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http://www.mdcourts.gov/opinions/coa/2014/99a13ag.pdf

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed with this Court a Petition for Disciplinary or Remedial Action (the "Petition") against Respondent, attorney Talieb Nilaja Wills. The Petition alleged violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") in connection with Respondent's misappropriation of funds belonging to his client, Mrs. Millicent Goode, and his deceitful responses to questions, from Bar Counsel and others, concerning both his use of those funds and his representation of Mrs. Goode.

The Court of Appeals assigned the matter to the Honorable David A. Boynton of the Circuit Court for Montgomery County ("hearing judge") to conduct an evidentiary hearing and issue written findings of fact and conclusions of law. After an evidentiary hearing, at which Respondent appeared and testified on his own behalf, the hearing judge found the following facts:

On or about April 8, 2010, Respondent prepared, and Mrs. Millicent Goode, an 80 year old woman with poor health, executed, a "Durable Power of Attorney for Financial and Business Matters of Millicent R. Goode" ("Power of Attorney"). The Power of Attorney appointed the Respondent as Mrs. Goode's agent to make financial and health care decisions and provided that all of Mrs. Goode's future tax returns were to be prepared, executed, and filed by Respondent.

The same day Mrs. Goode signed the Power of Attorney, Respondent added his name as a joint owner of Mrs. Goode's Bank of America bank account, and began withdrawing cash and making debit card purchases for his personal use. By the end of June 2010 (less than three months after Respondent added his name to the account), more than $14,000 had been taken from the account, leaving the balance of the account at $2.92.

On June 30, 2010, Mrs. Goode sold her home, and the proceeds were deposited into the joint bank account. Respondent began accessing those funds for his own use. He wrote himself multiple checks from the account and withdrew tens of thousands of dollars in cash. Respondent used account funds to pay his personal utility and cellular phone bills, to buy clothes, meals at

restaurants, and alcohol, as well as to purchase plane tickets to Miami, Las Vegas, and Hawaii, and pay for hotels while on those trips.

By the time of Mrs. Goode's death on June 10, 2012, there were no funds left in the joint bank account. Respondent nevertheless wrote several checks from the account to cover Mrs. Goode's funeral and burial expenses. Those checks were returned for insufficient funds.

After the death of Mrs. Goode, her son, Clyde V. Goode, hired an attorney, who sent repeated requests to Respondent asking for specific information relating to Respondent's work for Mrs. Goode. Respondent provided the attorney with a "Memorandum," which Respondent intended to serve as his response. With the Memorandum, Respondent included an itemized account summary that explained some of the work he had done on behalf of Mrs. Goode, but Respondent did not provide the requested detailed account of Respondent's work for Mrs. Goode.

The Memorandum set forth several specific representations including information about the sale of Mrs. Goode's home, his attorney rate, his administrative work rate, and his care for Mrs. Goode during her various stays at hospitals. The hearing judge found that Respondent's itemized "accounting" of the work he had performed for Mrs. Goode was fabricated by the Respondent in an effort to knowingly and intentionally mislead the attorney and to cover up his gross misappropriation of Mrs. Goode's funds.

Petitioner began an investigation and sent three separate letters to Respondent requesting information. Respondent did not reply to any of those letters. Respondent was subpoenaed and subsequently interviewed by Petitioner, but did not bring any of the subpoenaed documents to the interview. Respondent then failed show up to a second interview for which he was subpoenaed and failed to meet Petitioner's investigator to retrieve the documents, which were never recovered.

Based upon these findings, the hearing judge concluded, by clear and convincing evidence, that Respondent violated MLRPC 4.1(a); MLRPC 8.1; and MLRPC 8.4(a), (b), (c), and (d).

Held:

Neither Respondent nor Petitioner filed exceptions to the hearing judge's findings of fact. The Court, therefore, treated those findings as established for the purpose of determining the appropriate sanction. Also, neither Respondent nor Petitioner filed exceptions to the hearing judge's conclusions of law. Based on the Court's *de novo* review of the record, the Court agreed with the hearing judge that Respondent violated MLRPC 4.1(a); MLRPC 8.1; and MLRPC 8.4(a), (b), (c), and (d).

The Court held that Respondent misappropriated Mrs. Goode's funds and was evasive and dishonest with subsequent investigations into those funds. The default sanction for the intentional misappropriation of funds is disbarment. Respondent failed to provide any

compelling extenuating circumstances that might justify a lesser sanction. The Court, therefore, held that Respondent's misconduct warrants a sanction of disbarment.

Attorney Grievance Commission of Maryland v. Kevin Trent Olszewski, Misc. Docket AG No. 48, September Term 2013, filed January 27, 2015. Opinion by Greene, J.

http://www.mdcourts.gov/opinions/coa/2015/48a13ag.pdf

ATTORNEY DISCIPLINE – SANCTION – INDEFINITE SUSPENSION

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, filed a "Petition For Disciplinary Or Remedial Action" against Respondent Kevin Trent Olszewski arising out of two separate client complaints: one filed by Mr. and Mrs. Ware, the other by the office of Ramon A. DeJesus, M.D., LLC.

Mrs. Ware retained Respondent to represent her and her husband, Mr. Ware, on September 24, 2009, following a single vehicle accident in which she was driving and both Mr. and Mrs. Ware sustained injuries. On behalf of Mr. and Mrs. Ware, Respondent secured the payment of PIP benefits from Mrs. Ware's insurer, the Maryland Automobile Insurance Fund. Mrs. Ware's insurance policy provided the minimum statutory liability limits, however, which Mr. Ware's medical bills far exceeded. In completing further investigation of the Wares' potential claims, Respondent discovered that the vehicle involved in the accident, a 2000 Buick LeSabre, was a rebuilt salvage vehicle. On June 29, 2012, Mr. and Mrs. Ware filed a complaint with Petitioner, alleging that Respondent would not return their telephone calls or advise them about "the status of our case." Petitioner thereafter sent three letters to Respondent requesting a response to the Wares' allegations, to which Respondent failed to respond. On September 21, 2012, Respondent filed in the Circuit Court for Harford County a civil action against Mrs. Ware on behalf of Mr. Ware. Then, on September 24, 2012, Respondent filed a separate action in the Circuit Court for Harford County on behalf of both Mr. and Mrs. Ware against BH Motors. The Circuit Court subsequently consolidated the two civil cases, and, ultimately, both cases were dismissed.

The office of Roman A. DeJesus, M.D., LLC, engaged Respondent on December 2, 2008, for the purpose of collection of delinquent accounts owed to Dr. DeJesus's medical practice. The Representation and Fee Agreement specified that Respondent would represent Dr. DeJesus's medical practice on a contingent fee basis, at a rate of 33.3% of the amount collected. Since 2008, Dr. DeJesus's office referred only two collection cases to Respondent. Respondent resolved the first collection matter against Brian Bragg and forwarded the monthly payments he received from the patient to Dr. DeJesus's office. On September 21, 2011, Dr. DeJesus's office referred to Respondent the account of Cherie L. Chase, which had a delinquent balance of $9,075.00. Respondent sent correspondence to Ms. Chase, and on December 21, 2011, filed a collection action against her in the District Court of Maryland, sitting in Harford County. Shortly before the scheduled trial date, Dr. DeJesus's office received notice that Ms. Chase's insurer would process her claim. Ms. Chase's insurer paid Dr. DeJesus's office $1,745.61, but

adjusted the balance and did not cover the amount of $6,873.31. Dr. DeJesus's office wrote off the adjusted amount as uncollectible. As a result, the remaining principal balance on the Chase account was $456.08. On the trial date, March 30, 2012, with the approval of Dr. DeJesus's office, Respondent and Ms. Chase reached a settlement agreement for substantially more than $456.08. Thereafter, on April 5, 2012, Respondent sent a "remittance report" to Dr. DeJesus's office, which stated that Respondent's fee for this matter was one-third of the insurance payment of $1,745.61. Respondent also charged a 15% fee on the adjusted amount for an additional fee of $1,031.00. Dr. DeJesus's office disputed the $1,031.00 fee, because the $6,873.31 adjustment amount was not actually collected on the account. To cover the claimed 15% fee, despite knowledge that Dr. DeJesus's office disputed the fee, Respondent withheld funds owed to Dr. DeJesus from the monthly payments he was receiving on the Bragg account. Respondent did not explain to Dr. DeJesus's office that funds collected on one account could be applied to pay Respondent's fee related to a separate account.

