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Attorney Grievance Commission of Maryland v. Wortham David Davenport, Misc. Docket AG No. 67, September Term 2019, filed January 29, 2021. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2021/67a19ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

The Attorney Grievance Commission ("AGC"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action alleging that Wortham David Davenport violated numerous provisions of the Maryland Attorneys' Rules of Professional Conduct ("MARPC"). The Petition alleged that Mr. Davenport violated (1) Rule 1.1 (Competence); (2) Rule 1.2(a) (Scope of Representation); (3) Rule 1.3 (Diligence); (4) Rule 1.4(a) and (b) (Communication); (5) Rule 1.5(a) (Fees); (6) Rule 1.15(a) (Safekeeping Property); (7) Rule 1.16(d) (Declining or Terminating Representation); (8) Rule 8.1(b) (Bar Admission and Disciplinary Matters); and (9) Rule 8.4(a) and (d) (Misconduct). The charges arise from Mr. Davenport's representation of a client in a divorce and custody proceeding but, after taking the representation fees, substantively abandoned all representation.

The hearing judge found that Mr. Davenport failed to deposit the unearned fee paid by his client into his trust account. Additionally, although at the outset of the representation, Mr. Davenport drafted an untimely and defective counter-complaint, and a motion, he subsequently abandoned all representation. Specifically, he failed to attend the scheduled hearings, did not advise his client of the hearings, and failed to respond to discovery requests and motions, including motions to compel and motions for counsel fees. After the client terminated the representation and requested that Mr. Davenport return the unearned fee, he failed to withdraw from the case, thereby adversely affecting the client's ability to settle the matter and failed to return the unearned fee. Thereafter, Mr. Davenport failed to respond to Bar Counsel during its investigation and failed to participate in any manner in this attorney grievance proceeding.

Based on these findings, the hearing judge concluded that Mr. Davenport violated Rules 1.1, 1.2(a), 1.3, 1.4(a) and (b), 1.5(a), 1.15(a), 1.16(d), 8.1(b), and 8.4(a) and (d). The hearing judge

also found several aggravating factors, including that Mr. Davenport (1) had committed multiple offenses, (2) obstructed the disciplinary process in bad faith, (3) had substantial experience in the practice of law, and (4) showed indifference to making restitution.

Held: Disbarred.

Mr. Davenport did not file any exceptions, nor did he participate in these proceedings. The Court upheld all of the hearing judge's findings of fact. The Court also determined that there was clear and convincing evidence to support the hearing judge's conclusions that Mr. Davenport violated Rules 1.1, 1.2(a), 1.3, 1.4(a) and (b), 1.5(a), 1.15(a), 1.16(d), 8.1(b), and 8.4(a) and (d). The Court also agreed that there were several aggravating factors, specifically that Mr. Davenport: (1) had committed multiple offenses, (2) obstructed the disciplinary process in bad faith, (3) had substantial experience in the practice of law, and (4) showed indifference to making restitution. Based upon the aggravating factors and the underlying misconduct, the Court concluded that disbarment was the appropriate sanction.

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State of Maryland v. Kennard Carter, No. 74, September Term 2019, filed January 29, 2021. Opinion by Biran, J.

Watts, J., concurs.

https://www.mdcourts.gov/data/opinions/coa/2021/74a19.pdf

CONSTITUTIONAL LAW – FOURTH AMENDMENT – SEIZURE

CONSTITUTIONAL LAW – FOURTH AMENDMENT – IMPLIED CONSENT

CONSTITUTIONAL LAW – FOURTH AMENDMENT – SPECIAL NEEDS DOCTRINE

CONSTITUTIONAL LAW – FOURTH AMENDMENT – ATTENUATION

Facts:

On the evening of October 2, 2017, Maryland Transit Authority (MTA) police officers conducted a "fare sweep" of an MTA Light Rail train at the Mount Royal Light Rail stop in Baltimore City. A "fare sweep" is a form of fare payment inspection used by MTA. In a "fare sweep," after a train has arrived at a station, MTA officers simultaneously board each car of the stationary train and announce that all passengers must show their tickets or passes. If a passenger does not produce proof of fare payment, the officer at that point directs the passenger to leave the train and to speak with another officer who is waiting on the platform. Once all non-paying passengers have stepped off the train, the train departs the station. On the platform, officers then obtain identification from the non-paying passengers, conduct warrant checks on those passengers, and issue a $50 citation to each passenger for the criminal offense of fare evasion. If a non-paying passenger is not the subject of an outstanding warrant, the passenger is then free to leave. Respondent, Kennard Carter, was a passenger on the train at the time the fare sweep at issue occurred.

After the fare sweep was announced and while it was ongoing, Carter approached the officer who announced the fare sweep and told her that he did not have a ticket. The officer then directed Carter to step off the train. After Carter did so, another officer on the platform obtained identifying information from Carter and ran a warrant check on him, which revealed the existence of a warrant for Carter's arrest. In the course of attempting to arrest Carter on that warrant, a struggle ensued during which officers saw that Carter had a gun. Carter subsequently was indicted in the Circuit Court for Baltimore City on firearms and other charges.

Prior to trial, Carter moved to suppress the gun and other evidence that the officers allegedly discovered in the course of arresting him. At the suppression hearing, the State played the video recording of the events at the station that showed the officers boarding the train to conduct the fare sweep, as well as the aftermath of the fare sweep. MTA officers who helped conduct the fare

sweep also testified at the hearing. On cross-examination, one of the officers agreed that the purpose of the fare sweep was to "see if someone has committed a crime by riding the train without paying," and that a fare sweep entails "an investigation to determine if someone broke the law as set by MTA." The officer also agreed with defense counsel's characterization that "the fare checking also works as an apparatus to be able to check people for warrants as well."

After the conclusion of the evidence, Carter's trial counsel argued that the MTA officer on the train effected a *Terry* stop of Carter without reasonable suspicion to believe that he had evaded payment of the fare. Thus, defense counsel contended, Carter's admission that he did not have a ticket was the fruit of an illegal stop, and the court should suppress all evidence that flowed from the *Terry* stop. The State countered that the MTA officer on the train did not restrain Carter's "liberty of movement" when she announced the fare sweep and directed all passengers to show their tickets. Thus, according to the State, the officer did not seize Carter prior to his telling her that he lacked a ticket and effectively admitted that he had violated the fare evasion statute. Alternatively, the prosecutor argued that, if the officer seized Carter without reasonable suspicion, the discovery of an open arrest warrant attenuated the taint from the illegal seizure. The State did not alternatively contend that, if the fare sweep constituted a seizure, it was permissible under the special needs doctrine.

The Circuit Court for Baltimore City denied Carter's suppression motion. The court concluded that the MTA officer on the train engaged in a "mere accosting" of Carter, which did not require Fourth Amendment justification. Once Carter admitted he did not have a ticket, the circuit court reasoned, the officers had probable cause to believe that Carter had committed the offense of fare evasion, and therefore they were permitted to detain him to give him a citation as well as to conduct the routine warrant check that led to Carter's arrest and the discovery of the evidence Carter sought to suppress. Alternatively, the court ruled that, if a seizure occurred at the outset of the fare sweep, the discovery of the arrest warrant attenuated the taint of the unlawful stop. The court did not consider or decide whether the fare sweep was constitutional under the special needs doctrine.

After trial, a jury convicted Carter of two firearms offenses and resisting arrest. On appeal, the Court of Special Appeals reversed Carter's convictions. The intermediate appellate court concluded that the circuit court should have granted Carter's suppression motion. Contrary to the State's argument, the court held that the MTA officer seized Carter when she boarded the stationary train and announced the fare sweep, asking all passengers to have their tickets out for inspection. The court also rejected the State's alternate arguments that the fare sweep was constitutional under the special needs doctrine and that Carter impliedly consented to a seizure so that officers could check whether he had paid the fare to board the Light Rail train. The court determined the special needs doctrine was not applicable because the primary purpose of a fare sweep is to uncover evidence of ordinary criminal wrongdoing, based primarily on the officer's testimony that fare sweeps are used as an apparatus to search for open warrants. The court also disagreed that Carter impliedly consented to the seizure, and held that the discovery of the warrant for Carter's arrest did not attenuate the taint of his unlawful seizure.

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Held: Affirmed.

The Court of Appeals held that the MTA police officer seized Carter within the meaning of the Fourth Amendment when the officer announced a fare sweep aboard the Light Rail train after it arrived at a station. A reasonable passenger would not have felt free to leave the train without first displaying proof of fare payment, or the lack thereof, to the officer.

The Court also held that Light Rail passengers do not impliedly consent to be seized in a fare sweep. No signs or other notices inform riders that they may be subject to a seizure aboard the train. In addition, the Light Rail differs from military bases, airports, and other facilities where individuals who enter reasonably expect that they may be subject to search and seizure for security reasons.

The special needs doctrine is a recognized exception to the Fourth Amendment's warrant requirement. Under that doctrine, a program of warrantless searches or seizures undertaken without reasonable suspicion may be constitutional if the primary purpose of the program is to further a governmental interest besides the detection of ordinary criminal wrongdoing. The Court held that the record of the suppression hearing was insufficiently developed to determine the primary purpose of a fare sweep and, therefore, whether the special needs doctrine renders MTA's program of fare sweeps constitutional.

The Court held that, assuming (without deciding that) Carter's seizure was not constitutional under the special needs doctrine, the discovery of an open warrant for Carter's arrest did not attenuate the taint of the illegal warrantless seizure. The discovery of a warrant does not attenuate the taint of an unconstitutional seizure conducted under an agency program, where one of the directives of the program requires officers to search for open warrants.

State of Maryland v. Latoya Bonte Elzey, No. 3, September Term 2020, filed January 29, 2021. Opinion by Biran, J.

