within the judge's authority to prevent.

The Court of Special Appeals further explained that Maryland appellate courts have held that it is not proper for attorneys to argue jury nullification to a jury. The Court further considered that it has been held improper for trial courts to instruct juries that the court's instructions are "merely advisory" and to inform juries that they are free to disregard the court's instructions.

The Court of Special Appeals observed that it is improper for parties to argue nullification to the jury and for the trial court to expressly instruct the jury that it is permitted to disregard the court's instructions on the law but observed that Maryland appellate courts had not previously addressed directly how a trial court should respond when a jury specifically inquires about its power to nullify. The Court considered that the Court of Appeals had, in *dicta*, commented about the jury's power to nullify in the case of *Chambers v. State*, 337 Md. 44, 48 (1994). The Court also considered Maryland jurisprudence on inconsistent verdicts in criminal cases, which reflects an acknowledgment that juries, in some instances, reach verdicts contrary to the evidence not because the jury disagrees with or is unpersuaded by the evidence presented, but because a conviction is not consistent with the jury's sense of morality or fairness. The Court also found the Maryland Criminal Pattern Jury Instruction on reasonable doubt persuasive, observing that the pattern jury instruction specifically mandates that a "defendant must be found not guilty" in the presence of reasonable doubt. The instruction, however, is entirely silent as to what a jury is or is not required to do in the absence of reasonable doubt.

Having reviewed the law and persuasive authority relevant to the issue of jury nullification, the Court turned to how to reconcile a jury's power to nullify absent any consequences with the clear legal authority prohibiting trial courts from instructing juries that they have the power to disregard the law. With respect to the specific language of the trial court's instructions, the Court of Special Appeals focused upon the trial court's instruction that nullification is "contrary to the law" and would "violate" a court's order. The Court explained that because the power to nullify is well-established, it cannot be said to be "contrary to law." The Court further explained that the trial court's instruction that nullification would "violate" a court's order suggested that jurors could face legal consequences for engaging in jury nullification and that there is no legal authority to support such an instruction. The Court further explained that the trial court's instructions were compounded by the trial court's incomplete definition of jury nullification, which defined jury nullification as "a juror's knowing and deliberate rejection of the evidence or refusal to apply the law." The Court of Special Appeals reasoned that it is the motivation for the rejection of evidence that makes a rejection jury nullification, not simply the rejection itself. The Court determined that the appellants had demonstrated probable prejudice as a result of the trial court's erroneous instructions, and, therefore, vacated the appellants' convictions and remanded for a new trial.

Finally, in order to provide guidance on remand, the Court addressed appellant Sayles's motion to suppress photographic identifications of him made by two of the victims. Police had digitally altered the other photographs in the photo array so that all the faces had a face tattoo similar to Sayles's tattoo. Sayles argued that the digital alterations were obvious and served to draw attention to Sayles's photo, which was the only non-digitally altered photo. The Court agreed with the trial court that the alterations were not apparent to the viewer, and, as such, there was nothing about the digitally altered photographs that made them stand out from the photograph of Sayles. Accordingly, the Court of Special Appeals held that the trial court did not err in denying the motion to suppress.

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Bashunn Phillips v. State of Maryland, No. 3245, September Term 2018, filed April 30, 2020. Opinion by Kenney, J.

https://mdcourts.gov/data/opinions/cosa/2020/3245s18.pdf

CRIMINAL LAW – TIME OF TRIAL – DECISIONS SUBSEQUENT TO 1966 – CONSTITUTIONAL AND STATUTORY PROVISIONS

CRIMINAL LAW – TIME OF TRIAL – DECISIONS SUBSEQUENT TO 1966 – DELAY ATTRIBUTABLE TO PROSECUTION

Facts:

Appellant, Bashunn Christopher Phillips, was charged with the December 10, 2013 murder of Shar'ron Mason on July 18, 2014. His trial began approximately four years later on July 9, 2018. The extended aspect of this delay began on August 7, 2015, when appellant filed a motion *in limine* to exclude evidence related to cell tower maps that the State intended to use to establish the approximate location of appellant's cell phone on the morning of December 10, 2013. The circuit court granted appellant's motion, and the State requested in banc review. When the in banc panel reversed the order *in limine*, appellant appealed and the State responded with a motion to dismiss.

In *Phillips v. State*, 233 Md. App. 184 (2017) (*Phillips I*), this Court denied the State's motion to dismiss the appeal and reversed the ruling of the in banc panel for lack of jurisdiction. The Court of Appeals granted certiorari review and, on February 20, 2018, affirmed our holding that the State had no authority to seek in banc review of the evidentiary ruling in *State v. Phillips*, 457 Md. 481, 512 (2018) (*Phillips II*).

Throughout the pre-trial delay, appellant was incarcerated. On April 8, 2018, he filed a motion to dismiss for violations of his right to a speedy trial, which the circuit court denied on June 15, 2018.

On appeal, appellant challenged the circuit court's decision, arguing that his Sixth Amendment speedy trial right was violated from the near four-year delay resulting from the State's appeal of a trial court's evidentiary ruling to an in banc panel and the subsequent appeals that followed.

Held: Affirmed.

Under Article 21 of the Maryland Declaration of Rights, "in all criminal prosecutions, every man hath a right . . . to a speedy trial[.]" And we have held that "[t]he speedy trial right under the Maryland Constitution is coterminous with its Federal counterpart and any resolution of a claim under the Sixth Amendment will be dispositive of a parallel claim under Article 21." *Erbe v.*

State, 25 Md. App. 375, 380 (1975), *aff'd*, 276 Md. 541 (1976) (internal citation and quotation marks omitted).

No Maryland appellate decision has specifically addressed how delays caused by an interlocutory appeal initiated by the State should be weighed in a speedy trial analysis. On the other hand, federal courts have held that an interlocutory appeal by the prosecution "is a valid reason that justifies delay" and ordinarily the resulting delay will not be accorded "any effective weight" in a speedy trial analysis. *United States v. Loud Hawk*, 474 U.S. 302, 315–16 (1986); *see also United States v. Bishton*, 463 F.2d 887, 889 (D.C. Cir. 1972) ("the time spent on appeals is not generally included for purposes of calculating the period of delay in prosecution"). But if the issue appealed by the prosecution is "clearly tangential or frivolous," the delay resulting from the appeal should weigh heavily against it. *Loud Hawk*, 474 U.S. at 315–16.

As set forth in *United States v. Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978), which we find instructive in the *Barker v. Wingo*, 407 U.S. 514, 530–33 (1972), analysis in this case, relevant factors to assess the reasonableness of the interlocutory appeal include: (1) the strength of the government's position on the appealed issue, (2) the importance of the issue in the posture of the case, and (3) the seriousness of the crime. The defendant bears the burden of showing that the State acted in bad faith in pursuing the interlocutory appeal.