Following an evidentiary hearing, the hearing judge concluded that Respondent violated MLRPC 1.1, 1.3, 1.4, 1.5, 1.7, 1.15, 1.16, 8.1, 8.4(a) and (d). Neither Petitioner nor Respondent filed exceptions.

Held:

The Court agreed with the hearing judge's conclusions. Because neither Petitioner nor Respondent filed exceptions, the only remaining question was a determination of the appropriate sanction. The Court determined that Respondent's conduct, particularly with regard to his neglect and inattention of the Ware matter, was severe. Respondent failed to act competently and diligently in representing them and in pursuing their claims. He created a conflict of interest when he agreed to represent both Mr. and Mrs. Ware, knowing that as a result of the automobile accident, they had competing interests. Respondent then compounded the issue when he filed suit on behalf of Mr. Ware against Mrs. Ware, and subsequently failed to resolve the conflict by not advising the Wares to seek alternate counsel. The conflict was not waivable and, along with Respondent's failure to respond to discovery requests, ultimately led to the dismissal of the Wares' claims. In addition, with regard to Dr. DeJesus's complaint, Respondent charged an unreasonable fee and improperly withheld funds owed to Dr. DeJesus. Respondent failed to place the disputed fee into a trust account pending resolution of the dispute, and those funds were wrongly withheld for a period of approximately two years. Finally, Respondent failed on multiple instances to respond to communications from Bar Counsel. Thus, the Court held that the appropriate sanction was an indefinite suspension with the right to reapply after six months.

Attorney Grievance Commission of Maryland v. Eugene Alan Shapiro, Misc. Docket AG No. 83, September Term 2013, filed January 30, 2015. Opinion by Harrell, J.

Battaglia and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/83a13ag.pdf

ATTORNEY MISCONDUCT – MISREPRESENTATION TO CLIENT – CONFLICT OF INTEREST – INDEFINITE SUSPENSION

Facts:

In this attorney disciplinary action, the Attorney Grievance Commission of Maryland ("Petitioner"), acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action ("PDRA") against Eugene Alan Shapiro, Esquire ("Respondent" or "Shapiro"), charging him with violations of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") arising from his representation of Diana Wisniewski ("Wisniewski"). Respondent was charged with violating MLRPC 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.3 (Diligence), 1.4 (Communication), 1.8 (Conflict of Interest: Current Clients), 1.16 (Declining or Terminating Representation), 8.4(a), (c), and (d) (Misconduct). The PDRA served on Shapiro alleged that Respondent did not protect adequately a client's medical malpractice claim from expiration (because he claimed to have been unable to identify a medical doctor to complete the required arbitration certification as to causation) as the result of the running of the statute of limitations, failed to keep a client informed as to the status of her case, misrepresented the true status of the claim to the client for five years, entered into a business transaction with a client without advising the client in writing of the desirability of seeking independent counsel, and failed to withdraw immediately after learning of the potential cause of action that his client may have against him.

The case was assigned to a hearing judge to conduct an evidentiary hearing and render findings of fact and recommended conclusions of law with regard to the charges. Respondent was the sole witness to testify, although a number of documentary exhibits were received. The hearing judge concluded that the Commission proved, by clear and convincing evidence, that Shapiro violated MLRPC 1.2(a), 1.3, 1.4(a) and (b), 1.8(a)(2), 1.16, and 8.4(a), (c), and (d). The hearing judge declined to conclude that the terms of the settlement agreement between Shapiro and Wisniewski were unfair or unreasonable to Wisniewski, in violation of MLRPC 1.8(a)(1).

Petitioner filed with us a single written exception to the hearing judge's Findings of Fact and Conclusions of Law, arguing that the hearing judge should have concluded that Petitioner proved by clear and convincing evidence that the terms of the settlement agreement were unfair or unreasonable, leading to a violation of MLRPC 1.8(a)(1). Respondent filed no exceptions, timely or otherwise.

Held:

The Court of Appeals concluded that the facts found by the hearing judge were sufficient, to a clear and convincing standard, to warrant concluding that Respondent violated MLRPC 1.2(a), 1.3, 1.4(a) and (b), 1.8(a), 1.16, and 8.4(a), (c), and (d). Respondent's conduct violated MLRPC 1.2 by failing to keep Wisniewski informed as to the status of her case, and, accordingly, deprived her of the opportunity to make informed decisions as to the objective of the representation. MLRPC 1.3 was violated when he failed to act more promptly to prevent the dismissal at the arbitration process state of Wisniewski's claim or to reinvigorate the case by some other means and failed to advise Wisniewski of his apparent inability to find a willing doctor, such that Wisniewski could make decisions or assist with regard to locating a willing doctor before her claim lapsed. Respondent's failure to communicate with Wisniewski and misrepresentations to her (spanning several years) as to the true status of her case violated MLRPC 1.4. Respondent violated MLRPC 1.8(a) by not advising Wisniewski in writing of the desirability of seeking independent counsel prior to entering into an agreement regarding her potential claim against Respondent. MLRPC 1.16 was violated when Respondent failed to withdraw immediately after learning of the potential cause of action that Wisniewski may have had against him. The conduct described previously violated MLRPC 8.4(a), (c), and (d).

With regard to Petitioner's exception concerning MLRPC 1.8(a)(1), the Court noted that, when attorneys and their clients enter into contracts, the law recognizes a presumption against the attorney and in favor of the client as to the reasonableness of the contract. Accordingly, where the client has not been advised in writing of the desirability of seeking (and was not given a reasonable opportunity to seek) the advice of independent legal counsel regarding the transaction, the Court presumes that the agreement between the attorney and client, for purposes of MLRPC 1.8(a)(1), is not a fair and reasonable one. Respondents may overcome this presumption by adducing a prima facie case that the agreement is fair and reasonable, despite the lack of a written disclosure. The Court noted further that Petitioner's exception was moot, as MLRPC 1.8(a) was violated regardless of whether violations of all or any one of the conjunctive sub-parts (1), (2), and/or (3) are proven.

The Court held that an indefinite suspension was the appropriate sanction for Respondent's violations. The hearing judge declined to find any mitigating factors, and accordingly, the Court did not consider any. The Court identified several aggravating factors, including Respondent's prior disciplinary history, his arguably dishonest and selfish motive, his pattern of misconduct, the fact that his conduct involved several distinct violations of the MLRPC, Wisniewski's status as a vulnerable victim (by relationship to Respondent), and Respondent's substantial experience in the practice of law. In light of Respondent's sustained misrepresentations and other misconduct, the Court concluded that Respondent's misconduct warranted the sanction of an indefinite suspension.