McDonald and Booth, JJ., concur.

https://www.mdcourts.gov/data/opinions/coa/2021/3a20.pdf

CRIMINAL LAW – SELF-DEFENSE – BATTERED SPOUSE SYNDROME – JURY INSTRUCTION – When a defendant has introduced evidence of past abuse and abuse by the victim, as permitted by the Battered Spouse Syndrome statute, Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 10-916 (2020 Repl. Vol.), a trial court may not emphasize the victim's abuse over other abuse suffered by the defendant in its instruction on Battered Spouse Syndrome.

Facts:

In the medical and scientific communities, Battered Spouse Syndrome is considered a subcategory of post-traumatic stress disorder, which comprises "a collection of thoughts, feelings, and actions that logically follow a frightening experience that one expects could be repeated." Maryland's Battered Spouse Syndrome statute, CJP § 10-916, permits a trial court to admit: (1) evidence of repeated physical and psychological abuse of the defendant perpetrated by the victim; and (2) expert testimony regarding the Syndrome to explain the state of mind of a defendant at the time of the alleged criminal offense. The statute provides that a trial court may admit Syndrome evidence in a case where the defendant has been charged with first-degree murder, second-degree murder, manslaughter (or attempt to commit any of those crimes), or with first-degree assault.

Respondent, Latoya Bonte Elzey, grabbed a butcher knife during a heated argument with her boyfriend, Migail Hunter. A few minutes later, Hunter fell to the floor with a knife wound to his heart. By the time an ambulance arrived, Hunter was dead. Elzey was charged in the Circuit Court for Wicomico County with Hunter's murder. During her trial, Elzey did not dispute that she killed Hunter, but claimed that she did so in self-defense, using a Battered Spouse Syndrome theory. She testified about physical abuse that Hunter inflicted on her as well as details concerning abuse by other intimate partners before her relationship with Hunter. The trial court admitted expert testimony that Elzey suffered from Battered Spouse Syndrome at the time of Hunter's killing as a result of her history of abusive relationships, including her relationship with Hunter.

Over defense counsel's objection, the trial court instructed the jury to "determine, based upon a consideration of all the evidence, whether the Defendant was a victim of repeated physical and psychological abuse by the victim, and if so[,] whether she suffered from battered spouse syndrome." The basis for the court's instruction was its interpretation that CJP § 10-916 requires that there be a finding by the jury that Hunter had repeatedly abused Elzey before the jury could consider whether Elzey suffered from Battered Spouse Syndrome. The jury acquitted Elzey of

first-degree murder, second-degree murder, and first-degree assault. The jury convicted Elzey of voluntary manslaughter, second-degree assault, and reckless endangerment.

On appeal to the Court of Special Appeals, Elzey argued that the trial court erred in its instruction on Battered Spouse Syndrome. The State argued that the instruction was correct in all respects, and that the trial court acted within its discretion in delivering it. The court agreed with Elzey that the Battered Spouse Syndrome jury instruction was erroneous, both because it improperly required the jury to make a predicate finding that Hunter repeatedly abused Elzey, and because it was confusing as to the relevance of Elzey's past abuse by others. *Elzey v. State*, 243 Md. App. 425, 437-39 (2019). The court further held that the instructional error was not harmless beyond a reasonable doubt, and therefore ordered a new trial. *Id.* at 439-40.

Held: Affirmed.

Court of Special Appeals affirmed. Case remanded to the Circuit Court for Wicomico County for a new trial.

The Court of Appeals held that the trial court erred in its instruction because it required the jury to find that Hunter repeatedly abused Elzey, before the jury could consider all the evidence – including evidence of alleged prior abuse – upon which the expert relied in reaching his opinion that Elzey suffered from the Syndrome. CJP § 10-916 does not require a jury to make a finding that the victim repeatedly abused the defendant before it may consider all evidence of prior abuse, and expert testimony relying on such abuse, in assessing whether the defendant suffered from the Syndrome. In a case where there is evidence that the defendant was abused by one or more third parties before the decedent allegedly abused her, and an expert opines that all of the defendant's abusive relationships contributed to her development of Battered Spouse Syndrome, a trial court may not instruct the jury to make a predicate finding that the decedent repeatedly abused the defendant, before the jury may consider all the evidence that goes to whether the defendant was suffering from the Syndrome at the time of the alleged offense.

In addition, the instruction was ambiguous and sent mixed messages to the jury regarding the relevance of evidence of past abuse to the jury's assessment of whether Elzey suffered from the Syndrome. Under *Wallace-Bey v. State*, 234 Md. App. 501 (2017), the trial court properly admitted evidence of Elzey's past abuse and the expert testimony. All of the alleged abuse was relevant to the jury's determination whether Elzey suffered from the Syndrome and, if so, how that psychological condition affected her perception of the threat that Hunter presented and, ultimately, the viability of her self-defense claim.

The Court further held that the errors were not harmless beyond a reasonable doubt. Although the jury's verdict indicates that the jury concluded Elzey acted in imperfect self-defense, the State failed to show that, if the jury had received a proper jury instruction on the Syndrome, the jury necessarily would have reached the same verdict.

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Jose Canales-Yanez v. State of Maryland, No. 11, September Term 2020, filed January 29, 2021. Opinion by Barbera, C.J.

https://mdcourts.gov/data/opinions/coa/2021/11a20.pdf

CRIMINAL LAW – *BRADY* VIOLATIONS – STANDARD OF REVIEW

Facts:

Petitioner Jose Canales-Yanez was charged with two counts of first-degree murder, conspiracy to commit first-degree murder, armed robbery, and four counts of use of a firearm in the commission of a felony. One of the State's witnesses, Victoria Kuria, testified at trial that she was present at the trailer home of one of the four alleged co-conspirators on the night of the murders. She provided testimony that placed the four men together at the trailer approximately an hour to an hour and a half prior to when the murders took place. Ms. Kuria also stated that she overheard the men discussing street names that she later learned were located near the cul-de-sac where the murders occurred. Finally, she testified that she observed one of the alleged co-conspirators carrying a black semiautomatic pistol that she had not previously seen.

Ms. Kuria admitted during her testimony, both on direct examination and repeatedly on cross-examination, that the first time she was interviewed by detectives during their investigation she had lied and withheld much of the information that she knew about the night of the murders. She explained that she did so because she was dating one of the suspects and living with his family at the time, and she feared there would be retribution against her if she told the detectives what she witnessed that night. During that interview the detective informed Ms. Kuria that he believed she knew more about the murders than she was disclosing and warned her that lying to the police was a crime. He also asked her if she wanted to take a polygraph examination, which she declined. Ms. Kuria testified at trial that the second time she was interviewed by the detectives she told the truth. Her account during the second interview was consistent with her testimony at trial. Her trial testimony was also consistent with the testimony of Jasmine Jones. Ms. Jones testified about a conversation she had with Ms. Kuria shortly after the murders, prior to Ms. Kuria's first police interview, wherein Ms. Kuria told Ms. Jones about what she witnessed on the night of the murders. Finally, Ms. Kuria's testimony at trial was also consistent with the other circumstantial and forensic evidence proffered by the State, which the trial court characterized as "overwhelming." At the conclusion of the eight-day bench trial, the Circuit Court for Montgomery County convicted Canales-Yanez on all counts.

After trial, but prior to sentencing, the State informed defense counsel for the first time of a recorded interview that took place between two detectives and the Bells, the mother and stepfather of Ms. Kuria, the day prior to Ms. Kuria's second police interview. The detectives had gone to the Bells' home attempting to locate Ms. Kuria. During that undisclosed interview, detectives informed the Bells that they believed that Ms. Kuria had lied during her first interview and that she could be prosecuted for lying to the police if she did not meet with the detectives

again and tell the truth. Mrs. Bell also indicated to the detectives that Ms. Kuria had previously told her that she did not know who had committed the murders. Canales-Yanez, by way of new counsel, moved the circuit court for a new trial on the basis of the newly discovered evidence, arguing that its nondisclosure prior to trial constituted a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Canales-Yanez argued that the undisclosed interview created an inference that Ms. Kuria met with the police the following day and changed her story in a manner that was helpful to the State, either due to the threat of prosecution or in exchange for the State to not prosecute her and drop some of her other outstanding driving-related charges. Canales-Yanez further argued that if Ms. Kuria had told her mother that she did not know who had committed the murders, that would have been consistent with what Ms. Kuria told the police during her first interview.

The circuit court considered the motion for new trial at the sentencing hearing. The court noted that it was already established at trial that detectives had threatened Ms. Kuria with prosecution for lying to the police. The court also reasoned that if Ms. Kuria had told her mother that she did not know who had committed the murders, that likely would have been true, as she was not alleged to be at the scene of the crime at the time of the murders. Finally, the court noted that Ms. Kuria's trial testimony was consistent with the statement she made to Ms. Jones prior to her first police interview. Ultimately, the circuit court found that the undisclosed interview of the Bells was not material to the trial because it would not have affected the verdict, and the court denied Canales-Yanez's motion for new trial. The court then sentenced Canales-Yanez to two consecutive life sentences, without parole, plus forty years.

In a reported opinion the Court of Special Appeals affirmed the trial court's denial of Canales-Yanez's motion for new trial. *Canales-Yanez v. State*, 244 Md. App. 285 (2020). The Court of Special Appeals gave considerable weight to the fact that Canales-Yanez had elected a bench trial. As such, the trial judge was uniquely well-situated in ruling on the motion for new trial and considering the effect of the undisclosed evidence on the verdict, as the judge had also acted as the factfinder. The Court of Special Appeals cited to several out-of-state authorities that provide greater deference to trial court rulings on *Brady* violations in cases involving bench trials. The court found those authorities to be persuasive and adopted a new standard of review applicable to bench trial cases under which a trial court's determination as to the existence of a *Brady* violation will only be set aside if it is found to be "patently unreasonable." Finding that the trial court's ruling that the undisclosed interview of the Bells was immaterial was not patently unreasonable, the Court of Special Appeals affirmed the trial court's denial of Canales-Yanez's motion for new trial.