In this case, we were not persuaded that the State's request for in banc review was a dilatory tactic made in bad faith or a "deliberate attempt to delay the trial in order to hamper the defense." *State v. Kanneh*, 403 Md. 678 (2008) (quoting Barker, 407 U.S. at 531). Although the State did not prevail, the result was two reported opinions, *Phillips I* and *Phillips II*, which supported the State's contention that the "appeal presented a valid question that necessitated clarification from the appellate courts." Based on our application of the *Herman* factor, we concluded that the first two factors favor, but, in balance, not resoundingly, appellant. We agreed with appellant that the third *Herman* factor–the seriousness of the offense–weighed in favor of the State. Accordingly, we did not weigh the reasons for the delay in this case heavily against the State.

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Kyle Thompson v. State of Maryland, No. 198, September Term 2018, filed April 7, 2020. Opinion by Wells, J.

https://mdcourts.gov/data/opinions/cosa/2020/0198s19.pdf

SEARCHES AND SEIZURES – WARRANTS – *FRANKS* HEARINGS

SEARCHES AND SEIZURES – WARRANTS – *FRANKS* HEARINGS – MANDATORY MOTIONS -- WAIVER

SEARCHES AND SEIZURES – WARRANTS – *FRANKS* HEARINGS – MANDATORY MOTIONS -- WAIVER

SEARCHES AND SEIZURES – WARRANTS – *FRANKS* HEARINGS – DEFENDANT'S BURDEN

SEARCHES AND SEIZURES – WARRANTS – *FRANKS* HEARINGS – DEFENDANT'S BURDEN

SEARCHES AND SEIZURES – WARRANTS – PROBABLE CAUSE – SUFFICIENCY

Facts:

The Montgomery County police received information from a confidential informant that Kyle Thompson had sexually abused his four-year old daughter and possibly the girl's older half-sister. The informant disclosed that Thompson had made a video recording of one such assault and showed it to her on a computer in his home. After gathering more information from the informant, including several phone interviews, including one that was recorded, a police detective drafted a search warrant for Thompson's house, where the police suspected Thompson had abused his youngest daughter and where they hoped to find evidence of the crime. Another detective took the draft affidavit, revised it, and delivered the completed search warrant to a judge, who signed it. Upon execution of the warrant, the police found videos of multiple sexual assaults Thompson committed against his daughter. The State filed a 78-count indictment against Thompson charging him, with among other things, sexual abuse of a minor. A federal investigation was also initiated. Ultimately, Thompson pled guilty to ten counts in the state indictment. The court sentenced Thompson to three life terms, plus 145 years, all of which ran consecutively to a federal sentence of 5,040 months for the manufacture of child pornography.

On timely appeal to the Maryland Court of Special Appeals, Thompson sought review of the circuit court's denial of his request for a *Franks* hearing. At a preliminary *Franks* hearing, Thompson questioned the truthfulness of the affidavit the second detective drafted. The court denied the request for a *Franks* hearing finding, preliminarily, that the request was not timely. The court nonetheless undertook an analysis of the merits of the claim and found that Thompson

had not met his burden of showing the statements the second detective made in the affidavit were false or reckless. The court also denied a challenge to the sufficiency of the search warrant.

Held: Affirmed.

The Court of Special Appeals first considered the issue of the timeliness of Thompson's demand for a *Franks* hearing. The Court concluded that under Maryland Rule 4-252(a), Thompson was required to have requested a *Franks* hearing, a mandatory motion, within 30 days of counsel's entry of appearance or Thompson's first appearance before the court under Rule 4-213(c). Here, Thompson had two different attorneys. Thompson's first attorney did not request a *Franks* hearing within the prescribed 30-day time limit. Thompson's second counsel argued that questions about the truthfulness of the affidavit were not revealed until later, during the parallel federal investigation, and after Thompson's first attorney had been discharged. The Court concluded that the request was still not timely as Rule 4-252(b) requires that in the instance of newly discovered evidence, the motions request must be made within 5 days of the discovery of the new evidence. Here, counsel relied on evidence disclosed in the federal investigation which the State delivered to Thompson by June 29, 2018. Thompson did not request a *Franks* hearing until July 23, 2018, well beyond the 5-day time limit prescribed in Rule 4-252(b). Based on these largely uncontested facts, the Court determined that Thompson's request for a *Franks* hearing had been effectively waived.

Nonetheless, the Court exercised its discretion under Rule 8-131(a) to consider the merits of Thompson's challenge, not only because the circuit court had done so, but to give guidance to the trial court and the bar about how *Franks* hearings should be conducted. In its decision, the Court discussed the history of *Franks* hearings from the seminal case, *Franks v. Delaware*, 438 U.S. 154 (1978), to the present, including how our jurisprudence in this area has evolved since we first addressed it in *Yeagy v. State*, 63 Md. App. 1 (1985). In our analysis, we stressed that a defendant must clear two hurdles before obtaining a *Franks* hearing: (1) he must expressly request one, and (2) he must make "a substantial preliminary showing" that a statement made in the warrant's affidavit was false or made with reckless disregard for the truth. *McDonald v. State*, 347 Md. 452, 471 (1997). Further, should the court find that the statement was false or recklessly made, the court must then determine whether the affidavit still provides a substantial basis to find probable cause if the offending statement was removed. Only after these threshold requirements are satisfied may a defendant have a full-blown *Franks* hearing. In that case, the standard of proof is a preponderance of the evidence. *Franks*, 438 U.S. at 156.

Here, there was some confusion about whether the circuit court applied the proper standard. When announcing its ruling the court mentioned both "substantial preliminary showing" and "preponderance of the evidence." We concluded that the court found under either standard Thompson did not meet his burden of showing that the statements in the affidavit were false or recklessly made. We independently analyzed the statements and drew the same conclusion. Finally, we excised the portions of the affidavit to which Thompson objected and concluded

even if those statements were removed, the affidavit would still provide a sufficient probable cause basis to issue the search warrant.