Attorney Grievance Commission of Maryland v. David Peter Buehler, Misc. Docket AG No. 12, September Term 2014, filed January 26, 2014. Opinion by Adkins, J.

http://www.mdcourts.gov/opinions/coa/2015/12a14ag.pdf

ATTORNEY DISCIPLINE – RECIPROCAL DISCIPLINE – DISBARMENT

Facts:

Petitioner, Attorney Grievance Commission ("AGC") of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, David Peter Buehler. Bar Counsel alleged that Buehler, in connection with his representation of Jill Sozio in matters related to her business, Jill's Deli, Bakery & Grill, engaged in professional misconduct, violating the following Maryland Lawyers' Rules of Professional Conduct: (1) 1.3 (Diligence); (2) 3.1 (Meritorious Claims and Contentions); (3) 3.3(a)(1) (Candor Toward the Tribunal); (4) 3.4(c) (Fairness to Opposing Party and Counsel); (6) 4.4 (Respect for Rights of Third Persons); and (7) 8.4(c) (Misconduct). Bar Counsel also alleged that Buehler violated Maryland Rule 16-773(a) (Reciprocal discipline or inactive status).

After a determination by a Subcommittee of the Second District of the Virginia State Bar, the matter came before a panel of the Virginia State Bar Disciplinary Board, where Buehler represented himself. The Virginia State Bar presented evidence, and Buehler stipulated to the facts. The Board found that Buehler made repeated misrepresentations to the court, failed to appear at scheduled hearings, and brought a baseless proceeding. It imposed a suspension from the practice of law for six months. The Clerk of the Virginia Disciplinary System notified the AGC of Buehler's sanction. After the Court of Appeals issued a Show Cause Order as to why corresponding discipline should not be imposed, Bar Counsel responded that corresponding discipline would be inconsistent with Maryland precedent and urged the Court to impose either indefinite suspension or disbarment. It highlighted Buehler's failure to notify Bar Counsel of his Virginia sanction, additional misconduct the Board had not considered.

Held:

The Court of Appeals accepted the Findings of Fact and Conclusions of Law of the Virginia disciplinary board and concluded that Buehler also violated MLRPC 8.4(d) by repeatedly failing to attend hearings on behalf of Sozio and Maryland Rule 16-773(a) by failing to notify the AGC of his Virginia sanction. It stated that Buehler's multiple misrepresentations were particularly grave transgressions, and—when combined with the fact that he frequently delayed judicial proceedings—warranted a greater sanction than that imposed in Virginia. The Court imposed a sanction of disbarment.

Attorney Grievance Commission of Maryland v. Lance Butler, III, Misc. Docket AG No. 31, September Term 2013, filed January 27, 2015. Opinion by Greene, J.

Watts, J., dissents.

http://www.mdcourts.gov/opinions/coa/2015/31a13ag.pdf

ATTORNEY DISCIPLINE – RULE 8.1 – SANCTION – REPRIMAND

Facts:

Petitioner, the Attorney Grievance Commission of Maryland, began attempting to contact Respondent, Lance Butler, III, in March 2012 in response to a client complaint filed against him. Petitioner mailed numerous letters to Respondent at his home and work addresses, but received no response. In addition, Petitioner's investigator, Mr. Versis, made multiple unanswered phone calls to Respondent, and went to great lengths to contact Respondent over the course of nearly one year, including eventually a visit to Respondent's workplace and a meeting with Respondent's supervisor. Respondent maintained that he did not receive any letters until December 2012. Even after Respondent admittedly received the December 2012 letters, the hearing judge found that Bar Counsel left a telephone message for Respondent and that Mr. Versis repeatedly attempted to contact Respondent by telephone, and Respondent failed to respond. Moreover, Mr. Versis met with and interviewed Respondent on January 28, 2013, after interviewing Respondent's supervisor at USAID. Petitioner, however, did not receive any written response from Respondent until the receipt of Respondent's letter dated February 12, 2013.

Bar Counsel filed a "Petition for Disciplinary or Remedial Action" charging Respondent with violations of 8.1 and 8.4(d). At the evidentiary hearing, Respondent claimed that he only received the December 2012 letters, and explained that he did not respond promptly to Petitioner out of an irrational fear of Bar Counsel. The hearing judge concluded that Respondent's conduct violated 8.1, but was not prejudicial to the administration of justice in violation of 8.4(d). Neither Respondent nor Petitioner filed exceptions.

Held:

The Court held that, under these circumstances, all Respondent needed to do in order to resolve this matter was to pick up the phone and call Bar Counsel. By failing to do so, Respondent exacerbated the problem, leading to the instant disciplinary proceedings. Assuming Respondent received only the December 2012 letters, Respondent failed to respond to Bar Counsel for approximately two months, between December 5, 2012 and February 12, 2013. The Court condones neither Respondent's irrational fear of Bar Counsel nor his delay in responding to Bar

Counsel. Failing to respond in a timely manner to Bar Counsel's lawful requests for information is sanctionable conduct. Accordingly, the Court issued a reprimand.

Falls Garden Condominium Association, Inc. v. Falls Homeowners Association, Inc., No. 30, September Term 2014, filed January 26, 2015. Opinion by Battaglia, J.

http://www.mdcourts.gov/opinions/coa/2015/30a14.pdf

CONTRACTS – FORMAL REQUISITES – LETTERS OF INTENT

Facts:

Falls Garden Condominium Association ("Falls Garden") and Falls Homeowners Association ("The Falls"), neighboring entities located in Baltimore County, executed a Letter of Intent in settlement of litigation arising out of a case disputing ownership of parking spaces situated between the condominiums and townhouses that make up their respective associations. The Letter of Intent contained specific provisions regarding the rental of twenty-four parking spaces as well as a settlement agreement between the parties. Problems arose between the parties, and The Falls filed a Motion to Enforce Settlement Agreement to implement the Letter of Intent.

The Circuit Court Judge granted The Falls's Motion to Enforce Settlement, finding that the Letter of Intent was a binding enforceable contract between the parties. The Circuit Court Judge ordered that Falls Garden execute a lease proposed by The Falls and a settlement agreement. Falls Garden appealed, alleging that it did not intend to be bound by the Letter of Intent and that the Circuit Court Judge erred in failing to hold a plenary hearing on the Motion to Enforce Settlement Agreement. The Court of Special Appeals affirmed.

Held: Affirmed in part and reversed in part.

The Court of Appeals affirmed in part and reversed in part. The Court held the Letter of Intent is an enforceable contract because the parties intended to be bound and it is definite as to all material terms, and additionally, that it is unambiguous. It was, thus, unnecessary for the Circuit Court Judge to have a plenary hearing on the merits of the Motion to Enforce Settlement Agreement.

The Court looked to the four distinctive categories of letters of intent proposed by Corbin, which the Court cited with approval in its prior discussion of letters of intent, *Cochran v. Norkunas*, 398 Md. 1, 919 A.2d 700 (2007), quoting Joseph M. Perillo, *Corbin on Contracts* § 2.9, p. 157-58 (Rev. ed. 1993). The categories are:

> (1) At one extreme, the parties may say specifically that they intend not to be bound until the formal writing is executed, or one of the parties has announced to the other such an intention. (2) Next, there are cases in which they clearly point

> out one or more specific matters on which they must yet agree before negotiations are concluded. (3) There are many cases in which the parties express definite agreement on all necessary terms, and say nothing as to other relevant matters that are not essential, but that other people often include in similar contracts. (4) At the opposite extreme are cases like those of the third class, with the addition that the parties expressly state that they intend their present expressions to be a binding agreement or contract; such an express statement should be conclusive on the question of their 'intention.'

