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ATTORNEY GRIEVANCE – DISCIPLINARY ACTION – DISBARMENT – MITIGATION NOT AVAILABLE WITHOUT SUPPORTING EVIDENCE – AGGRAVATING FACTORS – FAILURE TO PROVIDE WRITTEN RESPONSE – FAILURE TO ATTEND EVIDENTIARY HEARING

DISBARMENT IS THE APPROPRIATE SANCTION FOR AN ATTORNEY WHO VIOLATED MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT 1.1, 1.3, 1.4, 1.16(d), 8.1(b) AND 8.4(d). THE ATTORNEY DID NOT RESPOND TO BAR COUNSEL'S REQUEST FOR WRITTEN RESPONSE TO THE PETITION OR ATTEND THE EVIDENTIARY HEARING. IN ADDITION, THE ATTORNEY FAILED TO REFUND THE UNEARNED FEES OR RETURN CLIENT DOCUMENTS TO THREE OF THE FOUR COMPLAINANTS.

Facts:

On 13 April 2012, the Attorney Grievance Commission of Maryland ("AGC") filed against Dean Clayton Kremer a Petition for Discplinary or Remedial Action ("Petition"). The Petition, based on four complaints made by former clients, alleged Kremer violated numerous provisions of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), including: MLRPC 1.1 (Competence), MLRPC 1.3 (Diligence), MLRPC 1.4 (Communication), MLRPC 1.16(d) (Declining or Terminating Representation), MLRPC 8.1(b) (Failure to Respond to Disciplinary Authority), and MLRPC 8.4 (d) (Conduct Prejudicial to the Administration of Justice). The AGC recommended that the appropriate sanction for Kremer's misconduct is disbarment.

On 18 May 2012, Kremer was served with a writ of summons and the AGC Petition. He failed to file a written response to the Petition as requested by the AGC. Consequently, an Order of Default was entered against him on 28 June 2012. The case was then referred to Judge Louis Becker of the Circuit Court of Howard County who conducted an evidentiary hearing. Kremer did not file a response to the Petition or attend the evidentiary hearing. The hearing judge found that Kremer did not return unearned fees or documents to three of the four clients. Kremer also did not return, in a timely manner, the unearned fee or documents to the fourth client. In addition, Judge Becker found that Kremer failed to file bankruptcy petitions for two of his four clients. For the other two clients, Kremer failed to attend bankruptcy hearings, causing one of the client's cases to be dismissed. Based on the evidence before him, Judge Becker found that

Kremer's conduct violated MLRPC 1.1, 1.3, 1.4, 1.16(d), 8.1(b), and 8.4(d). Neither the AGC nor Kremer filed any substantive exceptions to Judge Becker findings of fact or conclusions of law

Held:

The appropriate sanction was determined to be disbarment. The Court of Appeals began its analysis by reviewing Judge Becker's findings of fact. Because neither party filed substantive exceptions to Judge Becker's findings of fact, the Court accepted the hearing judge's findings of fact. The Court then reviewed the conclusions of law under a non-deferential standard and concluded, after reviewing cases that presented similar misconduct, that Kremer violated MLRPC 1.1, 1.3, 1.4, 1.16(d), 8.1(b), and 8.4(d).

Kremer's conduct implicated at least two aggravating factors: (1) a pattern of misconduct, and (2) a bad faith obstruction of the AGC disciplinary proceeding by failing to comply with the rules or lawful directives of the AGC. The Court concluded that consideration of any possible mitigating factors was unwarranted because Kremer did not file a written response to the AGC's petition or attend the evidentiary hearing. After reviewing precedent, that dictate disbarment is the appropriate sanction when attorneys with similar MLRPC violations present no mitigating circumstances, the Court concluded that disbarment was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Richard Valentine Patton, III, AG No. 24, September Term 2012, filed June 27, 2013. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2013/24a12ag.pdf

ATTORNEY DISCIPLINE – APPROPRIATE SANCTIONS

Facts:

The Attorney Grievance Commission moved to impose sanctions against Richard Valentine Patton, III ("Patton") for violations of Maryland Rules of Professional Conduct ("MLRPC") 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.4, 8.1, and 8.4 and Rule 16-604 of the Maryland Rules.

The hearing judge assigned to the matter, among other things, found that Patton: (1) failed to timely update his mailing address with the Client Protection Fund, the courts where his appearance had been entered and on his firm's website after he was asked to move out of his office; (2) failed to appear multiple times on behalf of clients in criminal matters, forcing many to appear without counsel after they had already paid him; (3) failed to respond to telephone calls, text messages, and letters from his clients, opposing counsel, and judges in the courts where he failed to appear; (4) was involved in various criminal matters, including the purchase, possession and use of illegal narcotics;(6) failed to respond to multiple jury summonses and was fined $500 for the failure, which he did not pay; (7) charged clients unreasonable fees for minuscule amounts of work and did not refund unearned fees to clients; (8) improperly had a client sign a retainer agreement that allowed Patton to put the fee paid by the client in Patton's operating account without explaining the purpose of a trust account or that money in an operating account could be reached by Patton's creditors; and (9) lied to Bar Counsel under oath about the length of time he used narcotics.

As to mitigation, Patton admitted to his dependency on narcotics and tranquilizers. The hearing judge concluded, however, that Patton has not committed to any treatment program and Dr. Christiane Tellefsen, an expert in forensic psychiatry testified that Patton "has made several failed efforts at treatment programs, that he has continued to use despite being in treatment and that he has a history of oppositional behavior and rebelliousness to treatment plans and support groups . . . that he does not believe in taking medication to assist in his recovery[]" and concluded that Respondent's "prognosis was guarded to poor." The hearing judge concluded that Patton's "diagnosis and prognosis interfere with his ability to practice law and that his sobriety is simply too tentative, and relapse too likely, to make him reliable enough to practice law."

The hearing judge determined that Patton violated MLRPC 1.1; 1.2; 1.3; 1.4 (a) and (b); 1.5; 1.15(a) and (c); 1.16(a) and (d); 3.4(c); 8.1; and 8.4 (a), (b), (c), and (d); and Md. Rule 16-604. The hearing judge also stated that Patton "has been in a downward spiral due to drug dependency from the end of 2010 until at least July 2012[;]" noted that Patton did not offer the hearing judge

any assurance or information with regard to his sobriety or participation in any treatment program "for any significant length of time[;]" and "has not shown th[e hearing c]ourt that he can effectively represent clients and simultaneously cope with the stress of being a criminal defense attorney." In other words, the hearing judge found by clear and convincing evidence that "Respondent's drug dependency has incapacitated him" to perform the duties of a lawyer.

Patton argued that because addiction is the "root cause" of his misconduct he should be indefinitely suspended with right to reapply in 90 days. Bar Counsel asserted that the appropriate sanction is disbarment because the "extent and severity" of Patton's misconduct, the absence of mitigating factors, the presence of aggravating factors, and the hearing judge did not find that addiction was the "root cause" of the misconduct. Bar Counsel also stressed that Patton has not committed to treatment, acknowledged his misconduct, nor made restitution.

Held: The appropriate sanction is disbarment.

Although Patton suffered from an admitted addiction, the hearing judge did not find that it was the "root cause" of his misconduct and therefore it does not warrant imposing a less severe sanction pursuant to *Attorney Grievance Comm'n v. Vanderlinde*, 364 Md. 376, 773 A.2d 463 (2001). Additionally, Patton did not commit to any treatment program, but rather took on additional clients facing criminal charges and rendered "inadequate legal services." Finally, eight (8) of the aggravating factors found in Standard 9.22 of the American Bar Association Standards for Imposing Lawyer Sanctions indicate that Patton should be disbarred for: (1) being dishonest and selfish; (2) having a pattern of misconduct; (3) engaging in multiple offenses; (4)submitting false statements and other deceptive practices during the disciplinary process; (5) refusing to acknowledge wrongful nature of conduct; (6) the vulnerability of his clients affected by Patton's misconduct; (7)his indifference to making restitution; and (8) his illegal conduct.

Attorney Grievance Commission of Maryland v. Cristine A. Kepple, AG No. 55, September Term 2007, filed June 21, 2013. Per Curiam.

http://mdcourts.gov/opinions/coa/2013/55a07agpc.pdf

ATTORNEY DISCIPLINE – SANCTIONS – INDEFINITE SUSPENSION

Facts:

The Attorney Grievance Commission filed a Petition for Disciplinary or Remedial Action against Cristine A. Kepple ("Respondent") for her alleged misconduct and violation of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"). Respondent was alleged to have knowingly concealed her state of residence from her law school in order to receive the benefit of in-state tuition at that institution, which conduct she later failed to disclose on her application for admission to the Maryland Bar.

The Petition was referred to the Honorable John H. McDowell of the Circuit Court for Washington County, who made findings of fact and conclusions of law. Judge McDowell found that, prior to applying for admission at the West Virginia University College of Law, Respondent met with the Director of Admissions and Student Affairs to discuss, among other things, residency requirements. On her application for admission, Respondent stated that her mailing address was a post office box located in Terra Alta, West Virginia. At that time, Respondent lived in West Virginia. Prior to commencing law school, however, Respondent relocated to Maryland. She did not notify the law school or the university of her change of address, instead maintaining her post office box in West Virginia as her address on file with the school. As a result, because West Virginia University assumed that Respondent remained a West Virginia resident, Respondent benefitted by paying the reduced, in-state tuition rate throughout her three years of law school. Judge McDowell determined that Respondent had an appreciation of the importance of her residency to the establishment of her status as an in-state student, was an intelligent young woman, and knew of the need to inform the school of important changes in her life. He therefore determined that she intentionally withheld the information to receive the benefit of in-state tuition.

Judge McDowell determined also that, having completed her Maryland bar application two days after graduating from law school, Respondent's omission of her misconduct in response to Question 17 of her bar application was knowing and intentional, in violation of MLRPC 8.1(a). Question 17 asked whether there were "any circumstances or unfavorable incidences in your life . . . which may have a bearing upon your character and fitness to practice law, not called for by the questions contained in this questionnaire or disclosed in your answers[.]" Respondent answered "No" to Question 17. Therefore, Judge McDowell concluded that Kepple knowingly failed to disclose, to the Character Committee of the Maryland Board of Law Examiners, conduct bearing negatively on her character and fitness to practice law.

Respondent took exceptions to Judge McDowell's findings of fact and conclusions of law. Bar Counsel, although taking no exceptions, recommended a sanction of indefinite suspension with the right to apply for reinstatement after no less than one year.

Holding:

The Court of Appeals determined that Respondent violated MLRPC 8.1(a). Although Respondent argued that Bar Counsel did not prove by clear and convincing evidence that she knowingly concealed information from her law school and the State Board of Law Examiners, the Court determined that sufficient evidence was produced by the Attorney Grievance Commission to support the hearing judge's conclusions. Thus, because the hearing judge's findings of fact were not clearly erroneous, and his resulting conclusions of law were supported by those facts, the Court of Appeals overruled Respondent's exceptions.

Although ordinarily the sanction for such intentional dishonesty might be disbarment, the Court found unique mitigating circumstances sufficient to warrant a lesser sanction. In determining the appropriate sanction, the Court noted that the misconduct at issue was not reported to Bar Counsel until thirteen years after the misconduct occurred – and then reported for purposes of retaliation by Respondent's ex-husband –, Kepple was admitted to the Bar during that period and compiled an exemplary record, was youthful at the time of her misconduct, and was remorseful for her misconduct. Because substantial mitigating circumstances weighed in favor of Respondent, the Court determined that an indefinite suspension with the right to apply for reinstatement after no less than thirty days was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Frank M. Costanzo, AG No. 13, September Term 2009; filed June 21, 2013. Per Curiam.

http://mdcourts.gov/opinions/coa/2013/13a09agpc.pdf

ATTORNEY DISCIPLINE – MISAPPROPRIATION OF CLIENT TRUST FUNDS – ABANDONMENT OF CLIENT REPRESENTATION – DISBARMENT IS PROPER SANCTION.

Facts:

Petitioner, the Attorney Grievance Commission, acting through its Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Frank M. Costanzo, charging him with various violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") and other Maryland Rules and provisions of the Maryland Code (which we shall enumerate *infra*). Bar Counsel based these charges on conduct arising from Costanzo's representation of seven clients, each of which filed complaints with the Commission. The matter was assigned to a judge of the Circuit Court for Baltimore City for an evidentiary hearing and to make findings of fact and conclusions of law regarding the matters asserted in the Petition. Costanzo was served constructively through the Client Protection Fund with a copy of the Petition, a Writ of Summons, and this Court's order assigning the matter for hearing in compliance with Md. Rule 16-753. Costanzo did not file an answer to the Petition — or otherwise participate in the proceedings.