Held: Affirmed

The Court of Appeals first held that under *Ware v. State*, 348 Md. 19, 48 (1997), appellate courts review trial court determinations as to the existence of *Brady* violations de novo, regardless of whether the defendant elected a bench or jury trial, as it presents a constitutional issue. The Court next considered whether, in light of the six factors for analyzing undisclosed impeachment

evidence enumerated in *Wilson v. State*, 363 Md. 333, 352 (2001), the disclosure of the interview with the Bells would have had a reasonable probability of affecting the verdict. The Court found that at least four of the factors weighed against such a finding, and Canales-Yanez had not established that any weighed in his favor, as was his burden. *See Yearby v. State*, 414 Md. 708, 720 (2010). In light of all of the other evidence proffered by the State, and the cumulative nature of the undisclosed evidence given the fact that Ms. Kuria was already heavily impeached at trial, the Court found that the undisclosed evidence was immaterial, as there was not a reasonable probability that its disclosure prior to trial would have altered the verdict. As a finding of materiality is a necessary element of a *Brady* violation, the Court affirmed the trial court's ruling that there was no such violation, and held that the trial court therefore did not abuse its discretion in denying Canales-Yanez's motion for new trial.

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State of Maryland v. Karon Sayles, No. 15, September Term 2020; *State of Maryland v. Bobby Jamar Johnson*, No. 16, September Term 2020; *State of Maryland v. Dalik Daniel Oxely*, No. 17, September Term 2020, filed January 29, 2021. Opinion by Watts, J.

Hotten, J., dissents.

https://www.mdcourts.gov/data/opinions/coa/2021/15a20.pdf

JURY NULLIFICATION – JURY QUESTIONS – SUPPLEMENTAL JURY INSTRUCTIONS – PREJUDICE

Facts:

Karon Sayles, Bobby Jamar Johnson, and Dalik Daniel Oxely, Respondents, were each charged with multiple offenses related to a home invasion, armed robbery, and kidnapping that occurred over the course of two days on August 1 and 2, 2017, in Silver Spring, Maryland. At a joint trial in the Circuit Court for Montgomery County, during jury deliberations, the jury sent three notes inquiring about jury nullification. In the first note, the jury asked whether it had the right to use jury nullification. The circuit court provided a written response advising that the jury's verdict must be based solely on the evidence, that the choices were guilty or not guilty, and that the jury should reread the court's instructions.

Later, in a second more insistent note, a juror asked that the question about the right to use jury nullification be answered with a yes or no response. In answer, the circuit court orally instructed the jury, among other things, that: jury nullification is "a juror's knowing and deliberate rejection of the evidence or refusal to apply the law"; a jury cannot engage in jury nullification; the jury was to decide the case based on the evidence as it found it and apply the law as given to it by the court; and jury nullification should not be a consideration.

In a third note that was "[f]rom juror #112[,]" the juror directly asked whether any law in Maryland prohibited jury nullification. In response, the circuit court orally instructed the jury as a whole, among other things, that the jury could not engage in jury nullification, jury nullification is improper, contrary to the law, and would violate the jury's oath, and jury nullification would violate the court's order and that the jury must apply the law as explained by the court. At the end of the next day, the jury returned verdicts finding Respondents guilty of numerous crimes, including home invasion, armed robbery, and kidnapping.

Respondents each appealed to the Court of Special Appeals, which, in a reported opinion, reversed the circuit court's judgment and remanded the case to that court for a new trial. *See Sayles v. State*, 245 Md. App. 128, 167, 226 A.3d 349, 372 (2020). In doing so, the Court of Special Appeals concluded that the power of jury nullification exists and held that the circuit court's instructions in response to the second and third jury notes concerning jury nullification

"were legally incorrect and prejudicial." *Id*. at 151, 144, 226 A.3d at 362, 359. The State filed petitions for writs of *certiorari*, which the Court of Appeals granted. *See State v. Sayles*, 469 Md. 659, 232 A.3d 259 (2020); *State v. Johnson*, 469 Md. 658, 232 A.3d 258 (2020); *State v. Oxely*, 469 Md. 658, 232 A.3d 258 (2020).

Held: Reversed and remanded.

Reversed and case remanded to the Court of Special Appeals for consideration of the remaining issues not addressed on appeal.

The Court of Appeals held that, despite the circumstance that jury nullification occurs, jury nullification is not authorized in Maryland and a jury does not have a right to engage in jury nullification. No case, statute, or rule in Maryland authorizes or gives juries the right to engage in jury nullification, *i.e*., there is no grant of authority permitting a jury to nullify.

The Court of Appeals reiterated that Maryland case law makes clear that it is improper for an attorney to argue jury nullification to a jury, and that jury instructions on the law are binding and trial courts must advise juries as much. On request, during voir dire, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on certain fundamental principles. In addition, a verdict resulting from jury nullification is analogous to the return of legally inconsistent verdicts because in both instances a jury acts contrary to a trial court's instructions as to the proper application of the law and both occurrences are impermissible. The Court held that, taken together, the principles of law led to conclusion that jury nullification is not a practice that is authorized in Maryland.

The Court of Appeals stated that, although a jury may have the ability to nullify, and the Court recognized that jury nullification occurs, a jury does not have the right to engage in jury nullification. In Maryland, a jury is required to determine the facts and render a verdict based on the instructions on the law provided to it by the trial court.

The Court of Appeals held that, in the case, the circuit court did not abuse its discretion when, in response to the second and third jury notes about jury nullification, it instructed the jury, among other things, that: jury nullification is a juror's knowing and deliberate rejection of the evidence or refusal to apply the law; the jury could not engage in jury nullification; jury nullification is contrary to the law and engaging in it would violate the jury's oath; jury nullification would violate the court's order; and, in Maryland, the jury must apply the law as instructed by the court. The Court held that the circuit court's instructions were neither legally incorrect nor prejudicial.

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State of Maryland v. Karen Campbell McGagh, No. 12, September Term 2020, filed January 29, 2020. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2021/12a20.pdf

CRIMINAL LAW – STANDARD OF REVIEW – SUFFICIENCY OF EVIDENCE – PERJURY

CRIMINAL LAW – SUFFICIENCY OF EVIDENCE – PERJURY – FALSITY

CRIMINAL LAW – SUFFICIENCY OF EVIDENCE – PERJURY – MATERIALITY

Facts:

Respondent, Karen McGagh, ("McGagh") was tried in the Circuit Court for Baltimore County for falsely accusing Glenn Trebay ("Trebay") of sexually assaulting her while patronizing a Verizon store. McGagh alleged that Trebay, a store employee, had touched her breast and inner thigh during the course of their two-hour interaction. McGagh relayed these allegations to a police officer and in a sworn Application for Statement of Charges that was submitted to a District Court Commissioner. Following an investigation, the State charged McGagh with perjury and making a false statement to a police officer. During a bench trial, the State admitted the store's surveillance video, which showed that Trebay did not touch McGagh's breast and inner thigh. McGagh took the stand in her own defense and conceded that the surveillance video did not show the alleged offensive touching had occurred. The circuit court convicted McGagh of perjury and making a false statement to police.

McGagh filed a timely appeal to the Court of Special Appeals, arguing that the evidence was legally insufficient to sustain the convictions. In a 2-1 decision, the Court of Special Appeals agreed and reversed the circuit court. The majority raised, *sua sponte*, the issue of whether McGagh's perjury and false report convictions infringed upon the First Amendment right to petition the government for legal address. The court reasoned that the implication of McGagh's First Amendment rights triggered a *de novo* standard of review. Under a *de novo* standard of review, the court held that there was insufficient evidence to establish the elements of perjury and false report. According to the court, the surveillance video left too many unanswered questions regarding McGagh's emotional state, Trebay's demeanor, and the substance of their conversation. The video, in this instance, could neither independently corroborate Trebay's version of events, nor rule out the possibility that McGagh may have merely misremembered the encounter.

The dissent asserted that the majority erred by applying a *de novo* standard of review. The dissent noted that no Maryland appellate court has ever departed from the traditional standard of review for the sufficiency of evidence in perjury cases. The dissent argued that given the importance of witness credibility determinations in a perjury case, an appellate court should be

more inclined to show deference to the circuit court. Even under a *de novo* standard of review, the dissent found sufficient evidence to sustain the circuit court's convictions arising from Trebay's testimony, the surveillance video, and McGagh's own admissions. The State duly noted an appeal to the Court of Appeals.

Held: Reversed.

The Court held that McGagh's perjury and false report convictions did not warrant a *de novo* standard of review. Maryland Rule 8-131(c) provides the standard of review for bench trials, which required appellate courts to give deference to the court's credibility determinations. This Court has consistently adopted a deferential standard when reviewing the sufficiency of evidence, specifically asking whether "*any* rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in original). In limited circumstances, this Court supplemented the *Jackson* standard with a *de novo* review when necessary to determine whether a State action violated protected speech under the First Amendment. No protected speech was implicated in this case. McGagh did not raise any First Amendment challenges at trial, and even if Respondent had, the First Amendment does not protect perjurious speech.

The Court also held that a store's surveillance video may independently corroborate a witness's testimony to establish falsity under the "two-witness rule." This rule refers to the State's burden in producing at least two, independent witnesses to establish the element of falsity. Maryland common law no longer requires two actual witnesses to satisfy the rule. The State may provide one witness corroborated by other evidence "of equal weight to that of at least a second witness[.]" *Brown v. State*, 225 Md. 610, 616-17, 171 A.2d 456, 458 (1961).

McGagh filed a cross-petition challenging whether the State provided sufficient evidence to establish the element of materiality. In the context of perjury, materiality constitutes "a statement *capable* of affecting the course or outcome of the proceedings or the decision-making of the court[.]" *Palmisano v. State*, 124 Md. App. 420, 429-30, 722 A.2d 428, 429-30 (1999). The Court held that McGagh's false statement affected court proceedings by initiating a criminal investigation and prompting the District Court Commissioner to issue an arrest warrant for Trebay.