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Marybeth Davis Meek v. Thomas Warren Linton, et al., No. 682, September Term 2019, filed April 29, 2020. Opinion by Woodward, J.

https://mdcourts.gov/data/opinions/cosa/2020/0682s19.pdf

ADULT GUARDIANSHIP – GUARDIANSHIP OF THE PERSON – NO LESS RESTRICTIVE FORM OF INTERVENTION – WELFARE AND SAFETY OF THE ALLEGED DISABLED PERSON

ADULT GUARDIANSHIP – APPOINTMENT OF GUARDIAN OF THE PERSON – "GOOD CAUSE" TO PASS OVER PERSON WITH HIGHER PRIORITY UNDER ESTATES & TRUSTS ARTICLE ("E.T.") § 13-707 – DEFINITION OF "GOOD CAUSE" UNDER E.T. § 13-707(c)(1)(ii)

ADULT GUARDIANSHIP – APPOINTMENT OF GUARDIAN OF THE PROPERTY – "GOOD CAUSE" TO PASS OVER PERSON WITH HIGHER PRIORITY AND APPOINT PERSON WITH LOWER PRIORITY UNDER E.T. § 13-207 – DEFINITION OF "GOOD CAUSE" UNDER E.T. § 13-207(c)(2)

Facts:

In 2008 Lois Hansen executed a Durable Power of Attorney and an Advance Health Care Directive, naming her daughter, Marybeth Meek, as attorney-in-fact and Health Care Agent. At that time both Mrs. Hansen and Meek lived in California. Also, around that time Mrs. Hansen reconnected with her childhood sweetheart, Adrien Hansen, who lived in Cambridge, Maryland. Mrs. Hansen moved to Cambridge to be with Mr. Hansen, and they were married in 2010. Several years later, Mrs. Hansen was diagnosed with dementia and in 2017 her mental state declined considerably. In March of 2017, Meek and Thomas Linton, Mrs. Hansen's eldest son, discovered that the home in which Mr. and Mrs. Hansen were living was in terrible condition. By the end of 2018, however, the home was in much better condition and a team of professional health care providers, along with family members, had been assembled to provide care for Mrs. Hansen in her home.

Notwithstanding the condition of Mrs. Hansen's home and the care that she was receiving there, Meek attempted to exercise her authority as attorney-in-fact and Health Care Agent to move Mrs. Hansen from her home to a long-term care facility. Linton then filed a petition for guardianship of the person and property. After a two-day trial, the circuit court issued a lengthy, thorough, and well-reasoned oral opinion. Among other things, the court ruled that (1) there was no less restrictive form of intervention available, other than guardianship, that was consistent with Mrs. Hansen's welfare and safety; (2) there was "good cause" to pass over Meek's higher priority under E.T. § 13-707(a) and appoint Linton, a person with lower priority under that section, as guardian of Mrs. Hansen's person; and (3) there was "good cause" to pass over Meek's higher priority under E.T. § 13-207(a) and appoint Barrett King, Esq., a neutral third

party and a person with lower priority under that section, as guardian of Mrs. Hansen's property. Meek noted a timely appeal.

Held: Affirmed.

I. On appeal, Meek argued that a guardianship was not warranted under E.T. § 13-705(b), because she was willing and capable of acting as Mrs. Hansen's attorney-in-fact and Health Care Agent, and thus a less restrictive form of intervention was available. The Court of Special Appeals rejected Meek's argument, pointing to the language of E.T. § 13-705(b)(2) that a less restrictive form of intervention must be available and "consistent with the person's welfare and safety." The Court explained that the evidence supported the trial court's findings that (1) Mrs. Hansen's was "well cared for" at her home; (2) Mrs. Hansen's "health and well-being may actually be negatively impacted" if she was moved from her home to a long-term care facility; and (3) Meek intended to place Mrs. Hansen in a long-term care facility if she was permitted to act as Mrs. Hansen's Health Care Agent. Therefore, the Court held that the trial court did not err when it found that allowing Meek to act as Mrs. Hansen's Health Care Agent was not a less restrictive form of intervention that was consistent with Mrs. Hansen's welfare and safety. *See* E.T. § 13-705(b)(2).

II. Meek argued that the trial court erred by finding "good cause" to pass over Meek's statutory priority under E.T. § 13-707(a) and appoint Linton, a person with lower priority, as the guardian of Mrs. Hansen's person. The Court of Special Appeals disagreed. The Court stated that the trial court must find "good cause" under E.T. § 13-707(c)(1)(ii) in order to pass over a person with higher priority and appoint a person with lower priority. Because there was no definition of "good cause," the Court considered the statutory purpose and relevant case law and concluded that "good cause" under E.T. § 13-707(c)(1)(ii) means a substantial reason to find that a person with lower priority under E.T. § 13-707(a) is a better choice than a person with higher priority to act in the best interest of the ward.

The Court noted that the trial court gave three reasons why "good cause" existed: (1) Meek failed to consider what Mrs. Hansen valued in her life at that time; (2) Meek's plans for Mrs. Hansen were not consistent with Mrs. Hansen's health and well-being and may have a negative impact on her; and (3) Meek would not "factor in" Mrs. Hansen's wishes while serving as her guardian. After a review of the record, the Court concluded that the trial court's reasons and underlying factual findings were based on competent evidence and that the reasons supported the conclusion that Linton was the better choice to act in the best interest of Mrs. Hansen. Because those reasons, when taken as a whole, could be classified as substantial, the Court held that the trial court did not abuse its discretion by determining that "good cause" existed to pass over Meek's statutory priority and appoint Linton as guardian of Mrs. Hansen's person.

III. Meek argued that the trial court erred by finding "good cause" to pass over Meek's statutory priority under E.T. § 13-207(a) and appoint King, a neutral third party and a person with lower priority, as the guardian of Mrs. Hansen's property. The Court of Special Appeals

again disagreed. The Court stated that the trial court must find "good cause" under E.T. § 13-207(c)(2) in order to pass over a person with higher priority and appoint a person with lower priority. Because there was no definition of "good cause," the Court considered the statutory purpose and relevant case law and concluded that "good cause" has the same meaning under E.T. § 13-707(c)(1)(ii) and E.T. § 13-207(c)(2).

The Court noted that the trial court gave two reasons why "good cause" existed: Mrs. Hansen deserved and needed a neutral third party, who (1) would be detached from any family members with motives for financial gain, and (2) would unravel prior financial transactions regarding Mrs. Hansen's assets. After a review of the record, the Court concluded that the trial court's reasons and underlying factual findings were based upon competent evidence and that the reasons supported the conclusion that King was the better choice to act in the best interest of Mrs. Hansen regarding her property. Because those reasons, when taken as a whole, could be classified as substantial, the Court held that the trial court did not abuse its discretion by determining that "good cause" existed to pass over Meek's statutory priority and appoint King, a neutral third party, as guardian of Mrs. Hansen's property.

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Linda Turner v. Maryland Department of Health, No. 2304, September Term 2018, filed April 2, 2020. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2020/2304s18.pdf

ESTATES & TRUSTS – AUTHORIZED MEDICAID REPRESENTATIVE

Facts:

Linda Turner was a resident at Ridge Leasing, LLC (the "Facility"), a long-term care nursing facility, until her death. She required twenty-four-hour care due to various ailments and had limited assets to pay for her care. Consequently, Ms. Turner submitted an application for long-term care Medical Assistance ("Medicaid benefits") to the Howard County Department of Social Services to pay for her care at the Facility. After the first application was denied, she submitted another. Just before the second application was denied, she passed away. The Facility petitioned the Circuit Court for Howard County for appointment as the "Medicaid Authorized Representative" on behalf of the deceased Ms. Turner. The court granted the Facility's motion and issued an "Order Appointing Authorized Medicaid Representative" ("MAR Order").