Bar Counsel sought, and the hearing judge granted, an order of default. A hearing was held on September 18, 2009, on Bar Counsel's *ex parte* proof. Bar Counsel, at the hearing, abandoned five of the complaints and produced evidence only as to the remaining two, those of Gilbert Hoffman and Louis Haug. The hearing judge, on November 5, 2009, filed his written opinion, in which he concluded that Bar Counsel proved, by clear and convincing evidence, certain violations alleged against Costanzo in his representation of Hoffman and Haug. No mitigating circumstances were found.

The hearing judge concluded expressly in the Hoffman matter that Costanzo violated MLRPC 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4(a)(2) (Communication), 1.15(a) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.4(c) (Misconduct), and Bus. Occ & Prof Art. § 10-306 (Misuse of Trust Money). Unmentioned in his disposition of the charges asserted by Bar Counsel were Md. Rule 16-609 Md. Rule 16-609 (Prohibited Transactions) or MLRPC 8.1(b) (Disciplinary Matters) or 8.4(d) (Misconduct). Moreover, an apparent violation of MLRPC 1.5 (Fees) was found; however, Bar Counsel did not charge Costanzo in its Petition with violating that provision. Bar Counsel took no exceptions to the judge's omissions or otherwise.

In the Haug matter, the hearing judge concluded expressly that, of the charges levied in Bar Counsel's Petition, Costanzo violated MLRPC 1.4(a)(2), 1.15(a), 1.16(d), and 8.4(b) and (c); Md. Rule 16-609; and Md. Code, Bus. Occ. & Prof. Art., § 10-306. Although Bar Counsel charged Costanzo also with violating MLRPC 1.1, 1.2, 1.3, 8.1(b) and 8.4(c) and (d), the hearing judge's conclusions of law were silent as to them. Moreover, the hearing judge appears to have concluded that Costanzo violated MLRPC 1.16(d) and MLRPC 8.4(b), violations of which he was not charged in Bar Counsel's petition, and Md. Code, Crim. Law Art., § 7-104, for which also he was not charged. Bar Counsel took no exceptions. Bar Counsel recommended disbarment as the appropriate sanction.

Costanzo failed to appear (in addition to filing nothing) for oral argument before the Court of Appeals. The Court agreed with Bar Counsel's recommendation and entered, on February 9, 2010, an Order disbarring Costanzo, with the Court's opinion to follow.

Held:

Following prior cases when a hearing judge neglected to express a conclusion of law as to a properly charged "violation" and no party excepted to that omission, the Court in this case did not address the charges asserted by Bar Counsel on which the hearing judge did not express a conclusion. In its non-deferential analysis and determination of sanction as to these charges properly before the hearing judge and for which conclusions were offered, the Court concluded that Costanzo violated MLRPC Rules 1.1, 1.2, and 1.3 by failing to provide Hoffman with competent and diligent representation, and by not consulting with his client as to the objectives of the retained representation. Costanzo failed to adhere to his agreed representation of Hoffman by failing to pursue a claim on Hoffman's behalf for the failed development of a golf-ball finder concept, and instead drafted erroneously a complaint against unrelated entities. Costanzo's inaction lasted the entire eleven months of his representation of Hoffman.

The Court held further that Costanzo violated MLRPC 1.4(a)(2) by failing to communicate with Hoffman concerning his case or comply promptly with Hoffman's requests for information — apart from a few inadequate e-mails — from November 2007 to March 2008. Respondent's failure to inform Haug that the U.S. Securities and Exchange Commission ("SEC"), with which Haug was involved in a pending settlement of federal litigation initiated by the SEC against Haug, rejected Haug's offer and Costanzo's complete lack of communication with Haugh from April 2007 to April 2008 constituted violations of MLRPC 1.4(a)(2).

Based on Respondent's failure to refund or to account to Hoffman or Haug for each retainer paid (in addition to the $50,000 Haug entrusted to Costanzo to fund the SEC settlement offer), the Court held that Costanzo violated MLRPC 1.15(a). Costanzo's misuse of his clients' funds — which constitute trust money within the meaning of Md. Bus. Occ. & Prof. Article § 10–306 — by not depositing the retainers in a trust account also violated Md. Rule 16-609. Costanzo violated MLRPC 1.16(d) when he failed to take any meaningful step in pursuit of Hoffman's

interest, abandoned his representation of Hoffman after November 2007 (if not earlier) without any prior notice, and failed to return to Hoffman his $9,000 retainer.

The Court concluded additionally that Respondent violated MLRPC 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation by misusing his clients' funds and failing to: (1) maintain those funds in trust; (2) account for his clients' funds; (3) provide his clients with meaningful legal services; and, (4) pursue his clients' claims and abide by the agreed terms of representation.

Lastly, the Court turned to the hearing judge's conclusions that Costanzo violated several MLRPC and statutory provisions that were not charged by Bar Counsel in its Petition. An attorney in disciplinary proceedings must know the charge(s) against him or her before the proceedings commence. Otherwise, the Court reasoned, the tacking-on of disciplinary charges against an attorney without notice of such charges deprives the attorney of procedural due process. Thus, because Bar Counsel did not charge Costanzo in its Petition with violations of MLRPC 1.5, 1.16(d), and 8.4(b), or Crim. Law Art., § 7-104, the hearing judge's apparent determinations that Costanzo violated these provisions were vacated and were not considered by the Court in determining that disbarment was the appropriate sanction.

Catherine Lynn Turner v. Direse Helen Hastings, No. 66, September Term 2012, filed June 25, 2013. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2013/66a12.pdf

TRIAL – RETURNING JURY VERDICT

TRIAL – JURY VERDICT – POWER TO REVISE

TRIAL – JURY VERDICT – INCONSISTENT VERDICT

Facts:

On July 4, 2008, Catherine Turner was driving her taxi cab when she was struck by Direse Hastings, who had ran a red light. Turner sued Hastings for negligence and assault. The verdict sheet submitted to the jury on the negligence count had four questions. Question 1: the jury found that Hastings was negligent. Question 2: the jury found that Turner was not contributorily negligent. Question 3: the jury found that Turner was not injured. Following Question 3, there was a clear instruction that if the jury found that Turner was not injured, it should end the deliberations. Nevertheless, the jury went on to answer Question 4: awarding damages to Turner.

In the courtroom, however, the clerk only asked the jury foreman for the jury's answers to the first three questions, stopping after the jury found that Turner had not suffered any injury. The jury was then harkened to its verdict and dismissed. Not until after the jury was dismissed did the trial judge review the jury's completed verdict sheet, upon which the judge discovered that the jury had gone on to award damages to Turner. After hearing arguments from both counsel, the trial judge found that there was "no question" that the jury intended to award damages to Turner, and therefore, enrolled the completed verdict sheet as the judgment, awarding damages as allocated by the jury in its answer to Question 4. The Court of Special Appeals reversed.

Held: Reversed

Under Maryland Rule 2-522, in order for a jury verdict to be properly "returned in open court" there must be an oral announcement of the verdict, a hearkening to, and an opportunity to poll the jury. In this case, the jury did announce in open court and hearken to its verdict that the defendant was negligent, that the plaintiff was not contributorily negligent, and that the plaintiff suffered no injury. This is a sufficient verdict that a jury is rightfully permitted to return and that fully satisfies all the requirements of Rule 2-522, that the verdict be "returned in open court." The verdict, once properly returned in satisfaction of Rule 2-522, is then taken from the jury, a judgment is entered, and it becomes subject to a court's revisory powers under Rule 2-535(a). Although in some instances revisory powers can be quite broad, they are much more limited

when it comes to revising a jury verdict. A judge may only revise a jury verdict when the intent of the jury is manifest and beyond doubt. Yet, the decision of whether the jury's intent is manifest and beyond doubt is still a discretionary one given to the trial judge, as it is the trial judge, with has his finger on the pulse of the trial, who is in the best position to make that determination. The trial judge, upon reviewing the verdict sheet, found a deliberate thought process by the jury in calculating and allocating damages, and therefore, found that "there is no question" that the jury intended to award damages. Under these circumstances the manifest and beyond doubt standard is satisfied and the trial judge properly exercised his discretion in awarding damages to Turner based on the jury's allocation on the verdict sheet.

By amending the verdict to include the award of damages, however, a second issue arose as the verdict now appeared to be internally inconsistent. Specifically, the jury found that Turner was not injured, yet Turner still received damages. However, it is only irreconcilably inconsistent verdicts that cannot stand. And, when a verdict appears to be inconsistent, judges should attempt to reconcile it so that the jury acted rationally and consistently. The verdict in this case can be reconciled by viewing the jury's answer to Question 3 as finding that Turner did not sustain any personal physical injury. Such an interpretation is consistent with how the jury subsequently awarded damages. Finding that Turner had not suffered any physical injury to her person, the jury awarded $0 for non-economic damages, such as pain and suffering. Yet, it did award Turner a small amount ($325) for her past medical expenses—apparently finding that it was reasonable for Turner to be examined by a doctor following the accident. The jury then awarded Turner her lost income because, although not physically injured, she would be unable to operate her taxi when it was getting repaired. And, the jury awarded Turner $2,820 in property damage to pay for the necessary repairs to her taxi. This specific allocation of damages is consistent with the view that the jury found that Turner had not sustained any physical injuries, yet she was still damaged through her loss of income and personal property damage. Therefore, the juries answers to Questions 3 and 4 are not irreconcilably inconsistent, and the verdict, awarding damages to Turner, can stand.

Michael David Gordon v. State of Maryland, No. 43, September Term 2012, filed May 20, 2013. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2013/43a12.pdf

EVIDENCE – HEARSAY– STANDARD OF REVIEW

Because many hearsay rulings involve both a legal and a factual component, a two-dimensional standard of review may be required. The trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential clearly erroneous standard of review.

EVIDENCE – HEARSAY – ADOPTIVE ADMISSION

The determination of whether a declarant manifested an adoption or belief in the truth of a statement of another so as to constitute an adoptive admission by the party-opponent under Maryland Rule 5-803(a)(2) is a preliminary factual determination to be made by the trial court.

Facts:

The events giving rise to Gordon's charges and convictions took place on January 10,2010. That day, a fourteen-year-old girl was shopping at a Pacific Sunwear Store in the St.Charles Towne Mall, where Gordon worked. In Gordon's presence, she tried on a pair of pants in a fitting room. At one point, Gordon "asked to touch parts of [the girl's] body and proceeded to insert his finger in her vagina." He later "pulled his penis out and asked if she would perform fellatio on him," but she declined.

Gordon was interviewed about this incident by Detective Kenneth Klezia on January14, 2010. Detective Klezia did not recall expressly asking Gordon for his date of birth, but upon request for identification, Gordon produced his Florida driver's license, which listed his birth date. Additionally, Detective Klezia had an earlier opportunity to observe Gordon's driver's license, when he visited Pacific Sun on an unrelated incident on January 9, 2010. Likewise, on that day, Gordon produced his Florida driver's license to Detective Klezia upon request.

Gordon was charged with and tried on the counts of third-degree sex offense and sexual solicitation of a minor. At the conclusion of the trial, the jury convicted Gordon on both counts, and he was sentenced to ten years of imprisonment, with all but one year suspended.

Gordon appealed to the Court of Special Appeals. The intermediate appellate court affirmed Gordon's convictions, holding "that Detective Klezia's testimony was admissible pursuant to the exception to the hearsay rule for adoptive admissions set forth in Md. Rule 5-803(a)(2)." Gordon

v. State, 204 Md. App. 327, 344, 40 A.3d 1093, 1102 (2012). Gordon filed a petition for a writ of certiorari, which the Court of Appeals granted, together with the State's cross petition. Gordon v. State, 427 Md. 606, 50 A.3d 605 (2012).

Held: Affirmed.

The court first examined the standard of review for hearsay exceptions at trial and adopted a two-part approach that differentiates between the legal and factual component of a hearsay ruling. The "two-dimensional" standard adopted by the Court mirrors the approaches of other jurisdictions such as Iowa, Nebraska, and the District of Columbia, where the de novo standard of review governs legal findings and the clearly erroneous standard applies to the underlying factual findings.

With the two-dimensional standard in place, the court moved into a discussion of whether the trial court made a factual or legal conclusion in ruling that, in handing the officer his driver's license in response to a request for identification, Gordon made an adoptive admission under Rule 5-803(a)(2). Under 5-803(a)(2) a "[s]tatement by party-opponent" is "not excluded by the hearsay rule, even though the declarant is available as a witness," when the party-opponent "has manifested an adoption or belief in [the] truth" of that statement.