The Court held that the Letter of Intent fell under Corbin's category three because, on its face, the Letter of Intent is definite as to all material terms. As a result, the Court enforced the Letter of Intent, but unlike the lower courts, declined to enforce the proposed lease drafted by The Falls because it was not assented to by Falls Garden. The Court, also, determined that the Circuit Court Judge did not err in failing to hold a plenary hearing, because the Letter of Intent was unambiguous, so that the taking of extrinsic evidence was unnecessary.

Dennis J. Kelly, Jr. v. George W. Duvall, Jr., et al., No. 26, September Term 2014, filed January 27, 2015. Opinion by Adkins, J.

Battaglia and Watts, JJ., dissent.

http://www.mdcourts.gov/opinions/coa/2015/26a14.pdf

TRUSTS AND ESTATES – WILLS – CONDITIONS PRECEDENT – SURVIVORSHIP

TRUSTS AND ESTATES – WILLS – LAPSE – CONTRARY INTENT NOT EXPRESSED

Facts:

Elizabeth Duvall passed away on April 16, 2011, only weeks after her son, Dennis J. Kelly, Sr., passed away. Ms. Duvall's Will contained a contested provision, which led to conflict between Respondents, Ms. Duvall's three surviving sons, and Petitioner, Kelly, Sr.'s surviving son, over the proper disposition of Ms. Duvall's estate. In addition to devising Ms. Duvall's house, the Will included Item III, which stated: "[i]f any of the legatee or beneficiary named or described under any provision of my Will does not survive me by a period of thirty (30) days, then all provisions of my Will shall take effect as if such legatee or beneficiary had, in fact, predeceased me."

Respondents filed a Petition for Construction of Ms. Duvall's Will in the Orphans' Court for Anne Arundel County, urging the court to "find that the Will leaves the assets of the estate to [Ms. Duvall's] living children only." They contended that Ms. Duvall's expressed intent in executing the Will was to distribute her estate among her living sons. They argued that the Will's language created a survivorship requirement and that, even in the absence of such a requirement, the Will expressed a contrary intent to the anti-lapse statute. Petitioner responded, contending that the house and its contents should pass to the estate of Kelly, Sr., and that his heirs are entitled to one-quarter of Ms. Duvall's residuary estate. He argued that Item III was a mere restatement of Md. Code (1974, 2011 Repl. Vol.), § 4-401 of the Estates and Trusts Article ("ET"). In line with this reading, he contended that Item III indicated no intent to create a survivorship requirement and that Ms. Duvall's expressed intent in the Will was to treat the inheritance of Kelly, Sr., who predeceased Ms. Duvall but was alive at the time of the Will's execution, as a lapsed devise, saved by ET § 4-403 because no language in the Will evinced an intent to negate the statutory presumption against lapsing.

The Orphans' Court ruled in favor of Respondents, concluding that "the Estate should be distributed to the three surviving children named in item IV" of Ms. Duvall's Will. Petitioner appealed to the Circuit Court for Anne Arundel County, which affirmed the judgment of the Orphans' Court. On appeal, a divided panel of the Court of Special Appeals affirmed in an unreported opinion, concluding both that Item III imposed survivorship as a condition precedent

to inheritance and that it manifested an intent to negate Maryland's anti-lapse statute. Judge James A. Kenney, III dissented, disagreeing with both conclusions.

Kelly, Jr. petitioned the Court of Appeals for writ of certiorari, asking the Court to decide whether the lower courts erred by construing the Will in a manner inconsistent with ET § 4-401 and in construing the Will as demonstrating a contrary intent sufficient to overcome the presumption that Maryland's anti-lapse statute, ET § 4-403, applies.

Held: Reversed.

The Court concluded that Item III merely reflected ET § 4-401, and, therefore, that it did not express a requirement that Kelly, Sr. outlive Ms. Duvall. Because the Will closely tracked the statute's language, the Court found the Henderson Commission Report's analysis of ET § 4-401 instructive to its construction of Item III. As a result, it found that § 4-403 determined whether the legacy had lapsed.

Observing that Maryland's anti-lapse statute has been liberally construed but that a contrary intent may be shown by express statement to that effect or by repeated references to survivorship, the Court examined the language of the Will. It held that such contrary intent was not present in Ms. Duvall's will. Thus, ET § 4-403 protected the devise from lapse. The Court reversed the lower courts, holding that Petitioner was entitled to inherit under the Will.

Joseph F. Cunningham, et al., v. Matthew Feinberg, No. 27, September Term 2014, filed January 27, 2015. Opinion by Harrell, J.

Adkins, J., concurs.

http://www.mdcourts.gov/opinions/coa/2015/27a14.pdf

LABOR & EMPLOYMENT – MARYLAND WAGE PAYMENT AND COLLECTION LAW – LEX LOCI CONTRACTUS

Facts:

Matthew Feinberg, Esq. ("Feinberg"), filed, on 4 October 2012, a Complaint in the District Court of Maryland, sitting in Montgomery County, against his former employer, Cunningham & Associates, P.L.C. ("C&A"), a Virginia-based law firm, and its principal, Joseph F. Cunningham ("Cunningham"). (C&A and Cunningham are referred to sometimes hereafter collectively as "Petitioners.") The only count of the Complaint to survive to this stage of the appeal is Feinberg's claimed violation by Petitioners of the Maryland Wage Payment and Collection Law ("MWPCL"), Maryland Code (1999, 2008 Repl. Vol.), Labor & Employment, §§ 3-501 *et. seq.*, for which he sought $1,974.20 in unpaid wages, treble damages, attorney's fees, and costs.

Feinberg testified at the 17 April 2013 trial in the District Court regarding his application for employment with C&A, his understanding of the terms of his employment, and many of the logistics of his daily work and the manner in which he reported his hours and was paid. He suggested that he was hired by C&A to serve as a Maryland attorney, handle Maryland cases, appear before Maryland courts, and advise Maryland clients. Feinberg testified that his work for Petitioners included representing clients at trial and motions hearings, attending depositions, meeting with clients, and gaining admission to the U.S. District Court, all in Maryland. He signed a very minimalist written employment agreement ("Agreement"), which did not contain a choice of law provision, or even what or how his compensation would be determined. He recounted instances in which he discussed disputed wages with Cunningham.

At the close of Feinberg's case-in-chief, Petitioners moved to dismiss the wage claim arguing, *inter alia*, that the parties' contract was governed, under Maryland's choice of law principles, by Virginia's wage claim statute (which does not allow a private cause of action to be maintained), and, as such, the MWPCL did not apply. The District Court granted Petitioners' motion, finding only one fact—that the employment contract was a "Virginia" contract." The District Court concluded that the MWPCL did not apply to contracts entered into outside of Maryland, and the contract was governed instead by Virginia law. Furthermore, the District Court did not identify a strong public policy basis to apply the MWPCL to Feinberg's claims.

Feinberg filed a Motion to Alter or Amend Judgment and/or for Reconsideration regarding his MWPCL claim. He relied on *Himes Associates, Ltd. v. Anderson*, 178 Md. App. 504, 943 A.2d

30 (2008), which he suggested was controlling precedent that indicated that Virginia employers, such as Petitioners, could be liable under the MWPCL in an action brought in Maryland. Feinberg argued that, under *Himes*, the MWPCL still applied even though he spent most of his office time in Petitioners' Virginia office and had signed a "Virginia" contract. His motion was denied.