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K. Hovnanian Homes of Maryland, LLC, et al. v. Mayor and City Council of Havre de Grace, et al., No. 22, September Term 2020, filed January 29, 2021. Opinion by Booth, J.

https://www.courts.state.md.us/data/opinions/coa/2021/22a20.pdf

MUNICIPAL CONTRACTS – ESTABLISHMENT OF FEES – MUNICIPAL HOME RULE AMENDMENT – ACTIONS INCONSISTENT WITH DELEGATION OF EXPRESS POWERS UNENFORCEABLE

Facts:

In 2004, the Mayor and City Council of Havre de Grace (the "City") adopted a resolution annexing approximately 150 acres of undeveloped property to the City, including 130 acres of land owned by Greenway Investments, LLC (the "Greenway Property"). The resolution contemplated that the Greenway Property would be developed for residential use and that Greenway Investments, LLC would be responsible for constructing certain on-site public improvements serving the Greenway Property. A year later, Greenway Investments, LLC and K. Hovnanian Homes of Maryland, LLC ("Hovnanian") began working with the City on a development plan for the Greenway Property. After subdividing the Greenway Property into three separate parcels (individually, "Parcel 1," "Parcel 2," and "Parcel 3," and collectively, the "Parcels") the City, Greenway Investments, LLC, and Hovnanian agreed to develop the Greenway Property in three separate phases, beginning with Parcel 1. Shortly thereafter, Hovnanian began developing Parcel 1, which included construction of public infrastructure necessary to serve the planned residential development.

While development on Parcel 1 was underway, Parcels 2 and 3 were conveyed into separate ownership. After acquiring Parcels 2 and 3, the new owners (the "Owners") began working with the City to develop construction plans for Parcels 2 and 3. These efforts culminated in a Public Works Agreement, wherein the City authorized the Owners to construct 414 residential units on Parcels 2 and 3. Importantly, the Public Works Agreement provided that the Owners would reimburse Hovnanian for certain expenses related to road, water, and sewer improvements that had been constructed on Parcel 1 and that "solely service[d]" Parcels 2 and 3, although the agreement did not specify the amount owed and instead contemplated that these fees would be memorialized in a future agreement. Ultimately, Hovnanian and the Owners were unable to reach an agreement on a specific reimbursement amount to be paid by the Owners for their share of the Parcel 1 infrastructure costs. Undeterred, Hovnanian prepared and presented to the Mayor and City Council of Havre de Grace a Recoupment Agreement, wherein Hovnanian would recoup costs associated with Parcel 1 infrastructure costs via a $3,304.57 "infrastructure fee" imposed on each residential unit for which a building permit is issued on Parcel 2 or 3. Although the City Council ultimately approved the proposed Recoupment Agreement by verbal motion, the Mayor declined to undertake any efforts to execute the Agreement. Because the Recoupment

Agreement was never executed, the City issued 33 building permits for Parcel 33 without collecting any recoupment fees.

Hovnanian filed a complaint against the City in the Circuit Court for Harford County seeking a declaration that the Recoupment Agreement was binding, an order directing the Mayor to sign the Agreement, and damages exceeding $100,000, which represented the fees the City failed to collect on the first 33 building permits. Relying on the Havre de Grace City Charter (the "Charter") the circuit court concluded the Recoupment Agreement was neither valid nor binding and entered judgment in the City's favor. On appeal, the Court of Special Appeals reversed the circuit court's decision and remanded the case for further proceedings. This time, the circuit court concluded that under the Charter, the Agreement was binding and enforceable and issued an order directing the Mayor to sign the Recoupment Agreement. The circuit court also entered judgment against the City in the amount of $144,822.32. The City timely appealed to the Court of Special Appeals. Relying on the Charter, the intermediate appellate court concluded that the Charter created a strong mayor system of government wherein the authority to enter contracts was vested in the executive. The court reasoned that because the Mayor did not execute the Agreement, the City could not be bound.

Held: Affirmed.

The Court of Appeals held that the Recoupment Agreement is not a valid and enforceable agreement against the Mayor and City Council, but for reasons different from those expressed by the Court of Special Appeals.

Under Article XI-E of the Maryland Constitution, a municipality only possesses those powers conferred upon it by the General Assembly. Consequently, the applicable provisions of the Charter must be read to comply with the General Assembly's express-ordinance making powers as set forth in Title 5, Subtitle 2 of the Local Government Article, which must be exercised by the municipal legislative body and pursuant to a duly enacted ordinance.

Stripped of its labels, the nature of the governmental action that is the subject of the "agreement" is the imposition and collection of fees, which under Article XI-E, Section 5 of the Maryland Constitution, Local Government Article §§ 5-203(b) and 5-205(d), and the applicable provisions of the Charter, are required to be established by the municipal legislative body known as the "Mayor and City Council of Havre de Grace," pursuant to the enactment of an ordinance. Because the Recoupment Agreement was not adopted by the Mayor and City Council by ordinance, it is *ultra vires* and unenforceable against the City.

COURT OF SPECIAL APPEALS

Frederick P. Winner, LTD v. Pabst Brewing Company, Case No. 1882, September Term 2019, filed January 29, 2021. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2021/1882s19.pdf

MARYLAND BEER FRANCHISE FAIR DEALING ACT – SUCCESSOR BEER MANUFACTURER – CHANGE IN OWNERSHIP AND AT CORPORATE GRANDPARENT LEVEL – CHANGE IN CORPORATE STRUCTURE

Facts:

In 2014, Frederick P. Winner, LTD ("Winner") entered into a distributorship agreement with Pabst Brewing Company ("Pabst Brewing"), a supplier of malt beverages operating in Maryland as a non-resident dealer. Pursuant to the agreement, Winner had the right to sell twenty-two brands of Pabst [Brewing] products. The 2014 distributorship agreement supplanted a previous distributorship agreement that Pabst had made with an earlier incarnation of Winner in 1994. When the parties entered into the 2014 agreement, Pabst Brewing was a Delaware corporation and a wholly-owned subsidiary of Pabst Holdings Inc., which was, in turn, a wholly-owned subsidiary of Pabst Corporate Holdings, Inc. On November 13, 2014, Pabst Brewing became a Delaware limited liability company. On the same day, Pabst Corporate Holdings, Inc. sold its interest in Pabst Holdings, Inc. to Blue Ribbon, LLC. Pabst Brewing subsequently informed Winner that it was terminating Winner's distribution rights effective May 8, 2015. In Pabst Brewing's view, Pabst Brewing had become a "successor beer manufacturer" as defined by the Maryland Beer Franchise Fair Dealing Act ("BFFDA") and was, therefore, entitled to terminate its agreement with Winner. In response, Winner's attorney sent a letter to Pabst Brewing asserting that Pabst Brewing was not a "successor beer manufacturer" and that, consequently, Pabst Brewing had no legal right to terminate the 2014 agreement.

On May 4, 2015, Winner filed the complaint in the Circuit Court for Baltimore County that ultimately gave rise to this appeal. Winner sought a declaratory judgment that Pabst Brewing had no basis to terminate the 2014 agreement as well as injunctive relief and damages. After Pabst Brewing sent a letter to Winner on August 3, 2015 reiterating that the distribution rights had been terminated and that Pabst brands would be distributed by successor distributors, Winner filed a request for a temporary restraining order, which was denied by the circuit court. On

January 21, 2016, Winner filed an amended complaint. Pabst Brewing moved to strike the amended complaint and the parties filed cross-motions for summary judgment. The circuit court subsequently granted Pabst Brewing's motion to strike the amended complaint but nonetheless proceeded to address Pabst Brewing's substantive arguments concerning the amended complaint. The circuit court also denied Winner's motion for partial summary judgment. Winner appealed to this Court, and, on appeal, we vacated the trial court's order striking Winner's amended complaint and remanded for further proceedings.

On remand, Winner filed a second amended complaint asserting that Pabst Brewing had violated the BFFDA and breached the parties' contract. Winner sought injunctive and monetary relief. The parties again filed cross-motions for summary judgment. The circuit court entered summary judgment in favor of Pabst Brewing and denied Winner's motion for partial summary judgment. The circuit court found that Pabst Brewing's parent company, Blue Ribbon, was a successor beer manufacturer, and, therefore, that Pabst Brewing's not-for-cause termination of Winner's distribution rights was permitted as a matter of law. The circuit court found that Winner would have been entitled to an award of the fair market value of its distribution rights but concluded that Winner's request for a fair market value award was time-barred. The circuit court further found that Pabst Brewing's termination of Winner's distribution rights did not constitute a breach of contract as a matter of law due to Pabst Brewing's status as a successor beer manufacturer. Winner appealed.

Held: Reversed and remanded.

The Court of Special Appeals held that the circuit court erred in granting summary judgment to Pabst Brewing on the grounds that Pabst Brewing was a "successor beer manufacturer" under the BFFDA. The Court explained that the narrow issue before it was whether Pabst Brewing and/or its parent or grandparent companies constitute a "successor beer manufacturer" under Md. Code (2016), § 5-201 of the Alcoholic Beverages Article ("AB"). The Court explained that the BFFDA protects distributors by limiting the circumstances under which a beer manufacturer may terminate a distributorship and by generally prohibiting not for cause terminations of distributorships. Pursuant to AB § 5 201, a successor beer manufacturer may terminate an agreement made between a distributor and the predecessor beer manufacturer but the successor beer manufacturer "shall remunerate the beer wholesaler a sum equal to the fair market value for the sale of the subject brand or brands of beer calculated from the date of termination."

When evaluating whether Pabst Brewing and/or its parent companies were a "successor beer manufacturer," the Court considered the definitions set forth in the relevant statute, observing that The statute defines a beer manufacturer as "(i) a brewer, fermenter, processor, bottler, or packager of beer located in or outside the State; or (ii) a person located in or outside the State that enters into an agreement with a beer wholesaler doing business in the State." AB § 5-201(a)(3). The statute also defines the term "successor beer manufacturer," providing that "'[s]uccessor beer manufacturer' includes a person or license holder who replaces a beer manufacturer with the right to sell, distribute, or import a brand of beer." AB § 5-201(a)(5). The

Court considered whether the change in Pabst Brewing's corporate structure in 2014, coupled with the change in ownership at Pabst Brewing's grandparent level, rendered Pabst Brewing and/or its parent and grandparent companies "successor beer manufacturers" under the statute.