Looking to the evidentiary record, the Court agreed with the State that when the trial court finds credible evidence that a person supplies a driver's license to a police officer when asked for identification, it does not err in admitting into evidence both the name and birth date on that license. Therefore, the question of whether Gordon manifested an adoption or belief in the truth of the date of birth listed on the license was a preliminary question of fact to be resolved by the trial court. The Court found no clear error in the trial court's factual inference that theoccasions on which the license was presented to Detective Klezia were circumstances inwhich Gordon could reasonably be expected to say something if his date of birth was notstated accurately on his license. There was sufficient evidence fore the jury to conclude that Gordon manifested an adoption or belief in the truth of information on his license. Consequently, the adoptive admission under Rule 5-803(a) (2) was met, and the judgment of the Court of Special Appeals is affirmed.

Antonio L. Brown v. State of Maryland, Case No. 58, September Term 2012, filed May 20, 2013. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2013/58a12.pdf

CRIMINAL LAW & PROCEDURE – POSTCONVICTION PROCEEDINGS – MOTIONS FOR NEW TRIAL

Facts:

Victim Mildred Fleming was subject to an attack during which she was beat with a cane and sodomized with a broomstick. She was also raped. Brown was charged with the beating and the rape.

At trial, Brown admitted hitting Fleming, but denied raping her. There was no physical evidence tying Brown to the crimes, as his blood or hair was not found at the crime scene or any of the objects used in the assault, including the broomstick. There was testimony at trial that some fibers, which were found on the bristles of the broomstick with which Fleming was sodomized, were still to be tested for DNA, but Brown's counsel stressed that the fibers were on the bristles only and everything else was tested and came back negative. Despite the lack of evidence, Brown was convicted of first-degree rape and related charges on September 27, 2001 after a four-day trial in the Circuit Court for Carroll County. He was also unsuccessful in appealing his convictions.
On June 6, 2009, Brown filed a petition for postconviction DNA testing. On July 8, 2010, the Circuit Court heard argument on a Revised Petition for Postconviction DNA Testing, in which Brown asked to test for the absence of Fleming's DNA on the broom and other weapons used during the attack. On September 29, 2010, the Circuit Court granted Brown's motion. The results of the DNA testing showed (1) the presence of DNA consistent with Fleming's on the top three inches, and somewhere around the mid-section, of the broomstick, and (2) that Brown's DNA was not on the broomstick.

Interpreting these results as favorable, Brown filed a Motion for Relief under Section 8-201 of the Criminal Procedure Article, requesting a new trial. On April 30, 2012, the postconviction court denied the motion, having found that no "substantial possibility exists that the Petitioner would not have been convicted had the DNA testing been introduced at trial or that ordering a new trial is in the interests of justice." The court also noted that the testing results were actually unfavorable to Brown because the results are contrary to his argument that the testing would fail to find Fleming's DNA. Pursuant to Section 8-201(k)(6) of the Criminal Procedure Article, Brown filed a direct appeal to this Court.

Held: Affirmed

Under the DNA postconviction statute, Section 8-201 of the Criminal Procedure Article ("CP"), a new trial is available as a remedy, but only when (1) "the results of the postconviction DNA testing are favorable to the petitioner," and (2) there is "a substantial possibility . . . that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial." Even if the DNA test results could be considered favorable to Brown, the postconviction court did not abuse its discretion in finding that there was no substantial possibility that Brown would not have been convicted, had the DNA evidence been presented at trial.

First, the State never suggested that there was physical evidence linking Brown to the crime generally, or the broomstick in particular. Not only was the jury not led to believe that there was forensic evidence linking Brown to the crime, but it was specifically told that there was no such forensic evidence. The jury heard that Brown's hand was bleeding on the night in question, yet no blood was found on the broomstick. Even if the jury was to think that the untested fibers found on the bristles were somehow linked to Brown, the State never argued that connection. Without the State's reliance on the fibers in the bristles here, the possibility of a different outcome at trial—even with this new evidence—is much less likely.

Second, Brown's counsel emphasized in his opening statement that there was no physical evidence linking Brown to the crimes. He specifically told the jury that the test for the presence of evidence to corroborate Fleming's testimony of the items the police retrieved from the apartment came back negative. Thus, "Brown could, and did, make the identical argument to the jury in 2001 that he now claims the DNA evidence allows: there is no forensic evidence linking him to the broomstick."

Third, although there was no physical evidence supporting Brown's charge, there was other evidence the jury found convincing in finding the defendant guilty: there was testimony at trial that Fleming was assaulted by Brown. Furthermore, the jury heard the testimony of eyewitnesses, as well as the photographs of Fleming's injuries taken by the police, Brown's admission of guilt and his statements to the police.

Under CP § 8-201(i)(3), "the court may order a new trial if the court determines that the action is in the interest of justice," even if the court finds that a substantial possibility of a different outcome does not exist. In contrast to Brown's argument that a new trial would be in the interest of justice because the DNA expert opined that the DNA evidence is inconsistent with the State's theory of the case, the Court found the expert's opinion on this issue unconvincing: Brown offered no other reason for why this case would require the Court to hold that the postconviction court abused its discretion in denying his motion for a new trial.

In re Ashley S. & Caitlyn S., No. 4, September Term 2013, filed May 30, 2013. Opinion by McDonald, J.

Bell, C.J., Adkins and Barbera, JJ., concur.

http://mdcourts.gov/opinions/coa/2013/4a13.pdf

JUVENILE CAUSES – CHILDREN IN NEED OF ASSISTANCE – CHANGES IN PERMANENCY PLAN – APPELLATE REVIEW

JUVENILE CAUSES – CHILDREN IN NEED OF ASSISTANCE – CHANGES IN PERMANENCY PLAN – CONSIDERATION OF INFORMATION RELATED TO TIME THE CHILD SPENT IN FOSTER CARE UNDER A PREVIOUS ORDER REVERSED ON APPEAL

Facts:

Upon a petition by the county department of social services, sisters Ashley S. and Caitlyn S. were found by the juvenile court to be children in need of assistance ("CINA") and placed in foster care. Nearly a year later, in an appeal by the girls' mother, the Court of Special Appeals held that the juvenile court had not made sufficient factual findings to determine that Caitlyn was a CINA or to place both girls in foster care. Based on the facts underlying the prior petition as well as events occurring in the previous year while the girls were in foster care, the department immediately filed a new CINA petition for Caitlyn and again requested out-of-home placement for both girls. For a second time, the juvenile court found Caitlyn to be a CINA and ordered that the girls remain in foster care. That decision was not appealed.

The juvenile court initially set the girls' "permanency plans" – the presumed final placement that the court and government agencies work to achieve – as eventual reunification with the mother. However, at a review hearing six months later, the juvenile court changed these plans to adoption. This decision was based on the court's findings that the mother had not completed previous court-ordered tasks; missed scheduled visits with the girls and did not interact appropriately with them; and was likely homeless. The court also noted that the girls were doing well in foster care, having made progress academically and generally benefitted from the emotional and psychological stability of their placement. These findings were partially based on the more than seven months in which the girls had been placed in foster care under the order that had later been reversed on appeal.

The mother appealed the change in permanency plan, arguing that it was improper for the juvenile court to have considered the events that occurred during this period. While the appeal was pending, the juvenile court changed Caitlyn's permanency plan from adoption to reunification with her father, who had appeared in the case for the first time. The department

contended that, as to Caitlyn, the appeal was moot, because her permanency plan was no longer adoption.

Held:

The Court first found that the appeal as to Caitlyn was not moot. Because the mother's parental rights would be negatively impacted, she would have been able to appeal both a change in permanency plan from reunification with her to either adoption or reunification with the father. It would be a perverse result if the sequential changes in plans from adoption to reunification with the father precluded her ability to appeal either. The Court therefore held that a parent's interlocutory appeal of a change in permanency plan from reunification with that parent to adoption does not become moot when the court later alters the plan to reunification with the other parent.

The Court also found that the juvenile court, in contemplating a change in the girls' permanency plan, did not err in considering the events that occurred during the time in which they were placed out of the home under an order that was later reversed. In analyzing the statutory factors for selecting a plan, a juvenile court is to assess the reality of the children's circumstances and parent's past actions in order to decide what is in the children's best interests. Because the time spent by the children in foster care and their progress in that placement are not dispositive factors in the analysis, a parent who fulfills court-ordered requirements and fully addresses the court's concerns – even if done so under an order that is later reversed – will not typically be prejudiced by the juvenile court's consideration of information from this period.

A&E North, LLC v. Mayor & City Council of Baltimore, No. 40, September Term 2012, filed April 23, 2013. Opinion by Adkins, J.

http://mdcourts.gov/opinions/coa/2013/40a12.pdf

CONDEMNATION – RELOCATION ASSISTANCE – TIMING OF REQUEST FOR ADVANCE PAYMENT

CONDEMNATION – RELOCATION ASSISTANCE – DISPLACEMENT

Facts:

In 2008, the City of Baltimore ("the City") initiated a condemnation action to acquire the Parkway Theater. A&E North, LLC ("A&E"), the theater's owner, contested the action, arguing that the City had no right to condemn the property. Six weeks before the condemnation trial, A&E filed an emergency motion, demanding a postponement and an order requiring the City to pay to move the vast amount of personal property stored at the theater prior to trial. It argued that the move prior to trial was necessary to avoid a prejudicial view of the property by the jury and claimed that, because it was indigent, it was entitled to this advance relocation payment under federal and Maryland relocation statutes. The trial court denied A&E's motion, however, and the jury was shown the theater with all of the personal property inside. The jury awarded $340,000, the amount the City argued was the property's fair market value.

After denial of its Motion for a New Trial, A&E timely appealed to the Court of Special Appeals, and the intermediate appellate court held that the Circuit Court did not abuse its discretion in denying A&E's request for an advance relocation payment prior to trial or a postponement.

Held: Affirmed

Section 12-205 of the Relocation Expenses Act covers reimbursement for actual moving and relocation expenses to displaced persons, and Section 12-210(c)(2) accommodates hardship cases, requiring a displacing agency to pay relocation expenses in advance of the move when "a displaced person . . . makes proper application for a payment [otherwise] authorized for the person by this subtitle."

The Court denied A&E relief under the statute based on two theories. First, the Court held that A&E was not entitled to a payment in advance of the trial because the focal point in the statute is the move, not the trial. That is consistent with the legislative intent behind the relocation statutes, which is to ensure that condemnees do not suffer "disproportionate injuries" during relocation. Assisting with relocation expenses prior to the move helps further that goal. But the

reason A&E requested an advance payment was not to facilitate its move; it was to maximize the amount of its "just compensation" award. That is not a goal contemplated by the Act.

Second, because A&E's request for payment came not only before trial but also before the move, the Court also considered A&E's claim of entitlement to payment independently of the trial. The Court emphasized that, as in any relocation assistance cases, the primary consideration was whether A&E was a "displaced person" at the time it requested assistance, not only whether A&E was indigent.

The Court concluded that A&E was not such a displaced person because at the time of the request for advanced payment, it was still challenging the condemning agency's right to condemn the property. Thus, it was not certain that A&E would actually ever become displaced.

Because A&E was not entitled to payment in advance of the trial, it could not have been prejudiced by the City's refusal to pay relocation expenses in advance of the trial, and it is not entitled to a new trial. The Circuit Court did not abuse its discretion in denying A&E's emergency motion.

St. Joseph Medical Center, Inc, Mark G. Midei, M.D., and MidAtlantic Cardiovascular Associates, P.A.., v. The Honorable John Grason Turnbull II, Misc. No. 21, September Term 2012, filed June 24, 2013. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2013/21a12m.pdf

Harrell, J., concurs and dissents
McDonald, J., dissents.

WRIT OF MANDAMUS AND/OR PROHIBITION

Facts:

In two of "nearly 300" lawsuits filed in Baltimore County Circuit Court based upon the insertion of medically unnecessary cardiac stents, the trial judge assigned to the cases granted defendants' motions bifurcating the trials in October 2012. The Administrative Judge for the Baltimore County Circuit Court and the Third Judicial Circuit, acting in his capacity as Administrative Judge, issued an Order on November 2 vacating the bifurcation of both cases. The November 2 Order also reassigned the two cases, along with a third stent case, to another trial judge. Finally, the November 2 Order directed that all bifurcation motions affected "case flow" and were, therefore, to be decided by the Administrative Judge.