Feinberg appealed, on the record, to the Circuit Court for Montgomery County. The Circuit Court reversed the dismissal of Feinberg's MWPCL claim and remanded the matter for further proceedings. That court did not disturb the District Court's factual finding that the employment contract was a "Virginia" contract, but reasoned that *Himes* controlled, suggesting that Feinberg could recover under the MWPCL. The Circuit Court declined to determine whether Feinberg was indeed an employee (or independent contractor) of C&A or whether there was a bona fide dispute as to the wages claimed, but instead left those issues to the District Court on remand.

The Court of Appeals granted C&A's and Cunningham's Petition for Writ of Certiorari. 437 Md. 66, 85 A.3d 156 (2014), which posed the following two questions: (1) "Does application of the Md. choice of law principle of *lex loci contractus* preclude a claim under the Md. Wage Payment and Collection Law (MD. Code Ann. Lab. & Empl. § 3-501 et seq. ("MWPCL"))[;]" and (2) "Does proper application of *lex loci contractus* preclude respondent's MWPCL claim?"

Held: Affirmed.

The Court of Appeals held that this matter did not implicate the choice of law doctrine of *lex loci contractus*.

The Court began by discussing the general purposes and function of the MWPCL, which allows employees to recover, in a privately-initiated action, wages withheld unlawfully from them by their employers. Recognizing that several federal courts have struggled to identify the exact nature of the private cause of action under the MWPCL, the Court of Appeals noted that the action does not sound in contract or tort, but instead is a statutory cause of action that is remedial in nature.

The Court of Appeals then discussed the proper application of the doctrine of *lex loci contractus*. The doctrine requires that, when determining the construction, validity, enforceability, or interpretation of a contract, the law of the jurisdiction where the contract was made should be applied. The doctrine is not implicated in *all* disputes over contracts entered into out-of-state, but instead is applied only when the validity or enforceability of a contract was challenged, or the interpretation or construction of some term or phrase was disputed. As the Agreement in this matter contained nothing relevant expressly to the proper payment of wages to interpret or enforce, the Court of Appeals concluded that the doctrine did not apply to Feinberg's unpaid wages claim.

The Court of Appeals responded to an argument made by the Petitioners that certain judicially-implied terms added to the parties' contract implicate *lex loci contractus*; specifically, they

argued that a portion of Virginia's Labor and Employment title addressing unpaid wages should be considered part and parcel of the parties' Agreement. Construed as such, the dispute between the parties was one of construction of a contract's terms, and thus *lex loci contractus* determined that the law of Virginia should apply, to the exclusion of the MWPCL. The Court of Appeals was not persuaded by this argument, and concluded that such an understanding of *lex loci contractus* would be an impermissibly broad application of the doctrine.

The Court of Appeals analyzed *Himes*, where the Court of Special Appeals held that Virginia employers could be subject to liability under the MWPCL in certain circumstances. In that matter, the Court of Special Appeals held that the MWPCL applied to situations in which a non-Maryland company directed its employee to go to a work site in Maryland for twice-monthly meetings. Though not referring directly to *lex loci contractus* in *Himes*, the employer in that matter argued similarly that the suit should have been filed in Virginia under that state's unpaid wages statute, which does not provide for a private cause of action. The intermediate appellate court determined that Virginia employers could still be liable under the MWPCL based on the Maryland statute's broad requirements.

The Court of Appeals proceeded, in considered dicta, to discuss Feinberg's fallback argument that the MWPCL falls within the public policy exception to the applicability of *lex loci contractus*. After reviewing previous cases discussing the public policy exception to *lex loci contractus* and *lex loci delicti*, the Court of Appeals concluded that, based on the recently added (2011) anti-waiver provision (§ 3-502(f)) and other clear indicators of legislative intent, the MWPCL likely constitutes an expression of strong public policy. The Court of Appeals came to this position despite conclusions of various federal courts to the contrary, most of which were decided prior to the 2011 enactment of the anti-waiver amendment. Finally, the Court of Appeals reasoned by analogy to other provisions of Maryland's overall labor and employment statutory scheme (especially the workers' compensation statute) that Maryland is willing generally to allow itself to be used as a forum by workers seeking recovery of their wage claims.

COURT OF SPECIAL APPEALS

GAB Enterprises, Inc. v. Rocky Gorge Development, LLC, et al., No. 2575, September Term 2012, filed January 29, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/2575s12.pdf

COLLATERAL ESTOPPEL – IDENTITY OF ISSUES FROM PRIOR LITIGATION

COLLATERAL ESTOPPEL – ISSUES ESSENTIAL TO PRIOR LITIGATION

Facts:

GAB and Rocky Gorge formed a partnership ("RGHGAB") to buy, develop, and sell property in Frederick County, but over time the venture languished, and the individuals involved ultimately were left with a $9 million promissory note on property worth less than $3 million. GAB initiated bankruptcy proceedings against RGHGAB, and after it failed in United States Bankruptcy Court, it filed a new proceeding in Circuit Court for Frederick County against Rocky Gorge alleging that its CEO had fraudulently formed a third entity to purchase RGHGAB at a low price and eradicate GAB's interest in RGHGAB. The circuit court granted Rocky Gorge's Motion to Dismiss and for Summary Judgment, holding that the prior rulings of the Bankruptcy Court collaterally estopped GAB from proceeding. GAB appealed.

Holding: Reversed and remanded.

The Court of Special Appeals explained the two prongs of the applicable test that the circuit court should have used in looking at whether collateral estoppel barred GAB's action: *first*, whether the issues in the prior litigation were *identical* to those in this action, and *second*, whether those issues were *essential* to the prior court's decision. The Court held that the circuit court was not barred by collateral estoppel from considering GAB's claims where the prior proceeding took place in a totally different forum—United States Bankruptcy Court—and the issues were litigated in the very different context of a bankruptcy proceeding where the presence of a trustee and other creditors necessarily altered what issues were decided. The Court also pointed out that the Bankruptcy Court made quite clear that its job was *not* to sort out the rights and duties between the parties later involved in the circuit court litigation, and on more than one occasion it took pains to carve out its own decision based on the bankruptcy issues presented, which had nothing to do with the two parties' relationship here. Because the issues before the

circuit court were not identical or essential to the bankruptcy litigation, collateral estoppel did not apply and the circuit court should not have granted defendant's motion for summary judgment.

Russell Anderson v. State of Maryland, No. 713, September Term 2013, filed December 17, 2014. Opinion by Eyler, Deborah S., J.

http://www.mdcourts.gov/opinions/cosa/2014/0713s13.pdf

EVIDENCE – RULE 5-616(b)(2) – ADMISSION OF EXTRINSIC EVIDENCE TO IMPEACH WITNESS BY CONTRADICTION – ENTITLEMENT TO IMPEACH ON NON-COLLATERAL MATTER – COLLATERALNESS – EXERCISE OF DISCRETION TO ADMIT EXTRINSIC EVIDENCE TO IMPEACH BY CONTRADICTION ON COLLATERAL MATTER.

Facts:

In his trial for raping the victim at gunpoint, the defendant testified that he and the victim had consensual sex. On cross, he was asked whether, at the relevant time, he had a handgun in his apartment (which was not the location of the rape). He answered that he did not. The court allowed the State to introduce for impeachment a police report of a search of the defendant's apartment in which a handgun was found. The search was conducted in an unrelated case; and there was no evidence that the handgun found in the defendant's apartment was the gun used in the rape. The court also allowed the State to call on rebuttal the lead detective in the other case, who testified about the handgun being recovered from the defendant's apartment in the police search.

Held:

Under Rule 5-616(b)(2), extrinsic evidence is admissible to impeach a witness by contradiction on a matter that is not collateral, *i.e.*, that is material. Ordinarily, extrinsic evidence may not be admitted to impeach a witness by contradiction on a collateral matter. The court has discretion to admit such evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, under Rule 5-403.