Forearmed with the MAR Order, the Facility appealed the denial of Medicaid benefits before the Office of Administrative Hearings ("OAH"). The OAH denied the Medicaid benefits, and the Facility filed a petition for judicial review in the circuit court. The Maryland Department of Health intervened and moved to dismiss the Facility's petition because the Facility had not filed to become the personal representative of Ms. Turner's estate and, correspondingly, lacked standing. The circuit court dismissed the Facility's petition, and the Facility noted a timely appeal.

Held: Affirmed.

The Court of Special Appeals reached two holdings. First, under prevailing law, the question of standing for judicial review cannot be waived by a failure to raise the issue before an administrative agency. Standing to maintain judicial review of an administrative decision is properly determined by the circuit court and is one of a narrow category of issues that courts of appeal will sua sponte address even if not raised by an appellant.

Second, the Court held that the MAR Order was not valid to give the Facility standing to petition for judicial review from the OAH's denial of Ms. Turner's application for Medicaid benefits because the Facility was never appointed, or applied to be appointed, the personal representative of Ms. Turner's estate. In so doing, the Court rejected the Facility's argument that it had standing to pursue the Medicaid benefits under federal law. Although 42 C.F.R. § 435.923 allows an applicant to personally designate an authorized representative, the Court pointed out

that the applicant must express her authorization by transmitting her signature through one of the manners specified in paragraph (f) of 42 C.F.R. § 435.923. Any valid designation of an authorized representative that does not require the signature of the applicant must be accorded under state law pursuant to C.F.R. § 435.923(a)(2). Accordingly, the Court held, after considering Code of Maryland Regulations ("COMAR") 10.01.04.12 and Maryland Code (1974, 2017 Repl. Vol.), Estates and Trusts Article, that the only way the Facility could pursue Ms. Turner's Medicaid benefits was to become the personal representative of Ms. Turner's estate, or "a person who has in good faith filed an application to be appointed the personal representative of [Ms. Turner's] estate" pursuant to COMAR 10.01.04.12B(3)(d).

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Renee Denice Damon v. Edwin Rafael Robles, No. 2196, September Term 2017, filed April 2, 3030. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2020/2196s17.pdf

FAMILY LAW – CHILD SUPPORT – INCARCERATED OBLIGORS

Facts:

In 2006, Mr. Robles, appellee, was ordered to pay Ms. Damon, appellant, $430 per month in child support. In 2010, Mr. Robles became incarcerated and remained in custody until August 2014. During his incarceration period, on October 1, 2012, Md. Code § 12-401.1 of the Family Law Article, which provides that arrearages of child support may not accrue during an obligor's incarceration under certain circumstances, went into effect.

In 2017, Mr. Robles filed a motion to modify child support and requested that the Office of Child Support Enforcement perform an accounting of the total amount of arrears accrued during his period of incarceration. In a hearing before the circuit court, Mr. Robles argued that, because FL § 12-104.1 automatically stops the accrual of arrearages when an obligor becomes incarcerated, the court should set aside the arrears that accrued during his entire incarceration period, or in the alternative, beginning when FL § 12-104.1 was enacted in 2012. The circuit court ruled that the child support arrears that accrued between October 1, 2012, and August 2014 should be set aside, and ordered the OCSE to reduce his arrearages accordingly.

Held: Affirmed with an amendment to the amount of credit in arrears.

FL § 12-401.1 changed the procedure by which an obligor could eliminate child support obligations while incarcerated. Rather than requiring the obligor to file a motion to modify child support, the statute creates a presumption of inability to pay and automatically prevents arrearages of child support from accruing during incarceration under certain circumstances. Because the statute is procedural and remedial, it may apply retroactively unless it impairs vested or substantive rights.

In ruling on Mr. Robles' 2017 motion to reduce arrearages he owed to reflect his incarceration, the circuit court properly determined that there was a vested right in arrears that had accrued prior to October 1, 2012, when FL § 12-104.1 was enacted, and the right to these payments could not be taken away. The right to child support, however, is not vested until the due date of each payment. Because FL § 12-104.1 automatically prevented Mr. Robles' payment obligations from accruing, FL § 12-104.1 applied retroactively as of October 1, 2012, and the court did not err in ruling that Mr. Robles' arrears should be adjusted accordingly.

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Frank Gerard Gizzo v. Kaycee Lauren Gerstman, No. 3236, September Term 2018, filed April 1, 2020. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2020/3236s18.pdf

CUSTODY AND VISITATION – EVIDENCE OF PRIOR ABUSE OR NEGLECT

Facts:

Father and Mother are parents of a child born in November 2014. Father and Mother lived together during the first year of the child's life. Mother served as the primary caregiver and Father provided financial support as a trainee to become a police officer. Mother soon became pregnant with a second child.

Father and Mother stopped living together in August 2015, after an incident in which Mother punched Father in the presence of his co-workers. For her actions, Mother received probation before judgment as to one count of second-degree assault.

Mother moved out of the home with the child. Father filed suit in the Circuit Court for Baltimore County, seeking sole legal custody and sole physical custody of the child. Mother counterclaimed for sole legal custody and primary physical custody of the child.

In December 2015, the one-year-old child sustained injuries while in Mother's care. According to Mother, the child fell off her bed while she was in another room. Mother admitted that she did not seek medical treatment until after the police arrived in response to a report of suspected child abuse. The child spent several weeks in foster care before being placed in the care of Father. Mother pled guilty to one count of child neglect and received supervised probation.

While on probation, Mother spent one year at a treatment center for pregnant women and women with young children. In 2017, Mother moved back to her parents' home in California, taking her infant daughter with her. Mother found work in a series of restaurant jobs. In 2018, Mother married a man who has custody of a young child from a previous relationship. Mother stopped working outside the home after she became pregnant with her third child, and her husband continued to work to support the family. Mother began taking courses toward a certification as a medical coder, hoping to find a work-from-home position.

Meanwhile, Father continued to work full time as a police officer in Maryland. The child resided with Father until 2017, when Father decided that the child should reside primarily with the child's paternal grandparents in New York. Father began having visits with the child at least three days per month and no more than six days per month.

After a trial in 2019, the circuit court granted sole legal custody and primary physical custody of the child to Mother. The court granted Father visitation on school breaks and vacations and granted Father regular access with the child through FaceTime.

In an opinion explaining its decision, the court expressly found that there were reasonable grounds to believe that Mother had previously neglected the child. The court found, however, that there was no likelihood of further child abuse or neglect by Mother. The court reasoned that her life circumstances had changed since the incident of neglect.

In analyzing the relevant custody factors, the court concluded that Mother had demonstrated her ability and genuine desire to raise the child in the home where she and her husband were already raising three young children. The court concluded that Father, by contrast, was nominally seeking custody even though Father intended to delegate his responsibilities to the paternal grandfather and for the child to continue living in New York.