In January 2013, defendants in the underlying lawsuits filed in this Court a Petition for Writ of Mandamus and/or Writ of Prohibition challenging the Administrative Judge's November 2 Order and his November 28 Order denying reconsideration of his November 2 Order.

On March 15, 2013, this Court vacated the Administrative Judge's November 2 and 28 Orders, and in an opinion filed June 24, 2013, explained its reasons for granting the writ of mandamus.

Held: Writ of Mandamus and/or Prohibition granted.

Judges, acting in their judicial capacity, have discretion over judicial decisions, or those affecting the rights and interests of the litigants in cases over which they preside. This discretion includes deciding whether to bifurcate issues in a trial. Although the Administrative Judge has authority over the internal management of the courts, the Administrative Judge may not, acting in his or her capacity as Administrative Judge, unilaterally strip the other judges of the court of their authority to make judicial decisions. In the present case, the Administrative Judge usurped the authority of the other trial judges.

Additionally, the Administrative Judge, in reviewing and then vacating the trial judge's bifurcation rulings, improperly acted as an appellate court. Nothing in the Maryland

Constitution, Code, or Rules grants the Administrative Judge appellate authority. And, while properly on appeal, the trial judge's bifurcation decisions would be challenged on an abuse of discretion standard, the Administrative Judge did not grant the same deference to the trial judge's decisions.

Finally, the Administrative Judge left Petitioners without an adequate alternative remedy. Because of the "nearly 300" stent cases pending in the court, many of which Petitioners were defendants in, challenging the Administrative Judge's Order on appeal could result in a substantial expenditure of time, money and resources for both Petitioners and the courts.

Granting a writ of mandamus or a writ of prohibition is an extraordinary remedy, rarely employed by this Court. The extraordinary circumstances and actions of the Administrative Judge in the present case, however, warranted granting a writ.

COURT OF SPECIAL APPEALS

James Catler et al. v. Arent Fox, LLP, et al., No. 538, September Term 2011; *Herschel M. Blumberg, et al. v. Arent Fox, LLP, et al.*, No. 2349, September Term 2011, filed May 30, 2013. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2013/0538s11.pdf

CIVIL PROCEDURE – DISCOVERY – ATTORNEY-CLIENT PRIVILEGE

CORPORATIONS AND ASSOCIATIONS – DIRECTORS AND OFFICERS – NON-DELEGABLE DUTIES

Facts:

On October 27, 2010, Herschel Blumberg, personally, for the estate of his wife, for his daughter Marjorie Blumberg, and for the corporate entities that they control, filed suit against longtime outside counsel Arent Fox LLP, Arent Fox PLLC, and Gerard Leval in the Circuit Court for Montgomery County. The five-count complaint alleged legal malpractice, breach of fiduciary duty, breach of contract, fraudulent concealment, and constructive fraud arising out of two loans entered into by the Blumberg entities.

During pretrial discovery, Arent Fox sent notices of depositions duces tecum to a series of non-party appellants. Among them, non-parties James Catler and Mark and Susan Blumberg refused the production of certain documents over which they claimed a protective privilege. To support his privilege claims, Catler relied on a retainer agreement between himself and Marjorie Blumberg and the law firm of Shulman, Rogers, Gandal, Pordy, and Ecker, P.A. Catler relied, secondarily, on a consultation agreement executed between himself and Shulman Rogers. Mark and Susan Blumberg raised similar defenses which the circuit court dismissed as untimely and insufficient. The non-party appellants, after initial resistance, complied with the court orders compelling production.

At the close of discovery, Arent Fox filed ten motions for summary judgment, each pertaining to a separate issue or theory of defense. The ten motions are as follows: (1) the statute of limitations bars appellants' claims; (2) Arent Fox had no duty to provide business advice; (3) Arent Fox did not breach a duty to have a guardian appointed for Mr. Blumberg; (4) appellants' claims are barred by contributory negligence and the doctrine of *in pari delicto*; (5) the conflicts alleged by appellants are either "illusory" or waived; (6) Arent Fox did not conceal any letters of intent; (7) Arent Fox did not conceal from appellants knowledge of their financial status; (8) there is no distinct cause of action for breach of fiduciary duty; (9) the claim for malpractice

does not support a breach of contract claim; and (10) appellants failed to prove causation. After a two day motions hearing, the circuit court orally granted appellees' motions in their entirety.

Held: Affirmed.

Retainer agreement to "investigate" liability and "recovery of loans" insufficient to support the existence of an attorney-client relationship for the purposes of suit against the law firm representing the corporate entities undertaking the loans where the signatory to the retainer in question was a non-party to the subsequent litigation. Objectively, the retainer agreement referred to investigation only and did not contemplate litigation within its scope. Appellants' counsel could not protect client's "work product" by artificially engaging non-lawyer client as litigation consultant.

Under the circumstances, law firm owed no duty to its allegedly incompetent client either to seek the appointment of a guardian or to withdraw from the representation. In the event of the client's incapacity, if ever, the entities' by-laws obligated their senior officers to execute the duties of the client, who served as the entities' president. In light of the process contemplated by the by-laws, as applied by MD. CODE ANN., CORPS. & ASS'NS § 2-414, the law firm advising the client with respect to certain loan transactions did not bear responsibility for its client's actions. The client's corporate officers could not delegate their responsibilities to the law firm, and, therefore, they were responsible for the collateral consequences of the loans' closings.

Deborah Hiob, et al. v. Progressive American Insurance Company, et al., No. 3009, September Term 2010, filed June 25, 2013. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2013/3009s10.pdf

CIVIL PROCEDURE – PIECEMEAL JUDGMENTS

Facts:

Deborah Hiob and the passengers of her vehicle—Margaret Nelson, Laura Dusome, and Virginia Hiob—were in an automobile accident, which resulted in the death of Laura Dusome and Virginia Hiob and serious bodily injuries to Deborah Hiob and Margaret Nelson. When, following that accident, a dispute arose as to the amounts due under their uninsured motorists' insurance policies, Deborah Hiob and her husband, Douglas Hiob, individually and as personal representative of the estate of Virginia Hiob, together with Margaret Nelson and the personal representative of the estate of Laura Dusome—all of whom are the appellants in this case—brought a declaratory judgment action in the Circuit Court for Baltimore County against appellee, Progressive American Insurance Company ("Progressive"), as well as Erie Insurance Exchange ("Erie Insurance").

The Baltimore County circuit court ultimately granted Progressive's motion for summary judgment, eliminating it from the case, and, on October 7, 2009, a written order, memorializing that decision, was docketed. Then, more than a year later, appellants, upon reaching a settlement with Erie Insurance, dismissed it from the case, and, on January 10, 2011, a line of dismissal to that effect was docketed. On the same day, appellants filed a motion to reduce the order of October 7, 2009, to final judgment. Then, more than thirty days after the line of dismissal was docketed, appellants, on February 15, 2011, filed a notice of appeal. The Baltimore County circuit court thereafter granted appellants' motion to reduce the order of October 7, 2009, to final judgment, and a docket entry to that effect was made on February 25, 2011.

In response, Progressive moved to dismiss this appeal, asserting that appellants had filed their notice of appeal more than thirty days after Erie's dismissal and that, therefore, their appeal was time-barred under Maryland Rule 8-202(a), which requires that a notice of appeal be filed within thirty days "after entry of the judgment."

Held: Appeal dismissed.

The Court of Special Appeals held that this case is controlled by *Houghton v. County Commissioners of Kent County*, 305 Md. 407 (1986), where the Court of Appeals held, under a previous version of Maryland Rule 2-601, that the voluntary dismissal by the plaintiffs, of the only remaining defendant in a case, amounted to a final judgment and therefore triggered the thirty-day period for filing a notice of appeal. Although Rule 2-601 was amended, eleven years

after *Houghton* was decided, to incorporate the so-called "separate document" requirement, the only effect of that rule amendment on so-called "piecemeal" judgments, such as those in *Houghton* and in this case, was to require that such (non-final) judgments now be entered in a separate document. But if each non-final judgment is docketed in conformance with Rule 2-601, finality attaches when the last such judgment is docketed, and in that respect, *Houghton* remains "good law."

Because, in the instant case, finality attached when Erie's dismissal was docketed, and the notice of appeal was filed thirty-six days later, the notice of appeal was untimely. And, because the thirty-day time limit for filing a notice of appeal is a jurisdictional requirement, the appeal was dismissed.

Megan S. Meese, et. al. v. Tim Meese, No. 827, September Term 2011, filed June 26, 2013. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2013/0827s11.pdf

COMMERCIAL LAW – MARYLAND'S UNIFORM FRAUDULENT CONVEYANCE ACT (MUFCA) – MD. CODE ANN., COMMERCIAL LAW ARTICLE; §15-201 *et seq.* – C.L. § 15-201(c). (A "conveyance is fraudulent as to creditors if it is made by a person who is insolvent or who will be rendered insolvent by it.") *Molovinsky v. The Fair Employment Council of Greater Washington*, 154 Md. App. 262, 278 (2003; C.L. §15-202(a) ("A person is insolvent if the present fair market value of his assets is less than the amount required to pay his probable liability on his existing debts as they become absolute and matured.").

Facts:

Timothy and Megan Meese moved into a home owned by Megan's father, Charles H. Miller, rent free, shortly after they were married. Charles entered into an agreement with Megan and Timothy when he retired which provided that they would purchase the home from him and, accordingly, Megan and Timothy assumed the remaining mortgage on the home and signed a balloon note for $30,000, in favor of Charles, which was to come due upon the first to occur of (1) the sale of the home; (2) sixty days after Charles' death; or (3) November 29, 2015. When Megan told Timothy she wanted a divorce, Timothy told Charles that he needed to look for a new place to live and Charles, realizing that he did not have a life estate as a result of the conveyance of his home, had the title to the home conveyed to the 3316 Weller Road Trust without consideration. Charles was the beneficiary of the Trust and, upon his death, the Trust would cease to exist and the property would revert to Megan in fee simple. Timothy, having received a $30,000 monetary award in their divorce proceeding, filed a motion for summary judgment in which he argued that Megan's transfer of the home to the Trust was a fraudulent conveyance because the property was conveyed for no consideration at a time when Megan was insolvent.

Held:

There was no genuine dispute of fact concerning Megan's insolvency at the time of the transfer, the lack of consideration for the transfer, or that the Trust did not purchase the real property in good faith, without notice, and for value; accordingly, the circuit court did not err in determining, as a matter of law, that Megan's conveyance of the property to the Trust was a fraudulent conveyance under the Maryland Uniform Fraudulent Conveyance Act.

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Julius Henson v. State of Maryland, No. 1046, September Term 2012, filed May 31, 2013. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2013/1046s12.pdf

FIRST AMENDMENT – ELECTION LAW ARTICLE – CAMPAIGN MATERIALS – AUTHORITY DISCLOSURE REQUIREMENTS – CONDITIONS OF PROBATION – EMPLOYMENT – CAMPAIGN RESTRICTIONS

Facts:

In the days immediately preceding the November 2, 2010 statewide elections, senior members of the Bob Ehrlich for Maryland Campaign met to discuss strategy. The campaign decided on producing a robocall to be placed in the evening of election day. Julius Henson was retained to engineer and distribute the call. On election day, Henson authored the message and distributed it as planned. The robocall lacked the required identification, and, by failing to disclose the campaign finance entity responsible for the call, ran afoul of MD. CODE ANN., ELEC. LAW §13-401(a). Based on his role in the conspiracy, Henson received a sentence of incarceration for a period of one year with all but two months suspended and an accompanying three year probationary period, during which time he was required to abstain from "working in any capacity in election campaigns[,] whether it's in a voluntary status or paid."

Held: Affirmed.

The First Amendment does not prohibit a state law punishing persons who knowingly and willfully cause to be published and distributed campaign material that does not include the name of the responsible campaign finance entity and its treasurer. Special conditions of probation that restrict a defendant from participating in public political campaigns do not violate First Amendment political speech protections where the defendant was guilty of violating state election laws.

DeAngelo Ferdale Savage v. State of Maryland, No. 1741, September Term 2011, filed May 29, 2013. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2013/1741s11.pdf

CRIMINAL LAW – INCHOATE CRIMES – CONSPIRACY.

Facts:

The home of Reginald Greene and his sister Barbara Greene was burglarized. Three suspects were later developed: Demarics Banks, Shawn Franklin, and DeAngelo Savage (appellant). At trial, there was testimony indicating: (1) all three men were part of one conspiracy to burglarize the Greene home, (2) a Banks-Savage conspiracy was developed after Franklin backed out of the Franklin-Savage conspiracy, and (3) Banks and Franklin had their own conspiracy.