The Court of Special Appeals observed that after the 2014 restructuring, Pabst Brewing was structured as a limited liability corporation but continued to operate under the same EIN as before the change in ownership. The Court further emphasized Pabst Brewing's letter to the Maryland Comptroller expressly stating that no new entity had been formed and that Pabst Brewing continued to have the right to sell, distribute, or import the same brands of beer. The Court of Special Appeals concluded that although a change in ownership and control occurred two rungs up the corporate chain, the entity with the right to sell, distribute, or import the brands of beer remained the same, and, therefore, was not replaced. The Court held that the circuit court erred when it concluded that Pabst Brewing and its parent company satisfied the statutory definition of "successor beer manufacturer." Because the circuit court's grant of summary judgment in favor of Pabst Brewing as to both counts was premised upon this incorrect conclusion, the Court of Special Appeals reversed the circuit court's grant of summary judgment in favor of Pabst Brewing and remanded for further proceedings.

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R. James Vaughn v. Faith Bible Church of Sudlersville, et al., No. 1258, September Term 2019, filed November 19, 2020. Opinion by Shaw Geter, J.

https://mdcourts.gov/data/opinions/cosa/2020/1258s19.pdf

CONSTITUTIONAL LAW – CORPORATIONS AND BUSINESS ORGANIZATIONS – RELIGIOUS SOCIETIES

Facts:

In the summer of 2016, John M. Stoltzfus began discussions with the pastor of Independent Baptist Church ("IBC") regarding his desire to found a local Baptist church in Maryland. Shore Haven Baptist Church of Sudlersville ("Shore Haven") was subsequently founded with the agreement that R. James Vaughn ("Vaughn") would serve as Shore Haven's pastor. Shore Haven was incorporated under the Maryland Religious Corporations Law. Shore Haven's Articles of Incorporation provided that five signatories had been elected by the members of the congregation of Shore Haven to act as trustees.

On November 27, 2016, IBC held an ordination and sending service for Vaughn and "planted" Shore Haven as an IBC mission church. On that same day, IBC members unanimously voted to install its Constitution as the constitution for Shore Haven. The Constitution made no mention of appointing or dismissing clergy but did provide that the officers of the church had the authority to conduct all of the business affairs of the church.

In March of 2019, after discussing removing Vaughn due to his inappropriate conduct, the Shore Haven Board of Trustees voted to remove him as pastor. Vaughn sought judicial review of the Board's decision in the Circuit Court of Queen Anne's County, and requested a declaratory judgment and injunctive relief. The circuit court entered a declaratory judgment finding that the Shore Haven Board of Trustees acted within the scope of its corporate and statutory authority when it voted to end Vaughn's tenure as pastor and denied his request for injunctive relief.

Held: Affirmed.

The Court of Special Appeals affirmed. First the Court noted that the First Amendment does not prohibit civil courts from resolving all church disputes, but only those concerning questions of discipline, or of faith, or ecclesiastical rule, custom, or law. U.S. Const. Amend. 1. Vaughn argued the Shore Haven trustees had no authority to remove him as pastor because Section 5-306 of the Maryland Corporations and Associations Article contains no language expressly authorizing the trustees to "control any operation of the church," aside from the church's assets. He also contended that the decision to remove him involved "ecclesiastical matters," and, thus, should have been left to the Shore Haven congregation.

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The Court explained that neutral principles of law, developed for use in all property disputes, can be applied to resolve religious organizations' secular disputes requiring an interpretation of corporate charters or bylaws without violating the First Amendment. The Court added that when there is no evidence that a religious corporations' Board of Trustees' decision is based on religious doctrine, biblical interpretations or other ecclesiastical matters, civil courts are permitted to resolve such disputes. The Court noted that the plain language of the Maryland Corporations and Associations Article § 2-103(18) states: "[u]nless otherwise provided by law or its charter, a Maryland corporation has the general powers, whether or not they are set forth in its charter," to perform "every other act not inconsistent with law which is appropriate to promote and attain the purposes set forth in its charter." The Court then concluded that the powers of a religious corporation are not limited to those specifically provided in the Maryland Religious Corporations Article and must be read as part of the Maryland Corporations and Associations Article, which confers "general powers" upon corporations, including religious corporations, to perform acts that are consistent with their charters. The Court added that in the absence of any provision therefore, a religious corporations' Board of Trustees is the body corporate, not the congregation. The Court held that the authority to terminate Vaughn was vested in the governing body, i.e., the Shore Haven Board of Trustees. The Court held further that removing Vaughn as pastor was not an ecclesiastical matter reserved to church because the Board's decision was not based on disputes regarding religious doctrine, biblical interpretations or other ecclesiastical matters.

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Fernando Baires v. State of Maryland, No. 955, September Term 2019, filed January 28, 2021. Opinion by Wells, J.

https://mdcourts.gov/data/opinions/cosa/2021/0955s19.pdf

CRIMINAL LAW – PARTICIPATION IN A CRIMINAL ORGANIZATION – PATTERN REQUIREMENT

CRIMINAL LAW – PARTICIPATION IN A CRIMINAL ORGANIZATION – KNOWLEDGE REQUIREMENT

CRIMINAL LAW – HARMLESS ERROR DOCTRINE – EVIDENCE

CRIMINAL LAW – CONFRONTATION OF WITNESSES – STANDARD OF REVIEW – ABUSE OF DISCRETION

Facts:

The State alleged that appellant, Fernando Baires, shot two men on the parking lot of an apartment complex in Hyattsville, killing one man and wounding the other. As a result, the State charged Baires with first-degree murder, attempted first-degree murder, conspiracy to commit first-degree murder, use of a handgun in a crime of violence, and participation in a criminal gang. After a four-day trial, a jury sitting in the Circuit Court for Prince George's County convicted Baires of all counts. The court sentenced him to a combined term of life imprisonment plus 20 years.

During the trial, in addition to witness testimony and other evidence of Baires' participation in the shooting, the State introduced certified copies of the convictions in two unrelated murders committed by members of the criminal organization known as MS-13. Under Criminal Code ("CR") section 9-804, the State sought to prove Baires' participation in a criminal gang using these convictions. Significantly, Baires did not participate in either of the other two murders, both of which occurred **after** the shooting for which Baires was being tried. Overruling an objection, the court admitted the convictions. Later, Baires was convicted of participation in a criminal gang, among the other charges mentioned.

Additionally, during the trial Baires sought to cross-examine three of the State's witnesses, a detective, the co-defendant, and a retired police officer.

Baires' appeal focused on the insufficiency of the convictions satisfying the requirement under CR 9-804 that the State prove Baires' knowingly participated in a criminal gang. Further, Baires claimed the trial court abused its discretion in limiting his cross-examination of the three witnesses. Baires requested a reversal of his convictions.

Held: Reversed in part, affirmed in part.

The Court of Special Appeals determined that the certified convictions, though unrelated to Baires, still could be used to prove a pattern of gang behavior, distinguishing *Marshall v. State*, 213 Md. App. 532, 546-47 (2013). In *Marshall*, the Court held that the appellant's individual participation in other gang activities was sufficient to prove his participation in a criminal gang. In Baires' case, the Court held that nothing in the language of CR § 9-804 requires the individual defendant to have engaged in a pattern of criminal gang activity. All that is required is that the defendant have knowledge that "members of the gang" had engaged in the pattern of such activity.

But the certified convictions fell short of proving Baires' knowing participation in a criminal gang as CR 9-804(a)(1) requires. Both of the other murders occurred after the incident in which Baires' was involved. At trial, the State specifically argued that the convictions proved a pattern of gang behavior. In admitting the evidence, the trial court noted only that the convictions tended to prove a pattern of gang activity, not Baires' *knowledge* of a pattern of gang activity. Since the convictions did not show knowledge, reversal of Baires' conviction for participating in criminal gang was appropriate.

The Court determined that, on balance, the certified convictions did not infect Baires' other convictions, they being harmless beyond a reasonable doubt. The Court concluded that there was ample independent evidence of Baires' guilt, including testimony from the surviving victim and video recordings of the crime from surrounding surveillance cameras. The undisputed evidence at trial was that Baires has asthma. One of the video recordings shows Baires running from the scene of the crime, dropping to the pavement, coughing and struggling to get up, as if suffering from an asthma attack. Finally, though relied upon to a lesser extent by the Court in its harmless error analysis, was the testimony of the accomplice who identified Baires as one of the shooters. Because of this evidence, the Court affirmed Baires' other convictions.

As for the remaining issues in the appeal, the Court concluded that the trial court did not abuse its discretion in ruling that Baires' counsel's cross-examination of Detective Cruz exceeded the scope of direct. With regard to cross-examination of the co-defendant about his plea agreement with the State, the trial court admitted the written plea agreement into evidence. Counsel's questions regarding the maximum time the State agreed the co-defendant would receive was answered by the terms of his written plea agreement. The trial did not abuse its discretion in limiting cross-examination as a result.

Finally, the court did not prevent trial counsel from cross-examining a retired detective about whether Baires had tattoos. During a bench conference, the trial judge offered advice about how not to get overruled and told counsel that he could ask the expert about whether Baires, in fact, had tattoos. Upon returning to counsel table, Baires' attorney voluntarily abandoned that line of questioning. The issue was unpreserved. *See Grandison v. State*, 305 Md. 685 (1986). If considered, the testimony that Baires sought would have been cumulative. After several cross-examination questions, the retired detective made clear he knew nothing specifically about Baires or the shooting. The State called the detective as an expert solely to educate the jury

about the MS-13 gang, not about Baires' individual participation in MS-13. If the claim had been considered, the court did not abuse its discretion by limiting the questioning in this instance.