Father appealed from the final custody order and moved for a stay pending his appeal. Father argued that the court had failed to consider a statute that requires the court, when deciding custody or visitation cases, to consider evidence of prior abuse by a party against the other parent of the party's child, and to make arrangements that best protect the child and the victim. The court denied Father's motion for stay. The court explained that it had considered the evidence regarding prior abuse and had determined that the geographical distance between the parties would minimize conflict between them and provide the necessary protection from abuse.

Held: Affirmed.

The Court of Special Appeals affirmed the order granting the mother's claim for custody. The Court rejected the argument that the circuit court had failed to consider the evidence of prior abuse by the mother and to make appropriate protective arrangements. The Court concluded that the ultimate decision was not based on any error or abuse of discretion.

Section 9-101 of the Family Law Article of the Maryland Code ("FL") requires that, if there are reasonable grounds to believe that a party abused or neglected a child, the court must determine whether abuse or neglect is likely to occur if the court grants custody or visitation rights to that party. This statute requires the court to make a specific finding regarding the likelihood of further child abuse or neglect by the parent. Unless the court finds no likelihood of further child abuse or neglect by that party, the court may not grant custody or unsupervised visitation rights to that party.

In this case, the trial court made the findings required under FL § 9-101. The court found reasonable grounds to believe that the mother had neglected the child, but specifically found no likelihood of further child abuse or neglect by the mother. The court credited the mother's testimony that, in the intervening years, she had worked to overcome mental health challenges and that she and her husband had established a suitable family home for their other young

children. The court reasonably concluded that, given the dramatic changes in her life, the circumstances under which she committed neglect were unlikely to be repeated. Accordingly, FL § 9-101 did not preclude an award of custody to the mother.

FL § 9-101.1 further requires the court to consider evidence of abuse by a party against certain family members and other household members. If the court finds that the party committed such abuse, the court must make custody and visitation arrangements that best protect the child and the victim of the abuse.

In its initial opinion, the circuit court did not expressly discuss FL § 9-101.1 or the evidence that the mother had assaulted the father. In the subsequent order denying the father's motion for a stay, however, the court explained that it had considered the evidence of abuse and determined that the geographical distance between the parents would minimize conflict between them and provide the protection contemplated by FL § 9-101.1. These statements demonstrated that the court had considered the evidence of abuse and exercised discretion to make the appropriate protective arrangements. To the extent that the initial opinion might have fallen short of the requirements of FL § 9-101.1, the subsequent order addressed any such deficiency.

The Court of Special Appeals rejected the father's various other challenges to the trial court's weighing of the evidence and evaluation of the child's best interest. The Court upheld the finding that the mother did not voluntarily abandon her child by moving to California while continuing to pursue her claim for custody in Maryland courts. The Court upheld the finding that the two parents did not reach an agreement regarding custody or visitation when the mother relocated. Although a reasonable fact-finder might have made a different custody decision, the trial court's findings were supported by sufficient evidence and the court's reasoning was not an abuse of discretion.

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In re: J.R., No. 459, September Term 2019, filed February 28, 2020. Opinion by Reed, J.

https://mdcourts.gov/data/opinions/cosa/2020/0459s19.pdf

INFANTS – DEPENDENCY, PERMANENCY, AND RIGHTS TERMINATION

INFANTS – IN GENERAL – CHILD ABUSE REPORTS AND INVESTIGATIONS

STATUTES – LANGUAGE AND INTENT, WILL, PURPOSE, OR POLICY

INFANTS – DISMISSAL AND MOOTNESS – PRESERVATION

CONSTITUTIONAL LAW – PARENT AND CHILD RELATIONSHIP

INFANTS – DEPRIVATION, NEGLECT OR ABUSE

INFANTS – RIGHT TO COUNSEL

Facts:

In response to a referral for medical neglect, the Department of Social Services (the Department) implemented a safety plan to address the well-being of a one-month old child, J.R., as well as allegations of substance abuse and domestic violence by the mother and father (Appellants), which were eventually corroborated throughout the investigation. After the father had a positive drug test, the Department implemented a second safety plan, which had a no-contact provision for the father. After violation of the second safety plan, J.R. was put into foster care.

At the first shelter care hearing on December 21, 2018, pursuant to an order controlling conduct, the parties agreed that the mother would get custody of J.R. and the father would get visitation. The Appellants then violated the order controlling conduct five days after the mother got custody of the child. J.R. was placed into foster care. Due to a paternity matter that halted the CINA proceedings from January - April of 2019, the adjudication did not take place until May; during this time, J.R. was in foster care under continued orders controlling conduct. At the end of the adjudication proceeding, the juvenile court found J.R. CINA, and without a disposition hearing, granted custody to the Department.

Held: Affirmed in part. Reversed in part.

Appellant appealed to the Court of Special appeals to determine (1) whether Cecil County Department of Social Services erred when it failed to follow the statutory scheme for handling a CINA case by implementing “safety plans”, which Appellant Mother alleges are not authorized

by the statute; (2) whether the juvenile court erred as a matter of law when it continued the shelter care orders; (3) whether the juvenile court erred when it found that J.R. was a CINA; (4) whether the juvenile court erred when it did not conduct a separate dispositional hearing and (5) whether Appellant Mother had a valid claim for ineffective assistance of counsel.

The Court of Special Appeals affirms the use of safety plans and found that the terms here, including the no-contact provision, were valid. At length, the Court discusses the federal legislative history that has permitted the use of safety plans, as well as examined Maryland's history in statutorily authorizing the use of safety plans as an alternative response to referrals for child abuse or neglect. The Court outline the scope of the Department's authority in making decisions and implementing services that are in the best interest of the child. See FL § 5-706(n), (q), (r), (s)(11).

In this opinion, the Court also declines to address the Appellant Mother's arguments regarding alleged procedural and substantive errors during the hearings that took place between January and April of 2019, as the orders that determined the temporary placement of the child were superseded when the court conducted a CINA adjudication and disposition on May 7, 2019, which determined the permanent placement for the child. The Court finds that there is no relief that could effectively be granted Appellant Mother in regard to orders that are no longer in effect. The Court also holds that the untimeliness of the investigation was a harmless error that was caused, in part, by Appellants' own inaction and refusal to work with the Department.

Finally, the Court outlines that while the evidence was sufficient for the juvenile court to find by a preponderance of the evidence that J.R. was CINA because Appellants had neglected the child by failing to give proper care and attention to the infant J.R., it remanded the case back to the circuit court so that the trial court could conduct a distinct and separate hearing, where the Appellants could present evidence as to why they would be able to provide for J.R., or for the court to make specific findings if it determines that the child needs to be removed, pursuant to the statute. The Court does not reach the merits of Appellant Mother's ineffective assistance of counsel claim, finding that the record was not adequately established to examine the ineffective assistance of counsel claim.