Savage was later sentenced to eight years each for three different convictions: two convictions for conspiracy to commit first-degree burglary (one conspiracy between Savage and Franklin, and another conspiracy between Savage and Banks) and a conviction for accessory to first-degree burglary.

Held:

Although the unit of prosecution for conspiracy is the agreement, and, as such, multiple agreements constitute multiple conspiracies, multiple agreements can also be part of a single conspiracy where a single conspiracy includes subgroups or subagreements.

Where the prosecution seeks to prove multiple conspiracies, it has the burden of proving a *separate* agreement for each conspiracy. If the prosecution fails to present proof sufficient to establish separate conspiracies, a defendant can be found guilty of only one conspiracy.

To address the single as opposed to multiple conspiracies question, it is necessary to analyze the nature of the agreement or agreements, and to ask, when there are agreements among several parties, whether there was one overall agreement to perform various functions to achieve the objectives of the conspiracy, or separate conspiracies. In the multiple conspiracy context, the agreements are distinct, and independent from each other, in that each agreement has its own end, and each constitutes an end in itself.

In this case, one of Savage's two conspiracy convictions was required to be vacated. First, because the jury was not instructed of the need to find separate conspiracies, it may very well have understood that any agreement among any of the parties could support more than one conspiracy count. In other words, without a clear instruction, there is no way to be certain that one or more jurors voting guilty on the conspiracy counts did not see the Savage-Banks

agreement and the Savage-Franklin agreement as one overall conspiracy among Savage, Banks, and Franklin to burglarize the Greene home.

Second, there was nothing in the State's opening or closing remarks to suggest to the jury that there were multiple conspiracies or that the Savage-Banks agreement was distinct from the Savage-Franklin agreement. In fact, if anything, the prosecutor's remarks suggest a single agreement among Savage, Franklin, and Banks to burglarize the Greene home.

Third, during trial the State did not concern itself with proving separate conspiracies. In fact, although the indictment contained separate conspiracy counts as to Banks and as to Franklin, it was not until a jury note during deliberations evidenced confusion about the issue that there was even a hint of the State's interest in proving separate conspiracies.

Thedral Thomas Williams, III v. State of Maryland, No. 1597, September Term 2011, filed June 26, 2013. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2013/1597s11.pdf

CRIMINAL PROCEDURE – SEIZURE – INVESTIGATORY STOP – LAW OF ARREST

Facts:

At about 1:00 a.m., in early January of 2011, an officer of the Chestertown Police Department received two calls "almost simultaneously" from the police dispatcher: one concerned a home invasion at 108 Elm Street and the other a panic alarm at a Citgo gas station within yards of that house. When the officer arrived at the location of the home invasion, he was informed by the home's owner that she had seen flashlights and that one or more individuals had attempted to break into her house. After checking the area around the house, the officer was advised by the dispatcher that the Citgo-station call had been upgraded to an armed robbery. So he left the site of the alleged home invasion for the Citgo station.

Upon arriving at that location, the officer spoke to a clerk employed by the gas station. The clerk informed him that three males, with their faces covered, had entered the gas station store. After one of them brandished a sawed-off shotgun and demanded money, they forced him to lay on the ground face down and threatened to kill him if he looked up. After taking cash and cigarettes from the store, they fled.

When the officer finished interviewing the clerk, he viewed, at the Citgo station, the surveillance video of the robbery, which showed "two black males" and "one possibly white male" entering the store from the direction of Greenwood Avenue, which is perpendicular to Elm Street, where the attempted home invasion had occurred. The videotape showed the three robbers fleeing in the same direction from which they had approached the Citgo.

Eventually, the officer along with two additional officers returned to the site of the home invasion to conduct a canine search. While the officers were standing in a yard adjacent to 108 Elm Street, the location of the attempted home invasion, with their vehicles' lights off, a Dodge suddenly appeared, after making a left turn onto Elm Street. It then passed by them, first slowing down and then speeding off. In the words of the officers , the Dodge was driving at a "normal speed," but then it slowed down to between "3 to 5 miles an hour" as it passed by the officers, though the posted speed limit in that area was 25 miles per hour. At that point, the officers were able to "clearly observe" that there was a white male and a white female in the front seats of the car and two black males and a black female in the back seat. One of the officers recognized the white male occupant seated in the front as someone he had had "prior dealings" with regarding drug use.

After the Dodge had passed the officers, the passengers in the rear seat looked back through the vehicle's rear window at the officers. The car then sped up as it left the area. Although no traffic violation had occurred, the officers decided to pull the Dodge over "to identify them as either possible witness [*sic*] or a . . . possibly suspects."

When the first pursuing officer activated his emergency lights, the Dodge slowed down and appeared to be coming to a stop, but before it did, the driver's side rear-passenger door opened, prompting that officer to pull up to the Dodge and position his patrol car so that it blocked what appeared to be an attempt to exit the moving vehicle. Moments later, when a second officer drove up in his patrol car, the rear door on the passenger's side of the Dodge also opened. The second officer then used his car to block any attempt to exit from that door as well. As the officers were approaching the Dodge in their respective patrol cars, they both observed Williams and the other male passenger in the back seat of the Dodge trying to leave the vehicle as the female backseat passenger attempted to pull them back to prevent that from happening. As one of the officers put it, Williams was "attempting to crawl over the female" in what appeared to be an effort to exit the Dodge.

When Williams was ultimately removed from the rear seat, an officer patted down Williams. Feeling "a large bulge in . . . the leg area of his pants," the officer asked Williams what it was. Williams responded, "Money, man. It's money." A "large stack of United States currency" was removed from Williams's person.

Williams filed a motion to suppress in the circuit court, but the court denied that motion. On appeal, Williams maintained that the circuit court erred in denying his motion to suppress, contending that the police both lacked a reasonable suspicion of criminal activity, when they stopped the car in which he was a passenger, and lacked probable cause to arrest, when they blocked the doors of that vehicle with their patrol cars, preventing him from leaving it.

Held: Affirmed

As to the issue of whether the police had reasonable suspicion to stop the vehicle in which Williams was a passenger, the Court of Special Appeals determined that the investigatory stop was lawful, under the Fourth Amendment, based on the following factors: (1) the time of day; (2) the secluded nature of the area; (3) the total lack of any traffic—vehicular or pedestrian; (4) the relatively brief period of time between the occurrence of the successive crimes and the stop; (5) the Dodge's appearance directly in front of the scene of the attempted break-in just a little more than a half-hour after an officer received the initial call from dispatch; (6) the Dodge's dramatic change in speeds as it passed the officers; (7) the actions taken by the back seat passengers, specifically, in turning around and staring at the officers; (8) the confirmation by the officers that the occupants of the vehicle included the same racial and gender composition as the group of robbers; (9) the officer's recognition of one of the occupants as someone with whom he "had had dealings" prior to the stop; (10) Williams's attempted flight from the Dodge while the

car was still moving; and (11) the attempt by the female passenger to try to keep the two males from fleeing.

As to the issue of whether the two officers unlawfully arrested Williams when they used their patrol cars to block his escape from the backseat of the vehicle, the Court held that the officers' use of force was lawful because the officers were preventing Williams's flight from the vehicle.

Financial Casualty Insurance Company v. State of Maryland, No. 1400, September Term 2011, filed March 21, 2013. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2013/1400s11.pdf

CRIMINAL PROCEDURE – BAIL – FORFEITURE OF BOND – STRIKING OUT A FORFEITURE.

Facts:

On March 3, 2009, George Butch Spencer was charged with various narcotics crimes. Bail was set at $25,000, and Spencer was "released from commitment" on March 9, 2009 when Financial Casualty Insurance Company posted a bond in that amount.

When Spencer did not appear for trial on October 15, 2009, a bench warrant was issued for his arrest and bail was "forfeited." The court gave Financial Casualty 90 days (until January 14, 2010) "to satisfy this forfeiture by either producing [Spencer] in court, or by paying the penalty sum on the bond. If the bail forfeiture has not been stricken, or satisfied within 90 days, a judgment will be entered against [Spencer] and Surety for the penalty sum of the bail[.]"

A "Notice of Recorded Judgment" in the amount of $25,000 "plus interests and costs" was entered on March 31, 2010 against Spencer and Financial Casualty. The docket entry for May 27, 2010 reflects a "Forfeiture of $25,000.00."

The bench warrant was served on Spencer on April 23, 2011 after he was arrested on other charges, and he was subsequently produced in court.

On June 9, 2011, Financial Casualty filed a Petition for Remission, seeking the refund of its $25,000 bond. After a hearing, the motion was denied because Spencer was not "picked up based upon efforts" of Financial Casualty.

Held:

Under § 5-208 of the Criminal Procedure Article and Maryland Rule 4-217, as in effect at the time of these proceedings, a surety has 90 or, for good cause shown, 180 days to return the defendant before requiring the payment of any forfeiture of bail or collateral. During this grace period, a surety may satisfy the order of forfeiture either by producing the defendant in court or by paying the penalty sum of the bond. If the defendant is produced within such time by the State, the court shall require the surety to pay the expenses of the State in producing the defendant and shall treat the order of the forfeiture satisfied with respect to the remainder of the penalty sum. If the forfeiture order is not satisfied during the 90/180 day period, an order of

forfeiture shall be entered and recorded as a judgment against the defendant and the surety in the amount of the penalty sum in addition to interest and costs.

But, if the defendant is produced in court *after* the 90/180 day period, the surety may apply for the refund of any penalty sum paid in satisfaction of the forfeiture less any expenses permitted by law. In that event, the court *shall* strike out a forfeiture of bail or collateral and deduct only the actual expense incurred for the defendant's arrest, apprehension, or surrender. If, on the other hand, the penalty sum has not been paid, the court, on application of the surety and payment of any expenses permitted by law, *shall* set aside the judgment.

Even though Spencer was not returned to the jurisdiction of the court based on the efforts of Financial Casualty, based the then-applicable statute, rule, and caselaw, the court could not refuse remission of some portion of the penalty sum when the defendant was produced in court *after* the 90/180 day period. Whether the defendant is produced through the efforts of the State, the surety, or the voluntary act of the defendant, the surety is entitled to a refund of the penalty sum less any expenses permitted by law.

The opinion notes that, had this case been decided under the revised statute and rule, Financial Casualty would *not* have been entitled to a refund. Under the revised scheme, when a defendant is returned to the jurisdiction of the court *after* the 90/180 day period, a refund is only appropriate if the penalty sum was paid *during* the 90-180 day period. Here, bail was forfeited on October 15, 2009, and the surety was given until January 14, 2010, to satisfy the forfeiture by either producing Spencer or paying the penalty sum on the bond. According to the petition for remission, the $25,000 judgment entered on March 31, 2010, was not paid until May 31, 2010.

Lori A. Robinette, et al. v. Luan Hunsecker, No. 2444, September Term 2011, filed May 29, 2013. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2013/2444s11.pdf

LABOR & EMPLOYMENT LAW – PENSION & BENEFIT PLANS – EMPLOYEE RETIREMENT SECURITY ACT – DETERMINATION OF BENEFIT CLAIMS – PERSONS ENTITLED TO BENEFITS – DESIGNATION OF BENEFICIARY – EFFECT OF DIVORCE ON DESIGNATION

POLITICAL STATUS & RELATIONS – FEDERAL SUPREMACY – PREEMPTION – LABOR AND EMPLOYMENT LAW – PENSION & BENEFIT PLANS – EMPLOYEE RETIREMENT SECURITY ACT – EXEMPT PENSION PLANS – GOVERNMENT PLANS

FAMILY LAW – MARITAL TERMINATION & SPOUSAL SUPPORT – DISSOLUTION & DIVORCE – PROPERTY DISTRIBUTION – CHARACTERIZATION – MARITAL PROPERTY – PENSION & BENEFIT PLANS – DETERMINATION OF BENEFIT CLAIMS – PERSONS ENTITLED TO BENEFITS – QUALIFIED DOMESTIC RELATIONS ORDER – NECESSITY & SUFFICIENCY OF ORDER

FAMILY LAW – MARITAL TERMINATION & SPOUSAL SUPPORT – DISSOLUTION & DIVORCE – SPOUSAL SUPPORT, ALLOWANCES, & DISPOSITION OF PROPERTY – SETTLEMENT AGREEMENT & STIPULATIONS – CONSTRUCTION, OPERATION, & ENFORCEMENT

EQUITABLE REMEDY – TRUST – CREATION, EXISTENCE & VALIDITY – CONSTRUCTIVE TRUSTS – NATURE OF A CONSTRUCTIVE TRUST – JUDICIAL IMPOSITION OF CONSTRUCTIVE TRUST – EVIDENCE TO ESTABLISH TRUST – FACTORS CONSIDERED

Facts:

After nearly seventeen years of marriage, Luan Hunsecker, appellee, and Mr. Robinette, decedent/pension plan participant, executed a voluntary separation agreement on April 16, 1998. Pursuant to the agreement, Ms. Hunsecker transferred and assigned all her rights, title, and interest in the marital home, with the proviso that the proceeds of any sale would be the sole and exclusive property of Mr. Robinette. In addition, Ms. Hunsecker further conveyed all her rights, title, and interest in a boat and trailer the couple owned, and released and discharged any claims for *pendente lite* and indefinite alimony.