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Daniel Beckwitt v. State of Maryland, No. 794, September Term 2019, filed January 29, 2021. Opinion by Beachley, J.

https://mdcourts.gov/data/opinions/cosa/2021/0794s19.pdf

GROSS NEGLIGENCE INVOLUNTARY MANSLAUGHTER – RECKLESS DISREGARD FOR HUMAN LIFE – LESS CULPABLE FORM OF SECOND-DEGREE DEPRAVED HEART MURDER

SECOND-DEGREE DEPRAVED HEART MURDER – EXTREME DISREGARD FOR HUMAN LIFE – HEIGHTENED FORM OF GROSS NEGLIGENCE INVOLUNTARY MANSLAUGHTER – REQUIRES LIKELIHOOD OR CERTAINTY OF DEATH

Facts:

Askia Khafra met Daniel Beckwitt in an internet chatroom where Khafra was seeking investors for his business idea—Equity Shark—a smartphone application that streamlined the process for ordinary people to invest in starter companies. Beckwitt agreed to invest in Equity Shark, and for approximately $10,000 he received a 5% stake in the business.

When Equity Shark failed to take off as expected, Khafra needed to repay Beckwitt for the $10,000 investment. Because Beckwitt feared a nuclear war between the United States and North Korea, he had been digging tunnels and a bunker underneath his home. Beckwitt allowed Khafra to repay the $10,000 debt by digging such tunnels at Beckwitt's home. On numerous occasions in 2017, Beckwitt would pick up Khafra and drive him back to his house to dig. Concerned with his privacy and in order to conceal his actual address, Beckwitt required Khafra to wear a blindfold during such drives. Additionally, Beckwitt did not allow Khafra into the first and second floors of the residence; Khafra was free to roam in the basement and the tunnels. Because Beckwitt did not own a cellular phone, he generally communicated with Khafra by using computer programs.

On September 10, 2017, in the early morning hours, Khafra sent Beckwitt a text message indicating that the power had gone out in the tunnels, that there was no airflow, and that he believed he smelled smoke. Khafra shortly thereafter clarified that he no longer detected smoke, but asked Beckwitt to fix the issue. Beckwitt, who was sleeping, did not see the messages until the next morning. When he saw the messages, Beckwitt notified Khafra that there had been a "pretty major electrical failure" and then switched power to the tunnels over to a different circuit. Beckwitt then went back to sleep.

Beckwitt awoke in the afternoon at approximately 3:00 p.m. and headed to the kitchen for some food. At about 4:00 p.m., he heard a beeping sound which he understood to be the carbon monoxide detector indicating a loss of power. After waiting twenty to thirty minutes for the

breaker to automatically reset, Beckwitt went to the basement to manually reset the breaker. While in the basement, Beckwitt did not see Khafra.

Beckwitt reset the breaker and as he headed upstairs, he heard an explosion and immediately saw smoke rising out of the kitchen floor. Beckwitt immediately returned to the basement to tell Khafra about the fire. Although Beckwitt did not see Khafra, he heard him yell "yo dude." Beckwitt was soon overcome by smoke and had to exit the basement. Once outside, Beckwitt yelled for his neighbors to call 9-1-1.

Firefighters quickly responded to the scene, but noted unusual challenges in putting out the relatively small fire. The unusual challenges stemmed from the fact that Beckwitt was a hoarder, and the floor of his basement was completely covered with trash, debris, and other objects that rendered navigation difficult. When the smoke cleared, the firefighters found Khafra's body in the middle of the basement.

The State charged Beckwitt with second-degree depraved heart murder and two theories of involuntary manslaughter: gross negligence and failure to perform a legal duty. Following a trial, the jury returned a verdict of guilty as to second-degree depraved heart murder, and guilty as to involuntary manslaughter. The verdict sheet did not distinguish between the two theories of manslaughter. Beckwitt timely appealed.

Held:

Conviction for second-degree depraved heart murder reversed. Conviction for gross negligence involuntary manslaughter affirmed.

The evidence is insufficient to support a conviction for depraved heart murder but is sufficient to support a conviction for gross negligence involuntary manslaughter. Whereas gross negligence involuntary manslaughter, the "junior varsity" of depraved heart murder, requires a *reckless* disregard for human life, second-degree depraved heart murder requires an *extreme* disregard for human life.

The evidence in this case shows that Beckwitt demonstrated a reckless disregard for human life by hiring Khafra to dig tunnels underneath his home where Khafra was completely dependent upon Beckwitt for food and supplies, there was a history of electrical failures in the tunnels, the basement was completely cluttered with trash and debris making escape difficult in the event of an emergency, Khafra could not easily call for or receive emergency assistance because Beckwitt had sought to conceal his location, and the door leading from the basement to the outside may have been locked. Accordingly, the evidence was sufficient to support the conviction for gross negligence involuntary manslaughter.

Although the case law fails to draw a clear line of demarcation between "reckless disregard" and "extreme disregard," the cases discussing the sufficiency of evidence for depraved heart murder

intimate that the likelihood or certainty of death distinguishes it from mere gross negligence involuntary manslaughter. Although the circumstances in this case were dangerous enough to sustain a conviction for gross negligence involuntary manslaughter, they were not so egregious as to indicate that death was the likely, if not certain result, so as to satisfy the malice element of depraved heart murder. Accordingly, the evidence was insufficient to support the conviction for depraved heart murder.

As to Beckwitt's challenges regarding the prosecutor's closing arguments, Beckwitt generally failed to preserve his arguments for our review because the trial court, for the most part, sustained his objections as to the issues he raises on appeal. Beckwitt's challenges as to the jury instructions are unpersuasive. Finally, Beckwitt failed to preserve for our review his argument that the court erred by failing to hold a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) because he failed to indicate what evidence should have been excluded from his trial based on the court's failure to hold such a hearing.

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Kim Hargett v. State of Maryland, No. 1809, September Term 2019, filed November 19, 2020. Opinion Shaw Geter, J.

https://mdcourts.gov/data/opinions/cosa/2020/1809s19.pdf

CRIMINAL LAW – PRETRIAL PROCEDURES – REQUEST TO DISCHARGE COUNSEL – MD RULE 4-215

Facts:

Kim Hargett (Hargett) was charged in the Circuit Court for Baltimore City with robbery with a deadly weapon, robbery, attempt to obstruct justice, and suborning perjury. The latter two charges arose from allegations that Hargett had arranged for someone to threaten the victim of the robbery, an 84-year old man, to cause him not to testify and had urged a friend to testify falsely in his favor. On the day of trial, after the trial judge had requested that a jury panel be summoned to the courtroom, but before the panel had arrived, Hargett told the court he wished to "waive" counsel. Hargett asserted that his attorney was biased and prejudiced against him, to which defense counsel responded that it was "not true."

Upon questioning from the court, Hargett explained that he believed that defense counsel had violated the attorney-client privilege by speaking to the victim's private attorney about his case. Hargett did not specify the substance of the conversation or identify any privileged information shared with the victim's attorney. Hargett also argued that his attorney's demeanor had been "salty" ever since defense counsel heard a recording of Hargett telling someone that if the victim died before trial, it would be beneficial to his case.

The trial court implicitly found that Hargett's reasons for seeking to discharge his attorney lacked merit and advised him that his case would not be postponed if he elected to proceed without counsel. Hargett decided not to discharge his counsel and trial went forward.

Hargett was acquitted of robbery with a deadly weapon but convicted of the remaining charges. His convictions were affirmed on direct appeal in *Kim Lee Hargett v. State*, No. 1479, Sept. Term 2009 (filed Dec. 20, 2010), *cert. denied* 418 Md. 587 (2011) ("*Hargett I*"). He petitioned for post-conviction relief based upon ineffective assistance of appellate counsel in the first appeal and was granted the right to file a second, belated direct appeal to raise an issue not raised in *Hargett I*.

Held: Affirmed.

The Court of Special Appeals held that meaningful trial proceedings had not commenced when Hargett made his request to discharge counsel on the day of trial before the jury panel had

entered the courtroom. There was no risk of jury confusion because the prospective jurors were not present in the courtroom and the disruption to trial procedure occasioned by the belated request was minimal. Consequently, the provisions of Rule 4-215(e) were triggered and strict compliance was mandated.

The trial court complied with Rule 4-215(e) by permitting Hargett an opportunity to explain the reasons for his request to discharge counsel. The court did not abuse its discretion by finding that those reasons lacked merit. Considering this finding, the trial court was not obligated to continue the trial and did not err by so advising Hargett.

State of Maryland v. Arnold Davis, No. 1898, September Term 2019, filed January 28, 2021. Opinion by Gould, J.

https://mdcourts.gov/data/opinions/cosa/2021/1898s19.pdf

INEFFECTIVE ASSISTANCE OF COUNSEL – VOIR DIRE

Facts:

In 2007, Arnold Davis was convicted by a jury sitting in the Circuit Court for Wicomico County of several offenses related to an armed home invasion in Salisbury, Maryland. In 2019, Mr. Davis filed a motion for post-conviction relief. Citing *Dingle v. State*, 361 Md. 1 (2000), he argued that his trial counsel's performance was deficient because his counsel did not object to the compound "feelings" voir dire question recited above. In a subsequent written opinion, the court agreed with Mr. Davis's argument that his trial counsel was constitutionally ineffective. The court concluded that (1) the question was improper under *Dingle*; (2) the trial counsel's failure to object amounted to deficient performance; and (3) prejudice was presumed under *Wright v. State*, 411 Md. 503 (2009). The State appealed from that decision.

Held: Reversed.

The circuit court erred in applying the Court's holding in *Pearson v. State*, 437 Md. 350 (2014), retroactively to Mr. Davis's trial counsel in 2007, when the state of the law was quite different.

In *Dingle*, the Court of Appeals held that a trial court erred when it asked, over defense counsel's objection, several two-part voir dire questions concerning: (1) whether prospective jurors had certain "experiences or associations"; and (2) whether those experiences or associations would affect their ability to be fair and impartial. 361 Md. at 3-4, 21.