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Andrew Lasko v. Amanda Lasko, No. 2702, September Term 2016, filed April 1, 2020. Opinion by Woodward, J.

https://mdcourts.gov/data/opinions/cosa/2020/2702s16.pdf

FAMILY LAW – DIVORCE – PLEADINGS

FAMILY LAW – DIVORCE – PLEADINGS – NOTICE

Facts:

Appellant, Andrew Lasko ("Andrew"), filed a complaint for limited divorce and other relief in the Circuit Court for Montgomery County after ten years of marriage to appellee, Amanda Lasko ("Amanda"). Amanda filed an answer to the complaint, as well as a counterclaim for limited divorce and other relief. In her answer, Amanda requested, among other things, that the trial court determine and value the parties' marital property and grant her "all relief to which she may be entitled pursuant to the Family Law Article of the Annotated Code of Maryland." Andrew later filed a supplemental and amended complaint seeking an absolute divorce and other relief. Amanda did not file an answer to Andrew's amended complaint. At trial, Andrew argued that Amanda was not entitled to a monetary award because she did not properly plead an absolute divorce or request a monetary award. The trial court, however, determined that Amanda's answer sufficiently pleaded a request for a monetary award and subsequently granted her a monetary award.

Held: Affirmed.

The first issue was whether the circuit court lacked authority to grant Amanda a monetary award. Andrew argued that Amanda's answer was in response to his complaint for a limited divorce, and therefore, the court could not grant Amanda a monetary award.

The Court of Special Appeals first held that under Maryland case law and Maryland Rule 2-323(g), a defendant can request in a proceeding for absolute divorce a monetary award, or a transfer of an ownership of an interest in property described in Md. Code, Family Law § 8-205(a), in a counterclaim or in an answer. If the request for a monetary award is in the answer, the language of the answer must be sufficient to place the plaintiff on notice that the defendant is requesting a monetary award and/or a transfer of property.

The Court next addressed Andrew's argument that Amanda was not entitled to a monetary award because her answer was to his original complaint for a limited divorce and she did not file an answer to his amended complaint for an absolute divorce. The Court rejected Andrew's argument, pointing to Rule 2-341(a), which provides that, when a pleading is amended and no

new or additional answer is filed, "the answer previously filed shall be treated as an answer to the amendment." Thus, when Amanda failed to file an answer to Andrew's amended complaint, her answer to Andrew's original complaint for limited divorce became, by operation of Rule 2-341(a), her answer to the amended complaint for absolute divorce.

The second issue was whether Amanda's answer put Andrew on notice that he was subject to the possibility of the grant of a monetary award in favor of Amanda.

The Court of Special Appeals held that Amanda's answer sufficiently set forth a claim for a monetary award under the Family Law Article because she affirmatively requested that the court determine and value the marital property, and she included a request to be granted "all relief to which she may be entitled pursuant to the Family Law Article." In so doing, Amanda articulated the three-step process that a trial court must undertake in order to grant a monetary award. Accordingly, Andrew was put on notice that the trial court could grant Amanda a monetary award.

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K.B. v. D.B., No. 2860, September Term 2018 and No. 1155, September Term 2019, filed April 29, 2020. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2020/2860s18.pdf

DIVORCE – ALIMONY – INDEFINITE ALIMONY – UNCONSCIONABLE DISPARITY – MONETARY AWARD – MARTIAL PROPERTY

Facts:

K.B. ("Wife") and D.B. ("Husband") married in 1998 and had one child, a son who was born in 2003. The parties separated in 2015 and Wife filed a Complaint for Absolute Divorce. Following a twelve-day trial, the circuit court issued a custody order on October 2, 2017, granting primary physical custody of the parties' son to Husband. The trial court held all economic issues *sub curia*. Wife noted an appeal.

On appeal of the custody order, the Court of Special Appeals vacated the trial court's custody determination and remanded for further proceedings in an opinion issued June 19, 2018. Less than one month later, the circuit court issued a Memorandum Opinion and Judgment of Absolute Divorce resolving all non-custodial issues. The July 13, 2018 opinion and order did not address child support and referred to Husband having primary physical custody of the parties' Son despite the June 19, 2018 opinion of the Court of Special Appeals. The trial court awarded Wife rehabilitative alimony in the amount of $12,000.00 per month for thirty months. The trial court also ordered that Husband pay Wife a monetary award of $456,547.28, which was subsequently modified to $446,547.29. The trial court further addressed issues relating to the disposition of the parties' real property. Wife noted an appeal.

Held: Affirmed in part, vacated in part. Remanded for further proceedings.

Judgment of the Circuit Court for Anne Arundel County granting judgment of divorce affirmed. Judgment of the Circuit Court for Anne Arundel County otherwise vacated. Case remanded for further proceedings.

On appeal, Wife argued that the trial court erred by failing to properly consider several of the statutory alimony factors and further erred by finding that there was no unconscionable disparity between the parties' post-divorce standards of living and denying her request for indefinite alimony. Wife also raised issues regarding the monetary award, child support, and attorney's fees.

The Court of Special Appeals examined the trial court's factual findings with respect to the statutory alimony factors set forth in Md. Code (1984, 2019 Repl. Vol.), § 11-106(b) of the

Family Law Article. The Court of Special Appeals found problematic the trial court's finding that Wife was likely to become self-sufficient in a period of three to four years. The Court emphasized that the trial court did not acknowledged Wife's mental health history and its potential effect on Wife's ability to become self-supporting. The Court took further issue with the trial court's characterizations of the standard of living established during the parties' marriage, as well as of the length of the parties' marriage. The Court explained that the parties' long marriage should have been weighed more heavily in the trial court's analysis. The Court of Special Appeals further discussed the trial court's findings regarding the circumstances that contributed to the estrangement of the parties. The Court concluded that the trial court's conclusions regarding Wife's responsibility for estranging Husband from the parties' son were inconsistent with the Court of Special Appeal's previous opinion in the custody case and that the evidence failed to support the trial court's finding that Wife bore all or primary responsibility for estranging Husband from the parties' son. The Court of Special Appeals further explained that the trial court overemphasized the significance of the disparity of the parties' pre-marriage standard of living.

The Court of Special Appeals ultimately concluded that the trial court erred in denying Wife's request for indefinite alimony. The Court concluded that the evidence presented at trial established conclusively that even after Wife makes as much progress toward becoming self-supporting as could reasonably be expected, the respective standards of living of the parties would be unconscionably disparate. The Court focused particularly on the relative percentage of Wife's imputed income of $35,000.00 per year as compared to Husband's earned income of over one and one-half million dollars per year.

The Court of Special Appeals explained that its decision to vacate the trial court's alimony award affected the trial court's rulings on the monetary award, child support, and counsel fees as well because the determinations involve overlapping evaluations of the parties' financial resources. Accordingly, the Court determined it was appropriate to vacate the interrelated orders. Nonetheless, the Court exercised its discretion to address certain issues relevant to the interrelated orders in order to promote judicial efficiency and provide guidance on remand.