Most notably, however, paragraph eight of the separation agreement provided that Ms. Hunsecker would maintain a fifty percent equitable interest in Mr. Robinette's pension plan with the Montgomery County School System ("MCSS"). Paragraph eight further provided that the

judgment of absolute divorce would serve as a qualified domestic relations order ("QDRO") in the pension benefits and death benefits provided to Mr. Robinette through his employment. Ms. Hunsecker and Mr. Robinette were subsequently divorced on August 3, 1998, but paragraph eight of their separation agreement was never enrolled in a QDRO.

Mr. Robinette married appellant, Lori A. Robinette, on June 25, 2000. Throughout their nine year marriage, Mr. Robinette contined working for MCSS until his untimely death on October 2, 2009. Ms. Robinette was named as the personal representative of Mr. Robinette's small estate, which she administered without publication.

Upon learning of Mr. Robinette's passing, Ms. Hunsecker attempted to obtain a portion of the pension benefits from MCSS pursuant to the separation agreement she had entered eleven years earlier. Because MCSS had never received a QDRO to indicate Ms. Hunsecker as a partial beneficiary of Mr. Robinette's pension benefits, her efforts were unsuccessful. Consequently, Ms. Hunsecker was denied any portion of the benefits, and learned that Mr. Robinette's pension was being paid to Ms. Robinette.

Ms. Hunsecker subsequently instituted a cause of action against Ms. Robinette, seeking establishment of a constructive trust on grounds of Ms. Robinette's unjust enrichment. The parties filed joint stipulations of facts, and Ms. Hunsecker additionally moved for summary judgment, arguing that she had a superior equitable title to Mr. Robinette's pension. Ms. Robinette responded with her own motion for summary judgment.

After hearing argument of counsel and taking each parties' motions *sub curia*, the circuit court entered summary judgment in favor of Ms. Hunsecker, granting her a constructive trust in a portion of Mr. Robinette's pension and death benefits and further ordered issuance of a posthumous QDRO, consistent with the separation agreement.

Held: Affirmed.

As an initial matter, the Court of Special Appeals began with an overview of the applicability of the United States Employee Retirement Income Security Act ("ERISA"). The Court observed that ERISA's purpose is to provide better protection for beneficiaries of employee pension and welfare benefit plans abounding in the private workplace.

Thereafter, the Court engaged in a detailed discussion of Title I of ERISA, noting that a participant's former spouse may be treated as a beneficiary under the plan and additionally regarded as a surviving spouse only when no conflict of law arises between a State's domestic relations law and ERISA's preemption clause or general anti-alienation provision. In that regard, the Court observed that the Retirement Equity Act's ("REA") amendments to ERISA explicitly provide that the former spouse of the plan participant can only replace the participant's current spouse and be treated by the private pension plan as the surviving spouse pursuant to a QDRO.

The Court of Special Appeals determined whether a QDRO could be issued after the plan participant's death and vesting of the pension benefits in the participant's surviving spouse or other designated beneficiary. Following a review of the United States Courts of Appeals' opinions regarding the issuance of posthumous QDROs, the Court of Special Appeals concluded that a posthumous QDRO may be permissible, dependent upon the circumstances leading to the QDRO's issuance. As a consequence, the Court acknowledged four considerations in determining whether a posthumous QDRO permissibly entitles an alternate payee to all or a portion of an ERISA qualified pension's benefits:

> (1) Was notice provided to the pension plan of the potential alternate payee's interest in the pension benefits prior to the participant's death?
>
> (2) How aggressively did the potential alternate payee assert his or her interest before the participant's death?
>
> (3) Is the posthumous QDRO being issued *nunc pro tunc* to only correct a clerical error that was made in a previous domestic relations order that was not qualified by the plan?
>
> (4) Is there another beneficiary's rights infringed by the enforcement of the alternate payee's QDRO; and, if so, are the equities balanced?

Although the Court of Special Appeals recognized that a posthumous QDRO may be permissible under certain circumstances, the Court cautioned that ERISA expressly preemptes state law (outside the exceptions provided by a QDRO) by making the regulation of pension plans falling under ERISA's governance a matter of exclusive federal interest. Thus, the Court noted that in determining whether Ms. Hunsecker's claim provided under Maryland law is preempted by ERISA, the Court must first consider whether the claim "relates to" an ERISA covered plan, such that granting her relief would provide an impermissible remedy, and whether the employee benefits plan was governed by Title I of ERISA. As a result, the Court of Special Appeals addressed two different tests employed by the United States Courts of Appeals to determine whether the benefits sought were issued by a political subdivision, agency, or instrumentality of the State.

Ultimately, however, the Court of Special Appeals concluded that it need not adopt either test for a determination in the present case, because both parties agreed that Mr. Hunsecker's pension plan was a government plan exempt from ERISA's provisions. Therefore, the Court held that the circuit court committed no error in granting Ms. Hunsecker a posthumous domestic relations order to be qualified by Mr. Robinette's government pension plan.

The Court of Special Appeals then addressed Ms. Robinette's additional contention that the circuit court erred by imposing a constructive trust on the benefits already issued by the pension plan. Rejecting Ms. Robinette's argument, the Court acknowledged that a constructive trust is the remedy employed by a court of equity to convert the holder of the legal title to the property

into a trustee for one who in good conscience should reap the benefits of the possession of said property. Although noting that a constructive trust is not a remedy to right every wrong, the Court regarded the remedy as appropriate to scenarios where property has been acquired by fraud, misrepresentation, other improper methods, or where the circumstances render it inequitable for the party holding the title to retain it. The Court additionally ascertained that because a constructive trust is an equitable remedy, the court must consider all the relevant circumstances in deciding its appropriateness as a remedy in any given case.

Following a review of the facts presented before it, the Court of Special Appeals concluded that the voluntary separation agreement of Ms. Hunsecker and Mr. Robinette reflects their mutual intent that Ms. Hunsecker was to be the alternate payee of his pension plan, that she was conveyed a fifty percent interest in the martial share of that plan, and that she would receive fifty percent of the martial benefits from the pension when payments began. Accordingly, the Court found no difficulty in holding that the evidence was sufficient for the circuit court to conclude that a constructive trust arose out of Mr. Robinette's failure to designate Ms. Hunsecker as his alternate payee, irrespective of the parties' failure to acquire a QDRO prior to Mr. Robinette's death.

Brethren Mutual Insurance Co. v. Kenneth Suchoza, No. 1787, September Term 2011, filed May 29, 2013. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2013/1787s11.pdf

DAMAGES – MEDICAL BILLS – LESSER AMOUNTS ACCEPTED BY HEALTH CARE PROVIDERS INADMISSIBLE TO SHOW FAIR AND REASONABLE VALUE WITHOUT EXPERT TESTIMONY

CIVIL PROCEDURE – POST-TRIAL MOTION – WHEN TIMELY APPEAL FILED, CIRCUIT COURT RETAINS FUNDAMENTAL JURISDICTION TO DECIDE RULE 2-535(a) MOTION FILED MORE THAN 10 DAYS, BUT LESS THAN 30 DAYS AFTER ENTRY OF JUDGMENT

INSURANCE ARTICLE – § 9-513(e) – WORKERS' COMPENSATION – REDUCTION IN UNINSURED MOTORIST BENEFITS ALLOWED FOR WORKERS' COMPENSATION BENEFITS ACTUALLY RECEIVED, NOT FUTURE BENEFITS

Facts:

As a result of injuries sustained during an automobile accident within the scope of his employment, appellee sought relief by (1) filing a workers' compensation claim and (2) filing a claim with appellant, Brethren Mutual Insurance Company ("Brethren"), pursuant to Brethren's uninsured motorist ("UM") policy with appellee's employer. As to the workers' compensation claim, appellee received benefits totaling $179,206.97, and additionally, was entitled to future workers' compensation benefits.

After Brethren denied his UM claim, appellee filed a complaint in the Circuit Court for Prince George's County. At trial, appellee introduced evidence of his medical bills, along with the testimony of his treating physician that such bills were fair, reasonable, and necessary. Brethren sought to introduce evidence of the reasonable value of the medical bills by proffering evidence of the lesser amounts actually accepted as full payment by appellee's health care providers; however, the trial court did not allow this evidence, reasoning that it was a "collateral source." At the conclusion of trial, the jury returned a verdict in favor of appellee for $535,876.00, which was entered by the court on September 6, 2011.

Brethren filed a motion to alter or amend judgment on September 19, 2011. Between the close of trial and the court's ruling on Brethren's post-trial motion, appellee was awarded an additional $56,639.00 in workers' compensation, $9,339.00 of which was received by appellee. After hearing argument on Brethren's motion, the trial court reduced the judgment from $535,876.00 to $356,669.03 to reflect the $179,206.97 in workers' compensation benefits received by appellee at the time of trial, but did not reduce the judgment by either the amount awarded or received after trial.

Held: Affirmed.

The first issue addressed by the Court of Special Appeals was whether the trial court erred by excluding Brethren's proffered evidence of the lesser amounts paid and accepted by appellee's health care providers. The Court held that the trial court did not err, reasoning that Brethren's proffered evidence (*i.e.,* bills showing lesser amounts accepted by appellee's health care providers) was inadmissible in the absence of expert testimony or other competent evidence that would establish the fairness and reasonableness of such payments.

The second issue addressed by the Court of Special Appeals was whether the trial court erred in its ruling on Brethren's motion to alter or amend. The Court noted that Brethren filed its post-trial motion under Rule 2-535(a) more than 10 days but less than 30 days after the trial court's entry of the original judgment. Thus, the 30-day window for filing an appeal was not stayed until the disposition of the motion. Brethren, however, filed a timely appeal within 30 days of entry of the judgment. The Court of Special Appeals held that the appeal did not divest the trial court of jurisdiction to decide the post-10 day Rule 2-535(a) motion; instead, the trial court retained fundamental jurisdiction over that motion. Therefore, the Court concluded that the amended judgment was not void. Brethren, however, failed to file a notice of appeal from the trial court's amended judgment. Accordingly, the Court held that the merits of the trial court's denial of Brethren's post-trial motion, as to the workers' compensation benefits awarded or received after trial, were not properly preserved for appellate review.

The final issue on appeal was whether appellee could recover under the UM policy because of his entitlement to future workers' compensation benefits. The Court of Special Appeals construed Md. Code (1995, 2011 Repl. Vol.), § 19-513(e) of the Insurance Article, and held that an insurer may reduce the benefits due under a UM policy by the workers' compensation benefits *actually received* by the insured, and not by the amounts that the insured may be entitled to recover in the future under the workers' compensation law. The Court also determined that under Md. Code (1991, 2008 Repl. Vol.), §§ 9-902 & 903 of the Labor and Employment Article, the amount recovered by appellee under Brethren's UM policy is in place of any future workers' compensation benefits, unless the amount received under the UM policy is less than the workers' compensation benefits to which appellee is entitled.

Edgewood Management Corporation v. Donna Jackson, No. 76, September Term 2012, filed May 30, 2013. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2013/0076s12.pdf

CIVIL ACTION FOR EMPLOYMENT DISCRIMINATION BASED ON RETALIATION FOR REPORTING AN ACT OF GENDER DISCRIMINATION AGAINST A SUBORDINATE EMPLOYEE – SUFFICIENCY OF EVIDENCE OF RETALIATION – CONSTRUCTIVE DISCHARGE – DAMAGES RECOVERABLE FOR VIOLATION OF MONTGOMERY COUNTY CODE SECTION 27-19(C), AS PERMITTED BY SECTION 20-1201 OF THE STATE GOVERNMENT ARTICLE – UNEMPLOYMENT BENEFITS AS COLLATERAL SOURCE.