Mr. Davis's trial occurred seven years after the 2000 decision in *Dingle* and seven years before the 2014 decision in *Pearson*. The law on compound jury selection questions evolved over this 14-year period. Pinpointing Mr. Davis's trial on this continuum is critical to the central issue before us: whether Mr. Davis's trial counsel's failure to object to the compound strong feelings question deprived Mr. Davis of his Sixth Amendment right to the effective assistance of counsel.

After *Dingle*, in 2002, in *State v. Thomas*, 369 Md. 202 (2002), the Court of Appeals determined that *Dingle* did not apply to a "strong feelings" compound question. The Court of Appeals affirmed its *Thomas* holding three months later in *Sweet v. State*, 371 Md. 1 (2002). We followed the *Thomas* holding in *Baker v. State*, 157 Md. App. 600 (2004) and *Singfield v. State*, 172 Md. App. 168 (2006). In *Baker*, citing *Thomas* and *Sweet*, we held that the trial court erred in refusing to ask the venire the following question: "[D]o you have any bias or prejudice

concerning handguns which would prevent you from fairly weighing the evidence in this case?" *Baker*, 147 Md. App. at 612. In *Singfield*, citing *Thomas*, *Sweet*, and *Baker*, we held that the trial court erred in refusing to ask the venire the following question: "Does any member of the jury panel feel that the nature of this case would make it difficult or impossible for you to render a fair and impartial verdict, specifically because this case involves a murder with a handgun?" *Singfield*, 172 Md. App. at 170 n.2, 180-81 (italics omitted).

Mr. Davis was tried in the year following *Singfield*, on August 27-28, 2007. Four years later, in *State v. Shim*, 418 Md. 37, 39 (2011), the Court of Appeals reasserted its *Thomas* and *Sweet* position, holding that the trial court had abused its discretion in refusing "to ask whether the venire panel harbored 'such strong feelings concerning the violent death of another human being' that they would be 'unable to render a fair and impartial verdict based solely on the evidence presented[.]'" That same year, in *Wimbish v. State*, 201 Md. App. 239, 268 (2011), we articulated our understanding of the Court of Appeals' holdings in *Dingle*, *Thomas*, *Sweet*, and *Shim*. There, we held that a trial court did not abuse its discretion in refusing to ask prospective jurors four two-part questions about their "state of mind or attitude" that would prevent them from being fair and impartial.

Three years later, in *Pearson v. State*, 437 Md. 350 (2014), the Court of Appeals specifically abrogated those portions of *Thomas*, *Sweet*, and *Shim* that permitted two-part "strong feelings" voir dire questions. In *Pearson*, the Court of Appeals held that the trial court had acted properly in not asking the venire whether any prospective juror had ever been a victim of a crime, in part because the trial court had asked the prospective jurors: "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?" *Id*. at 361 (quotation marks omitted). In addition, the Court of Appeals determined that the phrasing of the two-part "strong feelings" question was improper. *Id*. at 360-61.

The Court of Appeals in *Pearson* recognized that its application of *Dingle* to the strong feelings compound questions marked a change in the law from allowing to disallowing compound questions that "shift responsibility to decide a prospective juror's bias from the trial court" to the prospective jurors. *Pearson*, 437 Md. at 363. Thus, the Court of Appeals emphasized that, "[t]o be clear, we amend this Court's holding in *Shim* only in the context of phrasing of the 'strong feelings' voir dire question in *Shim*." *Id*. at 363 (internal citations omitted). Moreover, the Court in *Pearson* made clear that its holdings applied "prospectively as of the date on which this opinion [was] filed." *Id*. at 370.

Here, the circuit court erred in applying the Court's holding in *Pearson* retroactively to Mr. Davis's trial counsel in 2007, when the state of the law was quite different. Based on the law as it existed at the time of trial, Mr. Davis's trial counsel's failure to object to the two-part "strong feelings" voir dire question was not a deficiency in counsel's defense of Mr. Davis. *See State v. Gross*, 134 Md. App. 528, 553 (2000) ("[C]ounsel is under no duty to anticipate a change in the case law" because trial counsel's performance is judged "upon the situation as it existed at the time of trial.") (quoting *State v. Calhoun*, 306 Md. 692, 735 (1986), *aff'd*, 371 Md. 334 (2002) (emphasis added in *Gross*)).

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Jason Mercer v. Thomas B. Finan Center, No. 1398, September Term 2019, filed January 28, 2021. Opinion by Arthur, J.

https://www.mdcourts.gov/data/opinions/cosa/2021/1398s19.pdf

STATUTORY INTERPRETATION – FORCED MEDICATION OF CONFINED INDIVIDUALS

Facts:

A patient involuntarily confined at Thomas B. Finan Center refused to take his prescribed medications. Based on safety concerns, a clinical review panel approved the administration of the prescribed medication against the patient's will.

The patient received a form advising him of his right to appeal the panel's decision. A lay advisor reviewed the form with the patient. The patient requested an appeal but checked a box indicating that he was declining representation by counsel.

At the administrative hearing, the patient requested counsel for the first time. The administrative law judge concluded that the patient had affirmatively declined legal representation after he had been informed of his right to request representation. The administrative law judge found no good cause to postpone the hearing to allow the patient to obtain counsel.

The administrative law judge ultimately approved the panel's decision. The patient petitioned for judicial review in the Circuit Court for Allegany County. The court affirmed the decision. The patient appealed to the Court of Special Appeals.

Held: Affirmed.

Patients involuntarily confined at mental health facilities have the right to request legal representation when appealing a decision to administer medication against the patient's will. Maryland Code (1982, 2019 Repl. Vol.), § 10-708 of the Health-General Article ("HG"), states that patients have "[t]he right to request representation or assistance of a lawyer or other advocate of the individual's choice[.]"

Under the statute, patients have a right to the assistance of counsel only if they first request counsel. Here, administrative law judge did not err in concluding that the patient affirmatively declined representation at the time that he initiated his appeal.

When the patient belatedly requested counsel at the hearing, it was reasonable for the administrative law judge to treat his request for counsel as a request for a postponement. HG § 10-708(*l*)(5) permits the administrative law judge to postpone the hearing only for good cause.

The administrative law judge did not abuse her discretion in concluding that the patient lacked good cause to postpone the administrative hearing.

The administrative law judge did not deny the patient due process by declining to postpone the administrative hearing. HG § 10-708(i) provides patients with sufficient procedural safeguards by ensuring patients are informed of the right to request representation at administrative hearings.

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Chicago Title Insurance Co. v. Allynnore M. Jen, No. 2015, September Term 2019, filed January 28, 2021. Opinion by Berger, J.

https://mdcourts.gov/data/opinions/cosa/2021/2015s19.pdf

INSURANCE – COVERAGE – TITLE INSURANCE – TITLE DEFECTS – RIGHT OF ACCESS – PREMIUMS – NON-PAYMENT OF PREMIUMS FOR COVERAGE CHARGED – DUTY TO DEFEND – DETERMINATION OF DUTY – POTENTIALITY OF COVERAGE

Facts:

The complaint giving rise to this case was filed by Allynnore M. Jen along with her husband Charles Shuler (the "Jen-Shulers"), after a dispute with their neighbors, Dennis and Teresa Bull (the "Bulls"). The Jen-Shulers and the Bulls disputed whether the driveway between their two lots was accessible by both neighbors. The Jen-Shulers filed a claim for coverage with their title insurance company, Chicago Title Insurance Co. ("Chicago Title"), asserting coverage under a lack of a right of access provision in their policy. Chicago Title denied the Jen Shuler's claim and requests for reconsideration multiple times. The Jen-Shulers later filed a complaint with the Maryland Insurance Administration ("MIA").

The MIA issued a written letter finding in favor of the Jen-Shulers on three issues. First, the MIA found that the Jen-Shulers were entitled to coverage under the lack of right of access provision insured by Chicago Title. Second, the MIA found that Chicago Title had failed to provide coverage for a provision for which it charged premiums. Finally, the MIA found that Chicago Title had a duty to defend the Jen-Shulers against a counterclaim filed by the Bulls in an underlying lawsuit and that Chicago Title's reasoning for denying such coverage was arbitrary and capricious. Chicago Title requested a hearing and one was later held before the MIA. The MIA issued a written decision different from the original letter. The MIA's final decision determined that Chicago Title was not required to provide coverage for the lack of right access provision because the Jen-Shuler's property abutted a private road. The MIA also found that Chicago Title had provided coverage under the lack of right of access provision in previous cases, so it was not charging premiums for which it was not providing coverage. Finally, the MIA agreed with the original decision that Chicago Title was required to defend the Jen-Shulers against the Bulls' counterclaim in the underlying lawsuit.

Both parties filed petitions for judicial review of the MIA's decision with the Circuit Court for Baltimore County. Both cases were consolidated. The circuit court held a hearing where both parties presented evidence. The circuit court agreed with the Jen-Shulers and remanded the case to the MIA to reinstate the original decision, finding in favor of the Jen-Shulers on all three issues. Chicago Title noted a timely appeal.

Held: Reversed.

Judgment of the Circuit Court for Baltimore County reversed. Case remanded to the Maryland Insurance Administration to reinstate the Maryland Insurance Administration's final decision.

The Court of Special Appeals held that there was substantial evidence before the MIA to support its determinations in its final decision. The Court explained that based on the case law throughout the county which has considered the lack of a right of access provision, "right of access" does not equate to reasonable or vehicular access. The Court agreed with Chicago Title that the case law throughout the country supports the findings of the MIA that Chicago Title was not required to provide coverage to the Jen-Shulers under the right of access provision in their policy when the property abutted two public roads. The Court therefore found that there was substantial evidence for the MIA to find that Chicago Title had not violated Md. Code Ann., § 4-113(b)(5).