The Court of Special Appeals did not disturb the trial court's ruling as to the value of Husband's ownership interest in his company. The Court was further not persuaded by Wife's arguments that the trial court erred in connection with its consideration of the parties' 2015 and 2016 tax refunds or with respect to the disposition of the parties' real property. The parties agreed on appeal that the trial court erred by failing to include as marital assets certain funds Husband left in his business to help satisfy the company's capital requirements, but the parties disagreed as to the value of this asset. The Court of Special Appeals explained that the trial court could determine the value on remand. The Court declined to address the propriety of the trial court's grant of Husband's motion to alter or amend without holding a hearing.

With respect to Wife's assertion that the trial court erred in connection with its child support order, the Court of Special Appeals agreed with Wife that the trial court's child support award appeared to be in part premised upon a computational error. The Court explained that the trial court would have the opportunity to address the computational error on remand. Finally, the

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Court of Special Appeals did not address Wife's assertion that the trial court erred in its award of attorney's fees.

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Monique Williams v. Mayor and City Council of Baltimore City, No. 3095, September Term 2018, filed April 7, 2020. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2020/3095s18.pdf

LOCAL CODES – MUNICIPAL GOVERNMENT – NEGLIGENCE – NOTICE

Facts:

Monique Williams appealed from a grant of summary judgment entered in the Circuit Court for Baltimore City in favor of the Mayor and City Council of Baltimore City (the "City"). In a complaint filed in 2017, Ms. Williams alleged two counts of negligence, naming the City as one of the defendants. She claimed that, on November 25, 2015, she lost control of her vehicle and sustained personal injury because a fire hydrant, for which the City was responsible, was leaking water and created a dangerous condition on Franklin Square Drive.

During her deposition, Ms. Williams had testified that, in the early morning on November 25, 2015, she drove down Franklin Square Drive on her way to Sam's Club. While driving home approximately 30 minutes later, again on Franklin Square Drive, she applied her brakes as another car pulled in front of hers. At that moment, her vehicle began to sway and then slid in a circular motion before landing on its side. Ms. Williams remained in the flipped vehicle until paramedics arrived to remove her. Subsequently, the paramedics transported Ms. Williams to Franklin Square Hospital where she was treated for multiple injuries.

On a motion for summary judgment filed by the City, the circuit court ruled that, although the City had notice of the defective condition of the hydrant, the City was entitled to summary judgment because Ms. Williams failed to meet her burden to show that "water or ice or some other defect in the roadway was the cause" of her accident. Ms. Williams challenged the court's decision to grant summary judgment in favor of the City on appeal.

Held: Affirmed

The Court of Special Appeals affirmed the circuit court's grant of summary judgment in favor of the City. First, the Court of Special Appeals determined that there was no genuine factual dispute about whether the City had constructive notice of any hazardous roadway condition. A person who is injured as a result of a municipality's failure to maintain its public works must show that the municipality had actual or constructive notice of *the bad condition that caused the damage* before the municipality may be held liable in negligence. The law imputes constructive notice of a defective condition when the evidence shows that the municipality would have learned of the existence of the condition due to its nature or the length of time it has existed. Although the City did not dispute that it had actual notice of an intermittently leaking hydrant,

the Court held that Ms. Williams failed to present evidence giving rise to an inference that the City had constructive notice of water or ice across the roadway.

Second, the Court of Special Appeals held that although Ms. Williams provided evidence that the hydrant was defective, she did not provide sufficient evidence that the hydrant created a dangerous roadway condition that caused her accident. The evidence before the circuit court was that no other cars encountered any dangerous roadway conditions, Ms. Williams did not see any water or ice, and she drove down Franklin Square Drive on the side closest to the hydrant earlier on the same day without issue. In the absence of admissible evidence to the contrary, there was nothing to support Ms. Williams's contention that approximately 30 minutes later there was a hazardous condition on the side of the road furthest from the hydrant. Accordingly, the Court discerned no error in the circuit court's determination that the City was entitled to judgment as a matter of law.

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Anthony Martinez v. Daniel Ross, et al., No. 2374, September Term 2018, filed April 29, 2020. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2020/2374s18.pdf

NEGLIGENCE – PREMISES LIABILITY – RECREATIONAL USE STATUTE

Facts:

Daniel Ross and his companies own and control a property known as Penn Shop Farm. The property is not open to the public. The entrance is controlled with fencing, a locked gate, and multiple warning signs that prohibit entry.

Ross invited a group of family and friends for a social event on the property on October 29, 2016. Ross invited the guests to ride all-terrain vehicles (ATVs) on courses that he had constructed on the property. Approximately 90 guests attended.

One guest in attendance was Anthony Martinez. While traversing one of the courses on an ATV, Martinez was thrown over the handlebars. The ATV landed on top of him. He suffered a spinal injury that rendered him a quadriplegic.

Martinez brought suit in the Circuit Court for Frederick County, alleging that his injuries were caused by Ross's negligence.

Ross and his companies moved for summary judgment, claiming that they were entitled to immunity under the Maryland Recreational Use Statute. Martinez argued that statute did not apply because Ross had not made his land available to the public.

The circuit court granted summary judgment in favor of Ross and his companies. The court reasoned that Ross had made his property available to the public for recreational purposes by inviting a large group of guests to ride ATVs on the property.

Martinez appealed.

Held: Reversed.

The Court of Special Appeals held that the circuit court erred in granting summary judgment in favor of the landowner based on the Maryland Recreational Use Statute.

The stated purpose of the statute is "to encourage any owner of land to make land ... available to the public for any recreational and educational purpose by limiting the owner's liability toward any person who enters on land … these purposes." Md. Code (1974, 2018 Repl. Vol.), § 5-

1102(a) of the Natural Resources Article ("NR"). Where applicable, if a landowner allows persons to enter onto land for recreational or educational purposes, the owner owes no duty of care to those persons (NR § 5-1103), except in cases of willful or malicious failure to guard or warn against a dangerous condition or in cases where the owner charges a fee. NR § 5-1106. Under the statute, an owner who permits other persons to use the land for recreational or educational purposes does not confer the legal status of an invitee or licensee upon those persons or incur liability for injury to those persons. NR § 5-1104. In addition, if the owner designates part of the property for the use of an off-highway vehicle, persons who use that part of the property assume all liability related to that use. NR § 5-1109.

The Recreational Use Statute is based on a model act drafted by the Council of State Governments in 1965. Because the Maryland statute is nearly identical to the model act, courts should look for guidance from courts that have construed similar legislation.

In view of the express purpose, other courts have recognized that the legislation creates a statutory *quid pro quo*: in exchange for opening lands to the public for recreational and educational use, owners receive a special statutory immunity from suit by those users. Courts have concluded that, to effectuate the purpose of legislation, its provisions must be limited to circumstances in which an owner makes land open to the general public. Where the operative provisions discuss an owner's liability to "persons" or "others," that language must be read to refer to members of the general public. The statute does not shield an owner from liability to social guests.