Facts:

For 30 years, Donna Jackson, appellee/cross-appellant, was employed by Edgewood Management Corp., the appellant/cross-appellee, as manager of a low-income apartment complex in Glen Burnie. She never had been disciplined or received a negative performance evaluation. On one day, in brief succession, she witnessed a male supervisor privately inform a male employee that his employment would be terminated in the near future, and then witnessed the same male supervisor loudly chastise a female employee, in front of other employees, tenants, and prospective tenants, for not taking a job transfer that would have been to her detriment and inform her that her pay was being cut. The female employee, who worked under Jackson, complained to Jackson that she thought she had been subjected to gender discrimination. Jackson reported the gender discrimination complaint to the male supervisor's superior. Jackson's superiors then embarked on an effort to terminate her employment by disciplining her for alleged wrongdoings, which were not substantiated and which she refuted. Jackson's superiors documented their intention to provoke her resignation by imposing as a disciplinary sanction a transfer to two distant workplaces and a salary reduction. As her superiors expected, the disciplinary action resulted in Jackson's resignation.

In the Circuit Court for Montgomery County, Jackson brought a civil suit against Edgewood for employment discrimination, alleging that it had retaliated against her for her conduct in reporting the subordinate female employee's complaint of gender discrimination. The trial court denied a motion for judgment and sent the case to the jury. The jury found in favor of Jackson, awarding her $150,000 in damages for pain and suffering and $500,000 for economic loss, *i.e.*, lost income. The court denied a motion for judgment notwithstanding the verdict, but granted a motion to amend the judgment to reduce the verdict based upon a section of the Montgomery County Code ("MCC") that creates an administrative remedy for discrimination. The court eliminated the pain and suffering award, without explanation, and reduced the economic loss award to an amount equal to two years of backpay, less unemployment benefits received.

Edgewood noted an appeal, complaining that the evidence was legally insufficient to support the verdict in favor of Jackson and that the trial court had abused its discretion in using a verdict sheet proposed by Jackson instead of one it proposed. Jackson cross-appealed, contending the trial court erred in reducing her damages award and in failing to send the issue of punitive damages to the jury.

Held: Amended judgment vacated. Remanded with instructions to reinstate the original judgment awarding Jackson $650,000.

The evidence at trial was legally sufficient to generate a jury issue on the issue of employment discrimination based on retaliation. Viewed in a light most favorable to Jackson, the evidence showed that an employee who worked under her made a complaint of gender discrimination based on the conduct of a supervisor that Jackson herself had witnessed; Jackson reported that complaint to the supervisor's superior; and Jackson's superiors then proceeded to make baseless determinations that she had committed infractions and that her work was substandard and to discipline her by transferring her to distant work locations at a reduced salary. Reasonable jurors could find that the disciplinary actions Edgewood took against Jackson amounted to constructive discharge and that the discharge was motivated by an intention to retaliate against Jackson for reporting her subordinate's complaint of gender discrimination. The trial court also did not abuse its discretion in using Jackson's verdict sheet and Edgewood did not show any prejudice to it from the use of that verdict sheet.

The trial court erred in reducing the amount of the jury's verdict against Edgewood. The MCC provides two avenues of to pursue relief for discrimination. One, under section 27-8, provides for an administrative determination and recovery of damages that are limited to $500,000 for non-economic damages and up to two years worth of lost wages, minus unemployment benefits received. The other, under section 27-9, provides for a civil action for damages under Maryland law. Even though Jackson opted to bring a civil action for damages, the trial court reduced her lost income award based upon the limitations in section 27-8. This was legally incorrect. In addition, there was no basis for the court's elimination of Jackson's pain and suffering award.

The question of whether the trial court should have submitted the issue of punitive damages to the jury for determination was not preserved for review.

Fraternal Order of Police, Montgomery County Lodge 35, et al. v. Montgomery County, Maryland et al., No. 107, September Term 2012, filed May 30, 2013. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2013/0107s12.pdf

MONTGOMERY COUNTY POLICE LABOR RELATIONS ACT – COLLECTIVE BARGAINING AGREEMENT – PROPOSED AMENDMENT – CONDITIONAL WAGE OR BENEFIT ADJUSTMENT

Facts:

The Montgomery County Police Labor Relations Act ("PRLA") governs negotiations between the County and the members of its police force over collective bargaining agreements and amendments. When an agreement or amendment has been proposed, the County Council then must "indicate by resolution its intention to appropriate funds for or otherwise implement the agreement or its intention not to do so, and . . . state its reasons for any intent to reject any part of the agreement." The PRLA and the parties' existing collective bargaining agreement give the Council unilateral discretion to refuse to fund "conditional wage or benefits adjustments" in whole or in part.

In November 2010, the FOP and the County Executive entered negotiations over an amendment to the officers' cash compensation and, after arbitration, the Council received a proposal to increase it by 3.5%. The Council declared its intent to reject funding for that proposed amendment, as well as to reject funding for three existing contractual benefits: retirement benefits, health insurance, and life or disability insurance. On May 26, 2011, the Council passed Council Resolution No. 17-149, which adopted the Council's previously announced position not to fund the wage increase or employment benefits. The resolution also reduced the County's contributions to the officers' retirement plans and to the officers' life, accidental death and dismemberment, medical, vision, dental, and drug insurance premiums.

The FOP filed the instant suit in the Circuit Court for Montgomery County, alleging various causes of action all based on the Council's decision not to adopt the amendment and not to fund the three contractual benefits. The circuit court issued a memorandum opinion and declaratory judgment, holding (and declaring) that the Council's actions were permissible under both the PLRA and the existing bargaining agreement. The FOP then noted this timely appeal.

Held: Affirmed.

The FOP argued that the Council made unauthorized changes to the proposed amendment it received, but a strict prohibition of "changes" appears nowhere in the PLRA. As even the FOP

admits, the "plain language" of PLRA § 33-80(h) authorizes the Council to refuse any proposed amendment and to refuse to fund any employee benefit in whole or in part, and the County Council's resolution was consistent with this authority. To the extent that this decision constitutes a "change" to the amended or original agreement, it is explicitly permitted by the plain language of PLRA § 33-80(h) and the existing collective bargaining agreement.

VEI Catonsville, LLC v. Einbinder Properties, LLC, No. 265, September Term 2011, filed June 25, 2013. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2013/0265s11.pdf

COMMERCIAL REAL ESTATE APPRAISAL – AGREEMENT REGARDING RIGHT OF REFUSAL AND OPTION TO PURCHASE – *Supervisor of Assessments of Allegany Cnty. v. Ort Children Trust Four*, 294 Md. 195, 202 (1982) – *Cordish Power Plant Ltd. P'ship v. Supervisor of Assessments for Baltimore City*, 427 MD. 1 (2012)

Facts:

Circuit City Stores, Inc., a "national retailer of consumer electronics," the predecessor on the lease to VEI, entered into a commercial ground lease (Lease) with Joseph Y. Einbinder, ultimately succeeded by Einbinder Properties, Inc., contracting to rent approximately 7.657 acres of land (Property) in Baltimore County for an initial term of twenty years, with six five-year renewable terms. The Property, which had been the site of the Westview Cinema, has since been razed and replaced by retail establishments – "HH Gregg, Vitamin World and Staples." The Lease contained a separate "Agreement Regarding the Right of First Refusal and Option to Purchase." The "option to purchase" includes the following:

> Option to Purchase. Landholder does hereby grant to CC the exclusive and irrevocable option to purchase the interest of Landholder in the property on and subject to the terms and conditions hereinafter set forth.

The agreement also established the method by which the purchase price would be determined:

> The purchase price ("Purchase Price") payable upon the closing shall be the greater of FOUR MILLION FOUR HUNDRED TWENTY-EIGHT THOUSAND AND NO/100 DOLLARS ($4,428,000.00) *or the appraised value of the Property* subject to adjustments at closing as more fully set forth in subparagraph 2(d) below, which appraisal shall take into account (i) CC's right of first refusal, (ii) the extension rights granted to the holder of the leasehold estate in the Property, and (iii) the absence of a brokerage commission to be paid by Landholder, and ***which appraisal shall not take into account the value of the leasehold improvements then-existing on the Property***, and which appraisal shall be conducted by an independent M.A.I. appraiser having at least fifteen (15) years experience in the field of commercial real estate and whose primary area of expertise is Baltimore County, Maryland reasonably satisfactory to Landholder and CC. (Emphasis added).

Circuit City filed for bankruptcy protection and, "on or about" March 17, 2009, "sold and assigned its interest as Lessee under the Lease to Vanguard Commercial Development, Inc." On August 10, 2009, Vanguard in turn assigned its interest in the lease to VEI.

The parties retained the services of Ronald Lipman, an independent appraiser and real estate consultant "to appraise the Property in accordance with the Option." Lipman submitted two figures: $6,050,000 based on a sq. ft. rate of $22.50 applied against the subject's usable area (269,223 sq. ft.) and $7,450,000 utilizing the current NNN rent, deducting modest expenses and applying a capitalization rate of 7.0% based on utilizing the sales comparison approach, market value of the subject property as of April 27, 2010.

Held:

The Circuit Court for Baltimore County correctly determined that the valuation methodology based on the "income approach" conformed to the requirements of the Option in that it did not account for the value of the improvements.

Dominique West v. Stanley Rochkind et al., No. 41, September Term 2012, filed May 30, 2013. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2013/0041s12.pdf

TORTS – NEGLIGENCE – CIRCUMSTANTIAL EVIDENCE – LEAD PAINT – CAUSE-AND-EFFECT – PROCESS OF ELIMINATION

Facts:

Dominique West brought suit in the Circuit Court for Baltimore City alleging that he had been injured by having ingested lead paint while living with his grandparents at 1814 Lorman Street from his birth in 1989 until 1992. West's own answers to interrogatories and deposition testimony by his mother revealed that he resided or spent substantial amounts of time at up to five different residential locations between his birth and 1995, including 1814 Lorman Street. The defendants, NBS, Inc., and Stanley Rochkind, owned and operated 1814 Lorman Street as a residential rental property from 1990 until 2001. 1814 Lorman Street has since been razed and no lead paint tests were ever conducted on the property. Thus, West's case was based entirely on circumstantial evidence.

The circuit court granted summary judgment in favor of the defendants. The court found that, as West could not isolate 1814 Lorman Street as the only possible source of his lead paint poisoning, he could not make out a *prima facie* case of negligence using only circumstantial evidence. West appealed to the Court of Special Appeals.

Held: Affirmed.

A negligence case may be proven using only circumstantial evidence, so long as it creates a reasonable likelihood or probability – rather than a possibility – supporting a rational inference of causation, and is not wholly speculative. In *Dow v. L & R Properties, Inc.*, 144 Md. App. 67, 796 A.2d 139 (2002), the Court held that a lead paint plaintiff could make out a *prima facie* case using only circumstantial evidence if the plaintiff could show that the defendant's property was the only possible source of his lead paint exposure.

The *Dow* analysis conflated two analytic steps in a circumstantial case: the plaintiff first has to show that there was lead present in the paint at the subject property; the plaintiff then has to show that his exposure at the subject property was an effective cause of his lead poisoning. Where there is no direct evidence that a subject property even contained lead paint, the plaintiff may only rely on that critical fact, as a necessary part of his circumstantial evidence, if he can show by the process of elimination that the subject property was the only possible cause for the critical effect of lead poisoning. It is the teaching of *Dow* that, even in the absence of direct proof, the presence of lead paint at a particular site can be inferred by the process of elimination,

but only if we have 1) the effect of lead poisoning in the plaintiff and 2) the fact that the site in question was the exclusive possible source of the plaintiff's lead paint exposure.

Dominique West, the plaintiff here, had no direct evidence that 1814 Lorman Street contained lead, and he could not eliminate several other residences as potential sources of his lead paint exposure. Because he was unable to show that 1814 Lorman Street was the only possible source of his lead paint exposure, he could not make the critical inference, from his lead poisoning, that 1814 Lorman Street must have contained lead paint. As such, he could not make out a *prima facie* circumstantial case. The circuit court properly granted summary judgment in favor of the defendants.