The Court agreed with Chicago Title that the MIA had substantial evidence before it to determine that Chicago Title had not violated Md. Code Ann., § 27-216(a) by charging premiums for the right of access provision and failing to provide coverage. The Court explained that the MIA had relied on the testimony presented by Chicago Title's expert that there were landlocked properties throughout Maryland and other areas. The expert also testified that Chicago Title had spent substantial funds providing coverage to insureds under this provision in other cases. The Court reasoned that the agency is entitled to weigh the evidence and the credibility of the witnesses before it. Therefore, the Court held that the MIA had substantial evidence to find in favor of Chicago Title on this issue.

The final issue the Court of Special Appeals considered was whether the MIA had substantial evidence presented before it to determine that Chicago Title had a duty to defend the Jen-Shulers in an underlying lawsuit. The Court concluded that there was a potentiality of coverage because a ruling by the lower court had in favor of the Bulls would interfere with the Jen-Shulers' access to their own land that makes up a portion of the shared driveway. The Court reasoned that the potentiality of coverage standard is broad and the duty to defend is broader than the duty to indemnify. Additionally, the Court found that an insurer must review all available information before making a determination of providing a defense. Therefore, the Court found that there was substantial evidence for the MIA to find that Chicago Title had violated Md. Code Ann., § 27-303(2) by not defending the Jen-Shulers against the Bulls' counterclaim.

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In re S.F., No. 582, September Term 2019, filed January 28, 2021. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2021/0582s19.pdf

JUVENILE DIVISION – CONDITION OF PROBATION – SCHOOL SUSPENSION

Facts:

S.F. was twelve years old when he entered *Alford* pleas to two different charges in the Juvenile Division of the Circuit Court for Frederick County. The cases proceeded separately, and each magistrate ordered as a condition of probation, among others, that S not be suspended from school. S filed an exception in each case, arguing that the no-suspension condition of his probation was impermissibly vague and failed to provide him with direction about the conduct that would violate it. At the hearing, the judge overruled the exceptions and found that the no-suspension condition of probation was not vague.

Held: Affirmed.

The Court of Special Appeals affirmed, holding that a no-suspension condition of probation for a juvenile defendant is not impermissibly vague. A condition of probation is permissible only if the court provides a defendant with reasonable, specific direction, so that the defendant understand what is required of him. A condition of probation requiring that the juvenile "attend school regularly without any unexcused absences, suspensions, or tardiness" was not impermissibly vague because the defendant, school administrators, and the defendant's probation officer are guided by the school district's disciplinary handbook as to which behaviors are or are not grounds for suspension. Further, a no-suspension condition of probation is subject to several layers of procedural safeguards within the school's disciplinary system and the judicial system.

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Mayor and City Council of Baltimore v. Thornton Mellon, LLC, et al., No. 1940, September Term 2019, filed January 28, 2021. Opinion by Shaw Geter, J.

https://mdcourts.gov/data/opinions/cosa/2021/1940s19.pdf

TAXATION – STATUTORY INTERPRETATION

Facts:

On May 15, 2017, Thornton Mellon LLC, a real estate investment company, purchased a residential property located in Baltimore, Maryland, at a Baltimore City tax sale. Thornton Mellon LLC, later filed a Complaint to Foreclose the Right of Redemption in the Circuit Court for Baltimore City. On July 10, 2019, the court entered a Judgment Foreclosing the Right of Redemption which ordered the plaintiff be "vested with an absolute and indefeasible fee simple title." The Judgment further ordered the City to "execute and deliver a Deed to the Plaintiff, his successors and assigns, in accordance with the provisions of §§ 14-831 and 14-847 of the Tax - Property Article of the Maryland Code Annotated . . . [.]"

On July 31, 2019, Thornton Mellon LLC filed a Notice of Substitution stating its interest in the property had been assigned to Ty Webb LLC and requested that Ty Webb LLC be substituted as plaintiff. Ty Webb LLC then filed a Motion for an Order Directing the City to Issue a Tax Deed to Assignee. In opposition, the City filed a Motion to Strike the Notice of Substitution and to Strike, or Alternatively, Respond to the Motion for Order Directed to the City of Baltimore to Issue a Tax Deed to Assignee.

At a hearing scheduled by the circuit court, the City argued that under the statutory scheme of the Maryland Tax Property Article, the assignment of a foreclosure judgment is not permitted, nor is a post-judgment assignment of a tax sale certificate. The court denied the City's Motion to Strike Notice of Substitution and granted Ty Webb LLC's Motion for an Order Directing the City to Issue a Tax Deed to Assignee, holding that the plain language of § 14-821 of the Maryland Tax Property Article does not limit the assignability of either a tax sale certificate or a Judgment Foreclosing the Right of Redemption. Further, the court held that a "chose in action" such as this one, is generally assignable.

Held: Affirmed.

The Court of Special Appeals affirmed. The Court found that, the circuit court, pursuant to its general revisory powers, may reopen an unenrolled final order foreclosing the right of redemption. Under Maryland law, the Notice of Substitution and Motion for an Order Directing the City to Issue a Tax Deed to Assignee, although not captioned as motions to revise the final judgment, may be treated as such. Thus, since both motions were filed less than 30 days after the

Judgment Foreclosing the Right of Redemption was entered, the court was well within its revisory powers to reopen and amend the judgment.

Next, applying the cardinal rule of statutory interpretation, the Court found that Section 14-821 of the Tax - Property Article is unambiguous and expressly states that a certificate of sale may be assigned. To that end, if the legislature had meant to limit the assignment of the certificate post-judgment, it would have done so. The Court further reasoned, because a certificate of sale still retains some value after the judgment is entered, its assignment post-judgment is valid and not a legal nullity.

Similarly, the Court found that the tax statute places no limitation on assignment of a final judgment foreclosing the right to redemption. Moreover, the foreclosure judgment constitutes a chose in action, which the Court has previously held, whether arising in tort or ex contractu, is generally assignable.

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Earl Davis, et al. v. Regency Lane, LLC, No. 1747, September Term 2019, filed January 28, 2021. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2021/1747s19.pdf

NEGLIENCE – PREMISE LIABILITY – LANDLORD – THIRD PARTY CRIMINAL ACTIVITY – DUTY – CAUSATION

Facts:

On October 30, 2016, two teenagers were shot and killed by an unknown assailant(s) outside an apartment owned by Regency Lane, LLC ("Regency"), appellee. On July 18, 2018, the decedents parents, appellants, sued Regency in the Circuit Court for Prince George's County, alleging that Regency negligently failed to exercise reasonable care in providing adequate security measures on the premises to protect tenants and invitees from foreseeable criminal activity. The circuit court granted Regency's motion for summary judgment, ruling that appellants failed to present sufficient evidence to support their claims. It found that, although the question of the decedents' status on the property at the time of the shooting was a dispute of material fact, appellants had failed to establish that Regency owed a duty to the decedents. Moreover, they did not identify a dangerous physical condition that existed and show that the shooting was a result of that condition.

Held: Affirmed.

The owner of property has a duty to use reasonable care to keep common areas safe for invitees. The status of a tenant and a guest of a tenant generally is that of an invitee, but when the property owner alleged that the decedents were using the parking lot for an impermissible purpose, the issue of the decedents' legal status became a dispute of material fact.

A landlord who is aware of criminal activity against persons in the common area has a duty to invitees to take reasonable security measures to eliminate foreseeable harm. Notice of shootings, assaults, and drug activity on the premises, combined with the property manager's concerns about the safety of the property would put a reasonable person on notice that a shooting could occur on the property in the absence of additional security measures. The circuit court erred in finding that summary judgment was proper because Regency owed no duty to the decedents.

The circuit court properly granted summary judgment, however, on the issue of causation. Where appellants provided no evidence regarding the circumstances of the shooting, appellants could not meet their burden to show that any failure by Regency to satisfy its duty to take reasonable security measures (assuming that the decedents were invitees) was the proximate cause of the

shooting. When plaintiffs fail to meet their burden of showing "a viable theory of causation" in a negligence case, summary judgment is proper.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated November 4, 2020, the following attorney has been disbarred by consent, effective January 1, 2021:

TIMOTHY J. MURPHY

*

By an Order of the Court of Appeals dated January 4, 2021, the following attorney has been suspended for sixty days by consent:

DAVID FERNANDO MORENO

*

By an Order of the Court of Appeals dated January 19, 2021, the following attorney has been indefinitely suspended:

SANDY YEH CHANG

*

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JUDICIAL APPOINTMENTS

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On December 17, 2020, the Governor announced the appointment of **KAREN MARTIN DEAN** to the Circuit Court for Wicomico County. Judge Dean was sworn in on January 8, 2021 and fills the vacancy created by the retirement of the Hon.Leah J. Seaton.

*

On January 6, 2021, the Governor announced the appointment of the **HON. LAURA SUE RIPKEN** to the Court of Special Appeals (Fifth Appellate Circuit). Judge Ripken was sworn in on January 22, 2021 and fills the vacancy created by the retirement of the Hon. Timothy E. Meredith.

*

On December 17, 2020, the Governor announced the appointment of **ERIK SAMUEL ATAS** to the Circuit Court for Baltimore City. Judge Atas was sworn in on January 12, 2021 and fills the vacancy created by the retirement of the Hon. W. Michel Pierson.

*

On December 17, 2020, the Governor announced the appointment of **MYSHALA EMUNAH MIDDLETON** to the Circuit Court for Baltimore City. Judge Middleton was sworn in on January 13, 2021 and fills the vacancy created by the retirement of the Hon. Wanda Keyes Heard.

*

On January 13, 2021 the Governor announced the appointment of the **HON. BRYON SETH BEREANO** to the District Court for Prince George's County. Judge Bereano was sworn in on January 21, 2021 and fills the vacancy created by the resignation of the Hon. Joseph L. Wright.

*

On January 13, 2021, the Governor announced the appointment of **MICHAEL OLIVER TWIGG** to the Circuit Court for Allegany County. Judge Twigg was sworn in on January 22, 2021 and fills the vacancy created by the retirement of the Hon. W. Timothy Finan.

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

https://mdcourts.gov/appellate/unreportedopinions

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