The Court of Special Appeals rejected the circuit court's conclusion that a property is "available to the public" within the meaning of the statute if the owner invites a sufficiently large number of social guests. Rather, the applicability of the statute turns on whether the owner makes the property to the general public. Here, the property was not open to the general public; the injured plaintiff was an invited social guest. Under the circumstances, the owner was not entitled to immunity under the Recreational Use Statute.

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Montgomery County, Maryland v. John T. Maloney, No. 632, September Term 2018, filed April 7, 2020. Opinion by Kehoe, J.

https://mdcourts.gov/data/opinions/cosa/2020/0632s18.pdf

WORKERS' COMPENSATION – REVIEW BY COURT – TRIAL DE NOVO

WORKERS' COMPENSATION – SCOPE AND EXTENT OF APPELLATE REVIEW

WORKERS' COMPENSATION – COMPENSABLE INJURIES – ARISING "OUT OF" EMPLOYMENT

WORKERS' COMPENSATION – COMPENSABLE INJURIES – ARISING "IN THE COURSE OF" EMPLOYMENT

Facts:

A Montgomery County fireman volunteered to work a two-day recruiting event at a county facility. Because the first day of the event ended late on a Friday night (around 8:30 p.m.) and the second day began early Saturday morning (around 6 a.m.), the fireman decided to spend the night at a nearby fire station. The station was not the fireman's normal assigned station, but it was much closer to the event than his Sterling, Virginia, home and was a relatively quiet station where he could rest.

That Friday night, after dinner, a shower and some reading, the fireman rolled his ankle when stepping down into the station's dark engine bay. He sought workers' compensation for the injury. At a hearing before the Workers' Compensation Commission, the fireman and others testified that although the fireman had not been required to stay at the station the night he was injured, staying at stations before and between shifts was routine. It was undisputed that the fireman stayed at the station so that he could get more sleep before the second day of recruiting. The Commission ultimately decided that the fireman's accidental injury was compensable because it arose "out of" and "in the course" of his employment, as is required for an injury to be compensable under Md. Code, Lab. & Empl. § 9-101(b).

The county petitioned the Circuit Court for Montgomery County for on-the-record judicial review of the Commission's award. With his response to that petition, the fireman requested "*de novo* judicial review by jury trial," pursuant to Md. Code, Lab. & Empl. § 9-745(d). The county moved to strike the fireman's request, arguing the fireman, as the non-appealing party, could not choose the method of appeal. The county also argued that the issue for which review was sought—a legal issue, the county said—was not the proper subject of a *de novo* trial, reserved for questions of fact. The circuit court denied the motion.

After hearing testimony from the fireman, a battalion chief, the officer in charge at the station where the fireman was injured, and the president of the local firefighters union, the circuit court affirmed the Commission's award, concluding that the fireman's injury arose out of and in the course of employment. The county appealed.

Held: Affirmed.

The issues before the Court of Special Appeals were (1) whether the circuit court erred in granting the fireman's request for a *de novo* appraisal of the facts under Lab. & Empl. § 9-745(d), and (2) whether the circuit court erred in its ultimate conclusion, at the end of the *de novo* trial, that the fireman's injury arose "out of" and "in the course of" employment.

The Court of Special Appeals held that the circuit court did not err in granting the fireman's request for a *de novo* appraisal of the facts under Lab. & Empl. § 9-745(d). First, even though the county initially sought traditional review of an administrative record, the fireman was not inescapably bound by this procedural preference. The language of Lab. & Empl. § 9-745(d) makes plain that "any party" can request, "in accordance with the practice in civil cases," a *de novo* review of "any question of fact involved in the case." Second, a *de novo* proceeding at the circuit court level was not foreclosed by the nature of the issue for which review was sought. A *de novo* trial is available so long as the issue before the circuit court is an issue of fact actually decided by the Commission. And whether an injury arises "out of" and "in the course of" employment is a factual question—or a "mixed" question of law and fact—able to be considered afresh by the circuit court if there are facts in dispute or if opposing inferences can reasonably be drawn from undisputed facts. In this context, an appellate court reviews the trial court's decision for clear error.

The Court held that the circuit court's conclusions that the injury arose out of and in the course of employment were not clearly erroneous. First, determining whether an injury arises "out of" employment is a simple question of causation. And the record before the circuit court made clear that but for his employment, the fireman would not have been where he was when he was injured. It was his employee status that permitted him to sleep in the fire station that night. Second, to arise "in the course of" employment, an injury must be sufficiently work-related, occurring within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. Even if an injury is sustained off premises and off the clock, however, the surrounding circumstances may evince an independently convincing association between the injury-causing activity and employment sufficient to make the injury compensable. Although the fireman in this case was not injured on the clock or in a place he would reasonably be expected to be during the course of his duties, the circuit court reasonably could have concluded the injury was sufficiently work-related to be compensable. The firefighter was engaged in an activity customarily permitted by the county, with an undisputed work-related justification for being there.

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Harford County, Maryland v. Gary E. Mitchell, Sr., No. 3456, September Term 2018, filed April 2, 2020. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2020/3456s18.pdf

WORKERS' COMPENSATION – OFFSETS

Facts:

Appellee developed cardiovascular disease while working as a Deputy Sheriff for Harford County. He was awarded workers' compensation benefits in 2005. Ten years later, appellee retired and began receiving retirement benefits as well as workers' compensation benefits. Pursuant to Section 9-503(e)(2) of the Labor and Employment Article, workers' compensation benefits "shall be adjusted so that the weekly total of those benefits and retirement benefits does not exceed the weekly salary that was paid to" the public safety employee. The Workers' Compensation Commission calculated the offset to appellee's workers' compensation benefits based on his salary at retirement rather than his salary at the time of disablement from occupational disease.

The County appealed to the Circuit Court for Harford County, arguing that the offset should have been calculated based on appellee's average weekly wage when he first received workers' compensation benefits. The circuit court affirmed the Commission's decision, and the County appealed.

Held: Affirmed.

The offset in LE § 9-503(e)(2) is calculated based on the claimant's "weekly salary." "Average weekly wage" is a term of art defined by LE § 9-602, calculated based on the claimant's earnings at the time of injury or last injurious exposure to the hazards of an occupational disease. The Court concludes that the legislature's use of "weekly salary" rather than "average weekly wage" was intentional. Because the employee is generally entitled to receive both workers' compensation and retirement benefits and construing the statute in accordance with its benevolent purpose, "weekly salary" refers to the claimant's salary at the time of retirement for purposes of calculating the offset.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated April 2, 2020, the following attorney has been disbarred by consent:

JASON EVAN SKLAR

*

By a Per Curiam Order of the Court of Appeals dated April 24, 2020, the following attorney has been disbarred:

GWYN CARA HOERAUF

*

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UNREPORTED OPINIONS

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

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