Whether the defendant had a handgun in his apartment that had no connection to the rape for which he was on trial was a collateral matter. Evidence showing the presence of the handgun in his apartment was not relevant and material to the substantive issues in the case. It would not have been admissible independently, that is, if the defendant had not testified. The evidence did not become relevant and material merely because the defendant testified to the contrary. The State was not entitled to impeach the defendant with extrinsic evidence contradicting his testimony that there was not a handgun in his apartment.

The court abused its discretion by admitting the evidence. Sometimes evidence on a collateral matter can have relevance and be material to an issue in the case, although not to a central issue.

This evidence was not relevant. And it was prejudicial, in that it telegraphed to the jury either that the defendant had been the subject of another criminal case in which he was found to have weapons, which was propensity evidence that was not specially relevant, or that the weapon found in the defendant's apartment in fact was the one used in the rape, which it was not. For the same reasons, the evidence was highly likely to confuse the jury, to the defendant's detriment.

Andres Cortez v. State of Maryland, No. 1952, September Term 2013, filed December 18, 2014. Opinion by Alpert, J.

http://www.mdcourts.gov/opinions/cosa/2014/1952s13.pdf

CRIMINAL LAW – SEVERANCE

Facts:

Andres Cortez and several men, all members of the "Little R" gang, participated in the sexual assault of a woman they had recently met at a party. During the assault, which Cortez videotaped, he and the men displayed gang signs and shouted out the name of their gang.

Cortez was charged with conspiracy to commit a sexual offense, several sexual offense offenses, and participation in a criminal gang. See Md. Code Ann., Crim. Law, § 9-804 (criminalizing participation in a gang). Cortez moved to sever his participation in a criminal gang charge from his other charges arguing that the gang evidence was unduly prejudicial. The court denied the motion.

At trial, an expert in the field of criminal street gangs testified about the history of the Little R gang, two prior gang related crimes (a stabbing death and an assault), and the hand signals and colors of the gang. The expert opined that the sexual assault was gang related and was intended to bolster the gang's reputation in the community.

Following Cortez's conviction, this appeal followed.

Held: Affirmed.

The Court of Special Appeals held that the trial court did not err in not severing under Md. Rule 4-325(c) the gang charge from the conspiracy and sexual assault charges. As a threshold matter, the Court found that there was a nexus between the charges and gang activity. The Court of Special Appeals held that the gang evidence had special relevance in proving motive and identity. The Court of Special Appeals also held that the gang-related evidence elicited at trial was well-tailored to the charges and so was relevant and not unduly prejudicial. This was unlike the gang-related evidence elicited in *Burris v. State*, 435 Md. 370 (2013) and *Guiterrez v. State*, 423 Md. 476 (2011), which were not joinder/severance cases but concerned the admission of other crimes (gang-related) evidence.

Piney Orchard Community Association, Inc. v. Piney Pad A, LLC, et al., No. 300, September Term 2013, filed January 29, 2015. Opinion by Nazarian, J.

http://www.mdcourts.gov/opinions/cosa/2015/0300s13.pdf

COMMUNITY COVENANTS – AMBIGUITY

SUMMARY JUDGMENT – OPPOSITION

Facts:

The community of Piney Orchard included a parcel of land, owned by Piney Pad and located in the community's commercial center that Piney Pad claimed did not fall within the community covenants. Specifically, Piney Pad believed that the Property was never brought within the declaration that imposed restrictions on residential properties, and that it had been "de-annexed" from declarations relating to commercial properties. The community association disagreed, and sought to bring the Property within the reach of either the residential community covenant or the commercial declarations. Piney Pad sued the Association and moved for summary judgment, claiming that as a matter of law, the Property was subject to neither. The Association opposed the motion with one affidavit from its president, and also pointed to a handful of notations of subdivision filings that it claimed "put the world on notice" that the Property fell under the commercial declarations.

The trial court granted Piney Pad's motion for summary judgment, holding that the Property was not subject to the commercial declarations and the Association had no right to enforce the residential covenants with respect to the Property. It appealed, claiming that the trial court should have invoked its equitable powers to bring the Property within the residential covenants. The Association also argued that condoning the Property's "de-annexation" from the commercial declarations would leave the Property (wrongly) unencumbered.

Held: Affirmed.

The Court of Special Appeals looked first at the language of the residential covenant and, finding no ambiguity in the language, approved the trial court's refusal to look to outside evidence to determine whether the covenant applied to the Property. Although the community association claimed that documents other than the deed conveying the Property gave rise to ambiguities in the covenant, those documents at most only arguably suggested some ambiguity in the covenant's scope, not in its inherent language. And in any event, the documents did not ultimately have the effect of bringing the subject property within the covenant's scope, and so did not need to be considered by the trial court in ruling on a motion for summary judgment.

The Court pointed out that a party opposing summary judgment must, under Maryland Rule 2-501(b), oppose the motion by identifying disputed facts with particularity, supported with evidence or testimony. Here, the party opposing summary judgment did not back up its claim about the meaning of the community covenant with any affidavits, documents, or other evidence to suggest that anyone believed the property at issue was subject to the covenant. The one affidavit submitted by the Association, that of its president, did not actually help its factual claims that there were perceptions held by the Association or anywhere in the community about the use of the Property one way or another. Accordingly, the trial court was left with nothing to consider in opposition to the summary judgment motion, and it properly granted the motion.

Marquis McClure v. Montgomery County Planning Board of the Maryland–National Capital Park and Planning Commission, No. 1031, September Term 2013, filed December 2, 2014. Opinion by Reed, J.

http://www.mdcourts.gov/opinions/cosa/2014/1031s13.pdf

REAL PROPERTY – EASEMENTS – CONSERVATION EASEMENTS – FOREST CONSERVATION EASEMENTS

ADMINISTRATIVE LAW – RULES AND REGULATIONS – *ACCARDI* DOCTRINE

ADMINISTRATIVE LAW – AGENCY POWERS – ENFORCEMENT AND REMEDIAL AUTHORITY

Facts:

In March 2000, appellant purchased Lot 7 of the Fairhill subdivision, which is located in Laytonsville, Montgomery County. The Fairhill subdivision was approved by the Montgomery County Planning Board in 1980. The Bozzuto Group sought to develop the subdivision further in 1995.

In 1992, Montgomery County enacted its Forest Conservation Law ("FCL"). When Bozzuto approached the Maryland-National Capital Park and Planning Commission about the further development of Fairhill, it wished to know whether the subdivision would be subject to the FCL. The Commission explained that, if approved, a new subdivision plan would be subject to the FCL's conservation requirements. Bozzuto received approval of its preliminary plan, but approval was contingent on the recordation of a final record plat that demonstrated a forest conservation easement ("FCE") encumbered Fairhill's lots. That final plat was never completed and recorded, and the FCE was never specifically marked on the plats for Fairhill's lots, including appellant's lot.

Bozzuto, via its Fairhill Partners venture, instead executed a Conservation Easement Agreement, which was recorded in 1998. The Agreement required Bozzuto to refer specifically to the FCE in any instrument that would convey an interest in property. Appellant's deed contained no references to the FCE, but the contract of sale indicated the FCE encumbered his lot.

The Commission became aware of appellant's construction activities on his lot. In early 2009, the Commission issued a notice of violation of the FCE to appellant, to which he did not respond. The Commission then issued a civil citation to appellant for his violations of the FCE and, in early 2010, the Planning Board commenced administrative enforcement proceedings. Two years later, in the spring of 2012, the Planning Board issued an opinion that found appellant responsible for several violations of the FCE. It imposed a large civil penalty and also mandated certain corrective actions to mitigate and cure the damage to forest areas protected by the FCE.