David S. Schuman v. Greenbelt Homes, Inc.,, No. 2020, September Term 2011, filed June 27, 2013. Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2013/2020s11.pdf

NUISANCE – PRIVATE NUISANCES – WHAT CONSTITUTES NUISANCE – SECONDHAND SMOKE

LANDLORD TENANT – PREMISES, AND ENJOYMENT AND USE THEREOF – COVENANTS FOR QUIET ENJOYMENT – WHAT CONSTITUTES BREACH OF COVENANT – SECONDHAND SMOKE

TRESPASS – ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR – NATURE AND ELEMENTS OF TRESPASS – SECONDHAND SMOKE

NEGLIGENCE – NECESSITY AND EXISTENCE OF INJURY – PARTICULAR CASES

Facts:

The appeal arose from one neighbor's unhappiness with secondhand smoke migrating onto his property. David Schuman has lived in the same townhouse unit in the housing cooperative community Greenbelt Homes, Inc. ("GHI") since 1995. In 1996, when Darko and Svetlana Popovic moved into the unit next to his, Schuman complained to the Popovics and GHI about their cigarette smoking, which he said was seeping into his unit through a shared wall. GHI sealed several cracks between the two units and although the Popovics continued to smoke inside and outside on their patio, Schuman's complaints stopped for a little over ten years. Then, after Schuman did some renovations to his home, he began smelling the smoke again and complained to the Popovics and GHI. GHI told Schuman there was nothing else it could do because GHI's membership contract does not prohibit smoking.

Schuman sued GHI and the Popovics in the Circuit Court for Prince George's County. Against GHI, he claimed breach of the covenant of quiet enjoyment and negligence. Against the Popovics, he claimed breach of contract, nuisance, trespass, and negligence. Schuman also requested a declaratory judgment that smoking was a nuisance under GHI's membership contract and a preliminary and permanent injunction to stop the smoking.

Immediately after Schuman filed his complaint, Mrs. Popovic was diagnosed with a brain tumor. As a result of her diagnosis, she stopped smoking altogether and Mr. Popovic stopped smoking inside their unit. Mr. Popovic continued to smoke between twenty minutes to an hour and a half on his porch in the evening. Because they no longer smoked inside their unit, the Popovics consented to an injunction against smoking inside the home and the court granted the injunction. The court denied Schuman's request for a preliminary injunction against Mr. Popovic's outside

smoking and the Court of Special Appeals affirmed that decision in June 2011. Mrs. Popovic died in April 2012.

Schuman, Mr. Popovic, GHI representatives, neighbors, and experts testified at the bench trial on Schuman's other claims. The neighbor on the other side of the Popovics' unit testified that shutting her window if Mr. Popovic was smoking on the patio stopped the cigarette smoke from entering her home, and she said sometimes she would run a small fan to eliminate any smoke that entered her home before she shut the window. A neighbor who used to live a couple units down from the Popovics testified that he would also shut the windows in his unit and that would eliminate the smell of smoke. However, Schuman testified that the smoke entered his home even if he shut the windows, and it caused him to have watery eyes and headaches, among other symptoms. One of Schuman's experts conducted a test on the amount of smoke entering Schuman's townhouse when the Popovics were smoking inside their unit. He said the level was unsafe. But the level detected inside Schuman's unit was equal to the level the expert detected in the courtroom, which does not allow smoking. He did not conduct a test of the level of smoke inside Schuman's unit after the Popovics stopped smoking inside their unit. This expert also testified that smoke dissipates after traveling a certain number of feet, but he did not provide a clear answer on how many feet. Schuman's medical experts testified about the possible health problems from secondhand smoke but could not give any specific likelihood that Schuman would develop a disease from the secondhand smoke entering his home. They also did not link any of his symptoms to secondhand smoke. The court found against Schuman on all counts except the injunction by consent against smoking inside the townhouse.

Held: Affirmed.

On the breach of contract claim, the Court of Special Appeals concluded that the business judgment rule protects GHI's interpretation that smoking did not qualify as a nuisance under its membership contract. On the common law nuisance claim, the Court determined that tobacco smoke was not a nuisance *per se* because the plaintiff did not provide sufficient evidence that smoke at any location, in any amount, will cause injury. Additionally, smoking is regulated by statute and the statute specifically exempts residential smoking. A finding that cigarette smoke was a nuisance *per se* would make it hard to reasonably define the areas where a smoker could smoke without the risk of a lawsuit. The Court also concluded that Mr. Popovic's outside smoking did not create a nuisance at its specific location because the interference with Schuman's use and enjoyment of his property was not substantial and unreasonable such that it would be offensive or inconvenient to the normal person. Schuman had not complained of the Popovics' smoking for over ten years when they were both smoking inside and outside the unit. Also, the smoke may be dissipating significantly before reaching Schuman's home. Regardless, the only inconveniences Schuman showed were that he cannot sit on his porch for up to an hour and a half each evening, has to shut his windows at that time, and possibly run a fan.

The Court also affirmed the circuit court ruling on the breach of the implied covenant of quiet enjoyment. Because the cigarette smoke complained of did not constitute a nuisance, GHI's

failure to stop Mr. Popovic's smoking did not breach the essence of the membership contract between Schuman and GHI. On Schuman's trespass action, the Court determined that Schuman's could not sustain the claim because he had not offered any evidence that smoke traveling from one cooperative housing unit to another's caused physical damage to the property. Finally, the finding against Schuman on his negligence claim against Mr. Popovic and GHI was affirmed because Schuman could not prove, by a preponderance of the evidence, any medical injury, or any likelihood of injury, directly from Mr. Popovic's outdoor smoking.

Jean Burns v. Bechtel Corp., n/k/a Sequoia Ventures, Inc., No. 427, September Term 2012, filed May 31, 2013. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2013/0427s12.pdf

STATUTE OF REPOSE – COURTS & JUDICIAL PROCEEDINGS ARTICLE § 5-108 – "ACTUAL POSSESSION AND CONTROL" – "IMPROVEMENT TO REAL PROPERTY"

Facts:

Appellant's late husband, Robert Burns, worked from 1949 to 1986 as a roving maintenance employee for the Potomac Electric Power Company ("PEPCO"). During the course of Mr. Burns' employment, PEPCO hired Bechtel as its general contractor to perform construction projects at three power stations where Mr. Burns worked. Bechtel was responsible for each project's design, specifications, and construction, and the contract for work at two plants granted Bechtel "absolute control" of the projects. The designs at all three locations specified the use of asbestos insulation, to which appellant was exposed.

Mr. Burns was diagnosed with mesothelioma in August of 2009 and, joined by his wife, brought suit against Bechtel and various other parties involved in the PEPCO construction projects on November 5, 2009. Bechtel moved for summary judgment on the ground that all claims against it were untimely under § 5-108 of the Courts & Judicial Proceedings Article, which provides repose for certain defendants from claims of "wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property." After hearing arguments on the matter, the trial court granted summary judgment in favor of Bechtel, and appellant timely appealed.

Held: Affirmed.

First, where an engineering and construction firm's rights were limited to the scope of its contractual duties to perform specified construction work; the control granted by those contracts did not give the firm a possessory or proprietary interest in the property sufficient to exclude it from the Statute of Repose by operation of CJ § 5-108(d)(2)(i). Second, except for manufacturers and suppliers, the Statute of Repose applies to personal injury or death resulting from exposure to asbestos dust or fibers which are shed or emitted prior to or in the course of the affixation, application, or installation of the asbestos or the product that contains asbestos to an improvement to real property. The General Assembly specifically amended the Statute of Repose to remove from it claims against manufacturers and suppliers resulting from such deaths and injuries, which was only necessary if those claims had previously fallen under the statute. Because the General Assembly did not remove other parties from the Statute of Repose for similar injuries and deaths, a defendant like the engineering and construction firm in this case remains shielded by the Statute of Repose.

Dehn Motor Sales, LLC, t/a Insurance Recovery Auto Liquidators, et al. v. Joseph A. Schultz, Jr., et al., No. 1276, September Term 2011, filed June 26, 2013. Opinion by Krauser, C.J.

http://mdcourts.gov/opinions/cosa/2013/1276s11.pdf

TORTS – SUMMARY JUDGMENT

Facts:

As a result of numerous citizen complaints, officers of the Baltimore City Police Department seized and towed untagged and unregistered vehicles owned by Dehn Motor Sales, LLC, a used car business that was operated and owned, in part, by Farzan Mohamed. Some of the vehicles, parked on a nearby street and in an alleyway, were impeding if not blocking traffic; others, parked in a fenced lot and on the lawn of an adjacent property owned by Dehn Motor Sales, LLC, were leaking fluids, posing both a fire and chemical hazard. Mohamed, Dehn Motor Sales, LLC, and a related entity (collectively "Dehn Motor") then brought a replevin action in the District Court of Maryland for the return of the towed vehicles, which ended when the parties reached an agreement that the vehicles would be returned to Dehn Motor, subject to the condition that it not bring them back to the locations from which they had been towed.

Following the resolution of the District Court replevin action, which was almost three years after the date the cars were towed, Dehn Motor filed suit in the Circuit Court for Baltimore City against, among others, the two officers who had ordered that the vehicles be towed, Officer Joseph A. Shultz, Jr., and Sergeant Anthony Proctor, alleging violations of the Maryland Declaration of Rights and the United States Constitution, although no timely notice of claim had been provided pursuant to the Local Government Tort Claims Act ("LGTCA").

Officer Schultz and Sergeant Proctor thereafter moved for summary judgment on the grounds that Dehn Motor's state claims were barred by its failure to comply with the notice provision of LGTCA. The circuit court agreed.

Dehn Motor noted this appeal, contending that its District Court replevin action, filed within 180 days from the towing of the vehicles, had provided all the notice to the City that the LGTCA required.

Held: Affirmed.

The District Court replevin action did not forewarn, as a notice of claim must, that an action for unliquidated damages may follow; in fact, it suggested the contrary: Dehn Motor's replevin claim was only against the City. More importantly, the only issue raised by the replevin action

was the return of the vehicles, the towing fees that had been charged, and any damages for the temporary detention of the vehicles. There was no reason to suspect from the replevin action—which Dehn Motor claims was comparable to a notice of claim—that Sergeant Proctor and Officer Schultz were potential parties. Nor was there any reason to believe, from the nature of the action, that constitutional claims were waiting in the wings. The matter was thereafter settled by the return of the vehicles and the lifting of towing and storage fees, in exchange for the promise by Dehn Motor not to return the vehicles to the locations from which they had been towed.

The relief sought by Dehn Motor's in the replevin suit was the return of its towed vehicles, without having to pay the towing and storage fees, as well as damages for the seizure and detention of the vehicles. No other injuries were alleged. Nor could they have been as a replevin action entails very limited relief, namely, the return of the vehicles and damages caused by the detention of the vehicles. Moreover, the replevin complaint gave no warning, expressed or implied, that the officers might be future defendants in a more substantial and thus more threatening action in an altogether different court involving constitutional claims and that the City could also face additional and substantial damage claims, far greater than those that could be advanced in a replevin action. While the replevin suit requested limited damages, the circuit court action demanded $500,000 in compensatory damages and $1,000,000 in punitive damages.

If, in addition to filing their replevin complaint in the District Court, Dehn Motor had sent a notice of claim to the Baltimore City Solicitor, the City would have been on notice that Dehn Motor might file an additional and significantly larger lawsuit. Provided with such notice, the City would have been on notice of the need to conduct a more extensive investigation, and would have probably provided the officers with counsel during the replevin proceeding at which they were called as witnesses or the officers would have obtained counsel on their own. Moreover, the City agreed to settle the replevin action unaware that another larger suit would follow, and, had it been put on notice of that, it would have probably requested, we presume, that Dehn Motor release it and its employees from liability for any future claims arising from the towing of Dehn Motor's vehicles. Thus, instead of aiding the City in preparing for a possible future suit, as is the purpose of the notice requirement, the replevin suit hindered that preparation by misleadingly suggesting that the City only faced an action of a limited nature.

Return to ToC

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals dated April 4, 2013, the following attorney has been indefinitely suspended by consent, effective June 1, 2013:

CHARLES LAMONT GREEN

*

This is to certify that

RANDY ALAN WEISS

has been replaced on the register of attorneys in this state as of June 5, 2013.

*

This is to certify that

THOMAS PAUL LINIAK

has been replaced on the register of attorneys in this state as of June 5, 2013.

*

By an Order of the Court of Appeals dated May 16, 2013, the following attorney has been indefinitely suspended by consent, effective June 15, 2013:

ROSS D. HECHT

*

This is to certify that

ELLIS HOWARD GOODMAN

has been replaced on the register of attorneys in this state as of June 19, 2013.

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*

By an Order of the Court of Appeals dated June 20, 2013, the resignation of

DANIEL EUGENE FISHER

from the practice of law has been accepted.

*

By an Opinion and Order of the Court of Appeals dated June 21, 2013, the following attorney has been indefinitely suspended:

CRISTINE A. KEPPLE

*

By a Per Curiam Order of the Court of Appeals dated June 25, 2013, the following attorney has been disbarred:

MICHAEL FRANCIS GERACE

*

By an Opinion of the Court of Appeals of Maryland dated June 27, 2013, the following attorney has been disbarred:

RICHARD VALENTINE PATTON, III

*