Later in the spring of 2012, appellant sought judicial review of the Planning Board's opinion in the Circuit Court for Montgomery County. Appellant argued that the Planning Board lacked the jurisdiction and authority to enforce the FCE, and that the FCE was not effective because it was not recorded by reference to his plat number nor indexed according to his lot's parcel identifier. He also argued the civil penalty imposed was excessive. The circuit court's opinion rejected appellant's contentions regarding the Planning Board's jurisdiction and authority, as well as the efficacy of the FCE. The circuit court, however, agreed with appellant regarding the penalty and remanded the case back to the Planning Board.

Held: Affirmed.

The FCE was a valid encumbrance on appellant's property because it was properly recorded and he had received actual and constructive notice of the easement. Section 3-501 of the Real Property Article ("R.P.") of the Maryland Code does not create a sui generis recording system for real property instruments in Montgomery County; it is simply an indexing system for instruments in that county. Because the FCE was properly recorded in the county's land records, and several closing documents that appellant had signed indicated the existence of the FCE, appellant had actual and constructive notice of an effective easement.

The Planning Board also did not violate the *Accardi* doctrine because it did not fail to follow its own rules. The Montgomery County Code did not require the Planning Board to mandate the re-platting of all of Fairhill's lots in order to indicate the existence of the FCE. Similarly, the Trees Technical Manual, a guidance document that appellant argued the Planning Board was required to follow, did not require re-platting. Moreover, because the Trees Technical Manual is a guidance document, it does not carry the force of law and does not impose any duties on the Planning Board.

Finally, the Planning Board possessed the jurisdiction and authority to enforce the FCE. The FCE was a valid instrument despite Bozzuto's failure to re-plat the Fairhill subdivision, and the statute provided a variety of methods by which the existence of an FCE could be indicated. In addition, the statute and subsequent amendments clearly demonstrated that the Planning Board had the authority to impose penalties and order remedial action for violations of the FCE.

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Phillip Powell, Personal Representative of the Estate of Beatrice C. Powell v. Alex Wurm, No. 782, September Term 2013, filed January 29, 2015. Opinion by Krauser, C.J.

http://www.mdcourts.gov/opinions/cosa/2015/0782s13.pdf

HEALTH CARE MALPRACTICE CLAIMS ACT – CERTIFICATE OF QUALIFIED EXPERT – DEFICIENCY IN CERTIFICATE OR ATTACHED REPORT

Facts:

Phillip Powell, in his capacity as the personal representative of the Estate of Beatrice Powell, filed, in the Circuit Court for Prince George's County, a medical malpractice action against Alex Wurm, M.D., alleging that the doctor had failed to "exercise appropriate care and technique" during his performance of an "inferior vena cava filter placement procedure" on Mrs. Powell. In accordance with section 3 2A 04(b) of the Health Care Malpractice Claims Act, the Estate filed with its malpractice claim both a "certificate of qualified expert" and a report by that expert. Dr. Wurm moved to dismiss the Estate's malpractice action on the grounds that the report from the Estate's medical expert was legally insufficient, asserting that the report did not "explain how or why the physician failed . . . to meet the standard of care and include some details supporting the certificate of qualified expert." *Walzer v. Osborne*, 395 Md. 563, 583 (2006). The circuit court found the Estate's expert report "legally insufficient" and dismissed the action.

Held: Reversed.

Section 3-2A-04(b) of the Maryland Health Care Malpractice Claims Act requires a "claimant or plaintiff" to file, with his or her medical malpractice "claim or action," a "certificate of a qualified expert" and a "report" from that expert. The Act does not specify what the expert's report should contain. But the Court of Appeals has explained that an expert's report is legally sufficient if it states what the applicable standard of care is and provides some information as to how the defendant physician did not meet that standard.

In the case at bar, the report of the Estate's attesting expert stated the precise nature of the medical procedure that Dr. Wurm was performing when he purportedly breached the standard of care; the error that was committed; the injury that resulted; and the future medical procedure that was necessary to address that injury. By so stating, the expert's report supplemented his certificate and provided additional information regarding what the standard of care was and how Dr. Wurm allegedly departed from it.

Moreover, the expert certificate and expert report may be considered together to determine whether both documents, collectively, satisfy the requirements of the Act. Thus it would not

have doomed the Estate's action if the report of its attesting expert, by itself, was lacking, so long as that informational insufficiency was cured by the certificate of qualified expert. Likewise, it would not prove fatal to the Estate's action if the expert's report simply duplicated the certificate, so long as the certificate itself contained sufficient information to satisfy the requirements of the Health Care Malpractice Claims Act.

Davis Israel Bord v. Baltimore County, Maryland, et al., No. 1154, September Term 2013, filed December 17, 2014. Opinion by Reed, J.

http://www.mdcourts.gov/opinions/cosa/2014/1154s13.pdf

STATUTES – PLAIN LANGUAGE – CRIMINAL PROCEDURE ARTICLE, § 1-203 – PLAIN MEANING OF RESTORE

OFFICERS AND PUBLIC EMPLOYEES – LIABILITY FOR OFFICIAL ACTS – IMMUNIITY AGAINST TORT ACTION

MUNICIPAL CORPORATION – IMMUNITY – EMPLOYEES ACTING IN GOVERNMENTAL CAPACITY – BALTIMORE COUNTY IMMUNE FROM TORT LIABILITY

INJUNCTION

AMENDMENT – MOTION FOR LEAVE TO AMEND – UNDUE DELAY AND PREJUDICE

PRETRIAL PROCEDURE – DISCOVERY VIOLATION – FAILURE TO PRODUCE – SANCTIONS

Facts:

Appellant is a licensed gun collector, and has an extensive collection of firearms that were fully registered and documented. In 2009, agents from the ATF Baltimore and Phoenix Field Offices approached Det. Socha, a Baltimore County Police Detective, concerning an investigation of illegal machine guns being transported into Maryland. The ATF agents informed Det. Socha that they seized an illegally manufactured machine gun from appellant in 2008, and that he may be in possession of another machine gun. Based upon this information, Det. Socha applied for a search warrant for appellant's home and his business in Baltimore County.

On December 8, 2009, while appellant was staying with friends in California after attending a gun show in Arizona, appellant received a phone call from Cpl. Kidwell. The corporal explained that a police team was present at appellant's residence with a warrant, and that they intended to open the door and drill open appellant's gun safes. Appellant called his adult children, who proceeded over to the residence, and opened the door and gun safes for the officers. The police officers executed the search and seizure warrant, as the ATF seized certain weapons they determined would require further investigation.

Det. Socha testified that the weapons were placed on top of a wool blanket in a Baltimore County vehicle, and towels were used "as . . . [they] laid more guns down for protection." Det. Socha testified that nothing was laid on top of the 30mm cannon when it was seized from appellant's auto repair shop.

Appellant's neighbor testified that the firearms were loaded into a mobile lab "one on top of the other" in "no particular order, [with] no particular care taken," and it appeared as if the police officers were building a "bonfire." Appellant later testified that, during the execution of the warrant, the police had "broken open" all of his firearms and removed the slides, and "all the mags were thrown on the floor, and every gun was taken out of its box and disassembled to make sure that it wasn't loaded." A total of twenty-eight weapons were seized from appellant's residence and a 30mm cannon was seized from appellant's auto repair shop.

On August 27, 2010, after several unsuccessful attempts to recover his firearms, appellant filed his complaint, which consisted of three counts: (1) demand for return of property, (2) detinue, and for (3) trover and conversion against Baltimore County, Det. Socha, and Cpl. Kidwell. Appellant subsequently requested a temporary restraining order, which was granted on August 31, 2010, followed by a request for preliminary injunction enjoining appellees from selling, destroying or damaging the property seized from appellant, which was granted on September 16, 2010.

The appellees moved to dismiss the complaint, and after the March 25, 2011, hearing, the circuit court granted the motion to dismiss as to the two officers because the civil liability of police officers in the ordinary course of employment requires allegations of actual malice, which appellant did not sufficiently allege. The circuit court, however, denied appellee Baltimore County's motion to dismiss. In that same order, the circuit court granted appellant leave to amend the complaint. Subsequently, appellant filed a motion for summary judgment, which was denied.

By the date of trial, appellee was no longer in possession of any of appellant's firearms. The circuit court conducted a trial on the merits on March 19, 20, and 21, 2013. At trial on March 20, 2013, appellant rested his case, and the County made a motion for directed verdict primarily based on governmental immunity. The circuit court reserved its ruling on appellee's motion for directed verdict to allow the parties to brief the issue on governmental immunity. During trial on March 21, 2013, Det. Socha testified that entry and exit photos were taken during the execution of the search warrant. Counsel for appellant stated that he had previously made numerous requests for those photos to no avail. In light of this development, the circuit court continued the trial by agreement to allow appellant to obtain copies of the photos, and also to brief the issue on governmental immunity.

On April 12, 2013, appellant filed a motion to reconsider order of dismissal against the officers, and a motion for leave to amend pleadings. At the hearing on April 29, 2013, the court denied both motions on the basis that appellant had previously received leave to amend and failed to amend the complaint against the officers during the two years that had passed. The circuit court also held that it would be unfair to allow appellant to amend after appellant had already rested his case.

At the conclusion of trial, the circuit court granted appellee Baltimore County's motion for judgment. Relying on *DiPino v. Davis*, 354 Md. 18 (1999), the circuit court found that appellant's causes of actions were common law torts. As a result, appellee Baltimore County was

not liable for common law torts committed while acting in a governmental capacity. The circuit court held that "executing a search and seizure warrant and confiscating property during that search and seizure warrant is a governmental function," and therefore, governmental immunity protected appellee from liability.

Held: Affirmed.

Section 1-203 of the Criminal Procedure Article ("C.P.") of the Maryland Code requiring restoration of property seized under search warrant to person from whom it was taken was not designed to provide a private cause of action for money damages. Owner of firearms, which were seized by the Baltimore County Police upon investigation of illegally manufactured machine guns, and returned to owner in damaged conditions, was not entitled to recover money damages under C.P. § 1-203 on the theory that the Legislature's use of "restore" in the statute reveals the legislative intent to provide for compensation for damages to the property. Review of the plain meaning of "restore" and the legislative history of the statute supports the conclusion that the statute only provides for the physical return of property.

Claims for return of property, detinue, and trover and conversion constitute a tort action entitling police officers to immunity absent malice. The officers and Baltimore County, appellees, are immune from liability, because the officers were acting in a governmental capacity and did not act with actual malice when they executed the search warrant.

Injunctive relief does not provide a cause of action against police officers who are entitled to immunity. Injunctive relief does not redress past wrongs. Appellant's injunctive action to prevent appellees from selling, destroying, or damaging the property was filed almost a year after the initial search and seizure took place. Thus, rather than attempting to prevent future harm, appellant sought to redress past wrongs, which injunctive relief is not designed to remedy. Furthermore, appellant seeks damages for the very tort claim from which the government is immune.

The circuit court's denial of appellant's motion for leave to amend was proper where appellant sought to amend complaint two and a half years later and alleged a new cause of action changing the nature of the cause that was litigated, which would result in undue delay and prejudice to appellees.

Finally, the circuit court did not abuse its discretion in failing to impose sanctions on appellee for a discovery violation, because appellant failed to seek an order compelling discovery or a motion for sanction as required by Rule 2-432.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated December 10, 2014, the following attorney has been indefinitely suspended by consent, effective January 1, 2015:

KENNETH DALEY

*

By an Order of the Court of Appeals dated November 7, 2014, the following attorney has been disbarred by consent, effective January 6, 2015:

LEONARD S. BLONDES

*

This is to certify that the name of

MATTHEW STROHM EVANS, JR.

has been replaced upon the register of attorneys in this state as of January 8, 2015.

*

By an Order of the Court of Appeals dated January 16, 2015, the following attorney has been disbarred by consent:

RONALD CLAUDE BRIGERMAN, JR.

*

By an Order of the Court of Appeals dated January 22, 2015, the following attorney has been indefinitely suspended:

DUANE TIMOTHY PHILLIPS

*

*

By an Order of the Court of Appeals dated January 26, 2015, the resignation of

PATRICIA LYNNE McDONALD

from the further practice of law in this State has been accepted.

*

By an Opinion and Order of the Court of Appeals dated January 27, 2015, the following attorney has been indefinitely suspended:

KEVIN TRENT OLSZEWSKI

*

By an Opinion and Order of the Court of Appeals dated January 30, 2015, the following attorney has been indefinitely suspended:

EUGENE ALAN SHAPIRO

*

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JUDICIAL APPOINTMENTS

*

On December 30, 2014, the Governor announced the appointment of **ZUBERI BAKARI WILLIAMS** to the District Court – Montgomery County. Judge Williams was sworn in on January 6, 2015 and fills the vacancy created by the elevation of the Hon. Audrey A. Creighton to the Circuit Court for Montgomery County.

*

On December 30, 2014, the Governor announced the appointment of **HOLLY DAVID REED, III** to the District Court – Montgomery County. Judge Reed was sworn in on January 6, 2015 and fills the vacancy created by the elevation of the Hon. Karla N. Smith to the Circuit Court for Montgomery County.

*

On December 30, 2014, the Governor announced the appointment of **KATINA SELF STEUART** to the District Court – Prince George's Count7y. Judge Steuart was sworn in on January 15, 2015 and fills the vacancy created by the appointment of the Hon. John P. Morrissey to Chief Judge of the District Court of Maryland.

*

On December 30, 2014, the Governor announced the appointment of **GLENN LOUIS KLAVANS** to the Circuit Court for Anne Arundel County. Judge Klavans was sworn in on January 16, 2015 and fills the vacancy created by the retirement of the Hon. Pamela L. North.

*

On December 30, 2014, the Governor announced the elevation of the **HON. KARLA N. SMITH** to the Circuit Court for Montgomery County. Judge Smith was sworn in on January 20, 2015 and fills the vacancy created by the retirement of the Hon. Michael J. Algeo.

*

On December 30, 2014, the Governor announced the appointment of **KEVIN YVONNE THOMAS WIGGINS** to the District Court – Baltimore County. Judge Wiggins was sworn in on January 20, 2015 and fills the vacancy created by the retirement of the Hon. Robert J. Steinberg.

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On December 30, 2014, the Governor announced the appointment of **LAURA MARIE ROBINSON** to the District Court – Anne Arundel County. Judge Robinson was sworn in on January 22, 2015 and fills the vacancy created by the retirement of the Hon. Megan B. Johnson.

*

On December 30, 2014, the Governor announced the appointment of **JOHN MICHAEL MALONEY** to the Circuit Court for Montgomery County. Judge Malone was sworn in on January 30, 2015 and fills the vacancy created by the retirement of the Hon. Eric M. Johnson.

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